

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

JACOB VAN METER, ADAM)
 FLETCHER, by and through his)
 guardian GAIL FLETCHER, and)
 ERIC REEVES, on behalf of themselves)
 and other similarly situated individuals)
)
 Plaintiffs,)
 v.)
)
 BRENDA HARVEY, COMMISSIONER,)
 MAINE DEPARTMENT OF HEALTH)
 AND HUMAN SERVICES,)
)
 Defendant.)

Civil Action No. 1:09-cv-00633

**FIRST AMENDED CLASS ACTION COMPLAINT
(INJUNCTIVE RELIEF SOUGHT)**

I. Introduction

This action is brought by Plaintiffs Jacob Van Meter, Adam Fletcher, and Eric Reeves (“Named Plaintiffs”) and others similarly situated. Named Plaintiffs all have cerebral palsy and are entitled to Medicaid-funded health care and supportive services. Despite their disabilities, the Named Plaintiffs and members of the putative class are capable of living in their own homes or other community settings. Nevertheless, Maine state officials have failed to accommodate the disabilities of the Named Plaintiffs’ and others similarly situated to ensure that they receive treatment and services in the most integrated setting appropriate. Thus, the Named Plaintiffs and others similarly situated have been forced to live in the most restrictive settings—nursing facilities both in and outside Maine. Additionally, contrary to federal law, state officials have failed to ensure that the Named Plaintiffs and members of the putative class receive adequate training, habilitation, or support services while living in the nursing facilities. Accordingly, the Named Plaintiffs bring this action against Brenda Harvey in

her capacity as Maine's Commissioner of the Department of Health and Human Services ("Defendant") seeking declaratory and injunctive relief.

Maine voluntarily participates in the federal Medicaid program. 42 U.S.C. §§ 1396-1396w-2. As a condition of participation, Maine must ensure that medically necessary services are provided in a reasonably prompt manner and in sufficient amount, duration, and scope to meet the medical and clinical needs of all eligible Medicaid recipients like the Named Plaintiffs. 42 U.S.C. §§ 1396a(a)(8), 1396a(a)(10)(B). Nursing facility services are among those that must be covered under the Medicaid program. 42 U.S.C. § 1396d(a)(4)(A). In addition, the Pre-Admission Screening and Resident Review provisions ("PASRR") of the Nursing Home Reform Act ("NHRA"), 42 U.S.C. § 1396r, part of the Medicaid Act, requires the Defendant to evaluate individuals who have mental retardation or "related conditions" and who have been deemed eligible to live in nursing facilities to determine what services, if any, they require that might permit them to live in an integrated community setting. See 42 U.S.C. § 1396r(e)(8)(B)(ii); 42 C.F.R. §§ 483.126, 483.130, 483.132. The NHRA also requires that the Defendant evaluate those individuals who will remain in the nursing facility and to provide such individuals with appropriate training, habilitation, and support services. 42 U.S.C. § 1396r(e)(7)(C)(i)(IV); 42 C.F.R. §§ 483.120, 483.130. "Related conditions" as defined by regulation expressly includes cerebral palsy and epilepsy. 42 C.F.R. § 435.1010.

Even though Defendant conducted the required PASRR evaluations of the three Named Plaintiffs after they instituted this action, the Defendant subsequently has failed to implement the recommendations in the evaluations and provide the services the Named Plaintiffs need. The Defendant has not conducted the required PASRR evaluations of most, if not all, members of the putative class and has failed to provide them with the services that they need. As a result, all members of the putative class are being compelled to reside in nursing facilities, and some of the members of the putative class would be able, with appropriate services, to elect to live in a more integrated community setting.

In segregating the Named Plaintiffs and similarly situated individuals in nursing facilities and failing to afford them equal access to community services and supports, Defendant contravenes the integration and non-discrimination mandates of Title II of the Americans with Disabilities Act (the "ADA"), 42 U.S.C. § 12131-12134, the Rehabilitation Act of 1973 (the "Rehab Act"), 29 U.S.C. § 794, the Nursing Home Reform Act, 42 U.S.C. § 1396r, and the Civil Rights of 1871, 42 U.S.C § 1983 ("Section 1983").

The Named Plaintiffs bring this action on behalf of themselves and other similarly situated individuals who are MaineCare eligible, have a related condition, apart from autism, as defined by federal Medicaid law, and who are or should be screened for admission to nursing facilities pursuant to 42 U.S.C. § 1396r(e)(7) and 42 C.F.R. §§ 483.100-.138. The Named Plaintiffs seek declaratory and injunctive relief under the ADA, the Rehab Act, the Medicaid Act, 42 U.S.C. §§ 1396a(a)(8), 1396r, and the Civil Rights Act of 1871, 42 U.S.C. § 1983 to compel Defendant to: comply with applicable Medicaid requirements, including the PASRR provisions; evaluate them and other similarly situated individuals; provide them and other similarly situated individuals with appropriate training, habilitation, and support services; and permit them and other similarly situated individuals to live in an integrated community setting if appropriate, and if they so elect, rather than in nursing facilities.

II. Jurisdiction and Venue

1. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343(a)(3), and 1343(a)(4); pursuant to 28 U.S.C. § 2201; pursuant to 28 U.S.C. § 2202; pursuant to Section 504 of the Rehabilitation Act, 29 U.S.C. § 794; pursuant to Title II of the ADA, 42 U.S.C. § 12133; pursuant to 42 U.S.C. § 1983; and pursuant to Rules 57 and 65 of the Federal Rules of Civil Procedure.

2. Venue is proper in the District of Maine pursuant to 28 U.S.C. § 1391(b)(2), as a substantial part of the events or omissions giving rise to these claims occurred within the State of Maine.

III. Parties

A. The Named Plaintiffs

3. Plaintiff Jacob Van Meter is a twenty-seven (27) year-old MaineCare recipient who resides in a nursing facility located in the Town of Ellsworth, County of Hancock, in the State of Maine.

4. Plaintiff Van Meter has cerebral palsy, a neurological disorder that profoundly and permanently affects his body movement and muscle coordination. As a result of this disability, Plaintiff Van Meter requires assistance with his activities of daily living, including dressing, feeding, and mobility, among other activities. Despite Plaintiff Van Meter's disability, his cognitive functions are not limited. He completed high school and is now taking college courses.

5. For more than seven years, Defendant failed to evaluate Plaintiff Van Meter to determine his need for specialized services and to determine whether alternate community placements were appropriate for him, as required by the NHRA, 42 U.S.C. § 1396r. As a result, Plaintiff Van Meter has been compelled unnecessarily to reside in a nursing facility for the past eight (8) years.

6. On July 9, 2010, as a result of his identification in this action, Defendant informed Plaintiff Van Meter that it had found him eligible to receive specialized services and for the first time specified the specialized services that Defendant alleges he is entitled to receive. To date, however, Defendant has not provided Plaintiff Van Meter with any of the specialized services it identified that he was entitled to receive. Defendant has not evaluated whether there is or could be an alternative community placement for Plaintiff Van Meter.

7. Plaintiff Adam Fletcher's claim is brought on his behalf through his legal guardian, Gail Fletcher. Gail Fletcher's legal residence is in the Town of Ellsworth, County of Hancock, in the State of Maine.

8. Plaintiff Fletcher is a twenty-eight (28) year-old MaineCare recipient who resides in a nursing facility located in the Town of Freeport, County of Cumberland, State of Maine. Up until this past week, for the past three (3) years, he had resided in a facility located in Braintree, Massachusetts, having been placed there by Defendant

9. Plaintiff Fletcher has cerebral palsy, a neurological disorder that has profoundly and permanently affected his body movement and muscle coordination. As a result of his disability, Plaintiff Fletcher requires assistance with his activities of daily living including dressing, feeding, and mobility, among other activities. Despite Plaintiff Fletcher's disability, his cognitive functions are not limited. Prior to entering a nursing facility, Plaintiff Fletcher graduated from high school, was a member of the National Honor Society, and planned to attend college.

10. For more than three years, Defendant failed to evaluate Plaintiff Fletcher to determine his need for specialized services and to determine whether alternate community placements were appropriate for him, as required by the NHRA, 42 U.S.C. § 1396r. As a result, Plaintiff Fletcher has been compelled unnecessarily to reside in a nursing facility for the past three (3) years.

11. On July 9, 2010, as a result of his identification in this action, Defendant informed Plaintiff Fletcher that it had found him eligible to receive specialized services and for the first time specified the specialized services that Defendant alleges he is entitled to receive. To date, however, Defendant has not provided Plaintiff Fletcher with any of the specialized services it identified that he was entitled to receive. Defendant has not evaluated whether there is or could be an alternative community placement for Plaintiff Fletcher.

12. Plaintiff Eric Reeves is a thirty-four (34) year-old MaineCare recipient who resides in a nursing home in the City of Bangor, County of Penobscot, State of Maine.

13. Plaintiff Reeves has cerebral palsy, a neurological disorder that has profoundly and permanently affected his body movement and muscle coordination. As a result of his disability, Plaintiff Reeves requires assistance with his activities of daily living including dressing, feeding, and mobility, among other activities. Despite Plaintiff Reeves' disability, his cognitive functions are not limited. Prior to entering the present facility, Plaintiff Reeves lived in various nursing homes and in his community. While living in the community, Plaintiff Reeves held a job for approximately five years.

14. For more than two years, Defendant failed to evaluate Plaintiff Reeves to determine his need for specialized services and to determine whether alternate community placements were appropriate for him, as required by the NHRA, 42 U.S.C. § 1396r. As a result, Plaintiff Reeves has been compelled unnecessarily to reside in a nursing facility for the past two (2) years.

15. On July 9, 2010, as a result of his identification in this action, Defendant informed Plaintiff Reeves that it had found him eligible to receive specialized services and for the first time specified the specialized services Defendant alleges he is entitled to receive. To date, however, Defendant has not provided Plaintiff Reeves with any of the specialized services it identified that he was entitled to receive. Defendant has not evaluated whether there is or could be an alternative community placement for Plaintiff Reeves.

B. The Plaintiff Class

16. Pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure, the Named Plaintiffs bring this matter as a class action on behalf of themselves and all other Maine residents who currently are or in future will be: (1) eligible for and enrolled in MaineCare, (2) age 21 or older, (3) have a related condition as defined at 42 C.F.R. § 435.1010, other than autism, and who do not have a diagnosis of Alzheimer's or dementia, and (4) who are or should be screened for admission to nursing facilities pursuant to 42 U.S.C. § 1396r(e)(7) and 42 C.F.R. § 483.112 *et seq.*

17. According to information provided by Defendant, there are currently 41 individuals, including the three Named Plaintiffs, with cerebral palsy (and who have not been diagnosed with mental retardation, autism, Alzheimer's disease, or dementia) who meet the definition of the class as set forth in paragraph 16 above.

18. The Defendant has also identified an additional 58 individuals who in the previous ten years met the definition of the class as set forth in paragraph 16 above but who no longer reside in nursing facilities. In addition, there are 18 other individuals currently residing in nursing facilities in Maine with the related condition of epilepsy who meet the definition of the class set forth in paragraph 16 above, unless they also have diagnoses of mental retardation, Alzheimer's disease, and/or dementia.

19. The plaintiff class is so numerous that joinder of all members is impracticable. Joinder is also impracticable because the class is not static; because the class members are geographically dispersed throughout 11 counties in Maine, from York County to Washington County; and because class members lack the knowledge and financial means to maintain individual actions.

20. There are questions of law and fact common to the plaintiff class including, *inter alia*:

- a. Whether the Defendant has failed to develop and implement a PASRR program sufficient to prevent the unnecessary admission of the plaintiff class to nursing homes;
- b. Whether the Defendant has failed to assure that members of the plaintiff class, once admitted to nursing homes, receive specialized services for their condition aimed at allowing the individual to function as independently and with as much self-determination as possible, and receive services designed to prevent or decelerate regression and loss of abilities;
- c. Whether Defendant's denial of community based services that the plaintiff class requires to avoid segregation in an institution constitutes unlawful discrimination in violation of Title II of the ADA and Section 504 of the Rehabilitation Act;
- d. Whether the Defendant has utilized criteria and methods of administering Maine's long-term care system, including the nursing facility program, that have subjected the Plaintiffs to unnecessary and unjustified segregation in violation of the ADA and Section 504 integration mandate, including (1) failing to assess properly the services and supports that would enable members of the plaintiff class to live in the community, and (2) failing to ensure that the plaintiff class have prompt access to Medicaid-covered services that will meet their needs in the community and/or the nursing facility; and

- e. Whether the Defendant's policies and practices as described herein, and which have been repeated and knowing, conflict with the plaintiff class's federal rights, as set forth above, and whether this violation entitles Plaintiffs to relief under 42 U.S.C. §1983.

21. The representative parties will fairly and adequately protect the interests of the class. The Named Plaintiffs will vigorously represent the interests of unnamed class members, and all members of the proposed class will benefit from the efforts of the Named Plaintiffs. The interests of the proposed class and the Named Plaintiffs are identical.

22. Defendant, her agents, employees, and predecessors and successors in office have acted or will act on grounds generally applicable to the class, thereby making injunctive or declaratory relief appropriate to the class as a whole.

C. The Defendant

23. Defendant Brenda Harvey is the Commissioner of the Department of Health and Human Services ("DHHS") for the State of Maine. Her principal place of business is in the City of Augusta, County of Kennebec, in the State of Maine. She has overall responsibility for administering Maine's Medicaid Program, MaineCare, and ensuring that the rules, policies and practices of the Maine Department of Health and Human Services are conducted in compliance with the Medicaid Act, the NHRA, Section 504 of the Rehabilitation Act, and the ADA. Defendant is responsible for reviewing and certifying nursing facilities that participate in the federal Medicaid program. 42 C.F.R. §§ 483.1-483.75. Her actions, relevant hereto, have been taken under the color of state law. She is sued in her official capacity only.

IV. Factual Allegations

A. The State-Federal Medicaid Program

24. Medicaid is a jointly funded state and federal program that provides medical services to low-income persons pursuant to Title XIX of the Social Security Act, 42 U.S.C. § 1396-1396w-2.

25. State participation in the Medicaid program is voluntary. States choosing to receive federal matching funds for their Medicaid program must comply with the requirements of the federal Medicaid Act and with the federal regulations governing state Medicaid programs promulgated by the U.S. Department of Health and Human Services (hereafter "HHS"). 42 U.S.C. § 1396; 42 C.F.R. §§ 430-484. The Centers for Medicare and Medicaid Services (hereafter "CMS") is responsible for the administration of the Medicaid program.

26. The state Medicaid agency may place appropriate limits on services based on such criteria as medical necessity or on utilization control procedures.

27. Maine has chosen to participate in the Medicaid program. It has prepared a state plan, which CMS has reviewed and approved. That plan, along with relevant federal law and regulations, forms the foundation for Maine's Medicaid program and establishes the State's obligations and responsibilities to Medicaid recipients.

28. Under federal Medicaid requirements, states must provide comparable benefits, *i.e.*, benefits that are equal in "amount, duration and scope," to all categorically needy Medicaid beneficiaries. 42 U.S.C. § 1396a(a)(10)(B)(i); 42 C.F.R. §§ 440.240(a), (b)(1). Categorically needy Medicaid beneficiaries are beneficiaries who, in most cases, receive cash public assistance to meet basic needs. Therefore (with certain exceptions for some groups such as pregnant women, certain aliens and services provided pursuant to waiver of federal requirements), Maine must provide benefits under its Medicaid program that are equal in amount, duration and scope to all eligible needy beneficiaries.

B. Nursing Facilities and the Nursing Home Reform Amendments to the Social Security Act

29. States must cover nursing facility services as a part of their Medicaid programs. 42 U.S.C. §§ 1396a(a)(10)(A) and 1396d(a)(4)(A).

30. A nursing facility is an institution that primarily provides: (1) nursing care; (2) rehabilitation services for those who are sick, injured or disabled; and (3) health-related care and services to individuals who,

because of their mental or physical condition, require care and services which can only be provided in an institutional setting. 42 U.S.C. § 1396r(a)(1)(A-C).

31. Nursing facilities' services are defined as "services which are ... required to be given an individual who needs ... on a daily basis nursing care (provided by or requiring the supervision of nursing personnel) or other rehabilitation services which as a practical matter *can only be provided in a nursing facility* on an inpatient basis." 42 U.S.C. § 1396d(f) (emphasis added).

32. In 1987, Congress passed the Nursing Home Reform Amendments to the Medicaid Act to address the widespread problem of warehousing people with psychiatric and developmental disabilities in the nation's nursing facilities. 42 U.S.C. § 1396r. Congress enacted the Pre-Admission Screening and Annual Resident Review Provisions of the NHRA to prevent and remedy the unnecessary admission and confinement of people with psychiatric and developmental disabilities in nursing facilities.

33. The PASRR pre-admission screening ("PASRR Level I") is designed to identify individuals suspected of having mental illness, mental retardation, or related conditions. See 42 U.S.C. § 1396r(e)(7)(B); 42 C.F.R. §§ 435.1010, 483.128.

34. "Related conditions" are chronic disabilities that manifest before age 22 and include disabilities that are attributable to cerebral palsy or epilepsy. See 42 U.S.C. § 1396r(e)(7)(G); 42 C.F.R. § 435.1010.

35. If the PASSR Level I screening identifies that an individual is suspected of having mental illness, mental retardation, or related conditions, the State must conduct a PASRR II evaluation of that individual. See 42 U.S.C. § 1396r(e)(7); 42 C.F.R. § 483.128. The function of the PASRR Level II evaluation is to determine whether a person is appropriate for admission to a nursing facility because he or she needs a level of care that can only be provided in a nursing facility and, if so, whether the person needs specialized services while living in the nursing facility. 42 U.S.C. § 1396r(e)(7)(B)(ii); 42 C.F.R. §§ 483.126, 483.128, 483.132, 483.136.

36. If the PASRR Level II evaluation determines that an individual does not require nursing facility services, but instead that services can be provided in a non-institutional setting, states have a mandatory duty to offer the individual a choice of remaining in the facility or receiving services in an alternative, appropriate, non-institutional setting. 42 U.S.C. §§ 1396r(e)(7)(C)(i-ii); 42 C.F.R. §§ 483.118(c), 483.130(m). On the other hand, if nursing facility level of care is needed, the PASRR Level II evaluation must determine whether a nursing facility is the appropriate setting for meeting an individual's needs and consider alternate placements. See 42 U.S.C. § 1396r(e)(7)(B)(ii); 42 C.F.R. §§ 483.126, 483.132(a)(4).

37. In the PASRR Level II evaluation, if the Defendant confirms that the person has a related condition, it must determine whether specialized services are needed based on characteristics commonly associated with the need for specialized services. See 42 U.S.C. § 1396r(e)(7)(B)(ii); 42 C.F.R. §§ 483.120(2), 483.136. The PASRR Level II evaluation must document, *inter alia*, the individual's need for assistance with activities of daily living; level of sensorimotor development; social development; academic and educational development; ability to live independently; and vocational development. See 42 U.S.C. § 1396r(e)(7)(B); 42 C.F.R. §§ 483.130, 483.136. Specialized services consist of an active and continuous treatment program that includes aggressive, consistent implementation of specialized and generic training, treatment, and health services that are aimed at allowing the individual to function as independently and with as much self-determination as possible, and services designed to prevent or decelerate regression and loss of abilities. See 42 U.S.C. § 1396r(e)(7)(G)(iii); 42 C.F.R. §§ 483.120(2), 483.440(a)(1).

38. After conducting the PASRR Level II evaluation, the Defendant must notify the individual of its determinations. See 42 U.S.C. § 1396r(e)(7)(C); 42 C.F.R. § 483.130. This notice must include: (1) whether nursing facility level of care is necessary, (2) whether specialized services are necessary, (3) and placement options available to the individual. See 42 U.S.C. § 1396r(e)(7)(C); 42 C.F.R. § 483.130. This notice must also inform the individual of his or her right to appeal the State's PASRR Level II evaluation determinations. See 42 U.S.C. § 1396r(e)(7)(F); 42 C.F.R. § 483.130.

39. If the PASRR Level II evaluation determines that an individual needs specialized services, the State is required to “provide for (or arrange for the provision of)” needed specialized services. 42 U.S.C. § 1396r(e)(7)(C)(i)(IV); 42 C.F.R. § 483.118(c).

40. Following admission to a nursing facility, annual reviews must be conducted to determine whether an individual with a related condition continues to need a nursing level of care and to require confinement in a nursing facility or whether the individual’s needs could be met in the community. 42 U.S.C. § 1396r(e)(7)(B)(ii); 42 C.F.R. §§ 483.106(a)(3), 483.114(b), 483.130, 483.132.

41. Whenever the PASRR review process determines that the person needs services in the nursing facility or outside of the nursing facility, those services that are covered under Maine’s MaineCare program must be provided with “reasonable promptness.” 42 U.S.C. § 1396a(a)(8), (a)(10)(A); 42 C.F.R. § 435.930.

C. Other Medicaid Long-Term Care Services

42. Maine currently provides MaineCare recipients with disabilities an array of direct care services, including personal care services, physician services, nursing services and various types of therapies, through residential care Private Non-Medical Institutions (commonly referred to as “PNMIs”). These facilities are more fully described in Chapter 101 of the MaineCare Benefits Manual of the Maine Department of Health and Human Services. See Chapter II, Section 97 at <http://www.maine.gov/sos/cec/rules/10/ch101.htm>.

43. The PNMI system currently serves discrete groups of people with disabilities. For example, there are PNMI’s to serve people diagnosed with mental illness, substance abuse problems, mental retardation, Muscular Dystrophy or Brain Injury. Maine has not established any PNMI’s to serve people like the Named Plaintiffs and the putative class.

44. Maine also provides MaineCare recipients with disabilities an array of direct services, including personal care services, nursing services, and physician services, through residential care Intermediate Care Facilities for the Mentally Retarded (commonly referred to as “ICFs-MR”). ICFs-MR are residential facilities defined as “primarily for the diagnosis, treatment, or rehabilitation of the mentally retarded or persons with other

related conditions[.]” 42 C.F.R. § 435.1010. In Maine, eligibility for ICFs-MR is limited to persons with a diagnosis of mental retardation or autism. These facilities are more fully described in Chapter 101 of the MaineCare Benefits Manual of the Maine Department of Health and Human Services. See Chapter II, Section 50 at <http://www.maine.gov/sos/cec/rules/10/ch101.htm>.

45. The Defendant currently provides services in community-based settings to permit some individuals with mental retardation, autism, and other disabilities to live in the community. These individuals have functional limitations that are similar to those of the Named Plaintiffs. However, the Defendant has refused to make these programs and services available to the Named Plaintiffs and other similarly situated individuals.

D. The Americans with Disabilities Act And Its Integration Mandate

46. On July 12, 1990, Congress enacted the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, establishing the most important civil rights law for persons with disabilities in our nation’s history.

47. Congress stated in its findings that “historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem.” 42 U.S.C. § 12101(a)(2).

48. Congress found that “discrimination against individuals with disabilities persists in ... institutionalization ... and access to public services.” 42 U.S.C. § 12101(a)(3). It also found that “individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion ..., segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.” 42 U.S.C. § 12101(a)(5).

49. A major purpose of the ADA is to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities, and to provide clear, strong, consistent and enforceable standards addressing discrimination against individuals with disabilities. 42 U.S.C. § 12101(b)(1) and (2).

50. Title II of the ADA provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such entity.” 42 U.S.C. § 12132.

51. “Discrimination” under the ADA includes the segregation of persons with disabilities from society as a result of unnecessary institutionalization. As the Senate Labor and Human Relations Committee observed: “One of the most debilitating forms of discrimination is segregation imposed by others ... Discrimination *also* includes exclusion, or denial of benefits, services, or other opportunities that are as effective and meaningful as those provided to others.” S. Rep. No. 116, 101st Cong., 1st Sess. 6 (1989) (emphasis added). Thus, Congress recognized that “discrimination” against persons with disabilities entails more than just disparate treatment, and that simply requiring evenhanded treatment would not remedy all discrimination.

52. The regulations implementing the ADA require that: “a public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.” 28 C.F.R. § 35.130(d). The affirmative duty embodied in 28 C.F.R. § 35.130(d) stems from the recognition that the failure to integrate individuals with disabilities in society (for example, through unnecessary institutionalization) constitutes unlawful discrimination under the ADA.

E. Section 504 of The Rehabilitation Act

53. Section 504 of the Rehabilitation Act of 1973 provides: “No otherwise qualified individual with a disability in the United States ..., shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 29 U.S.C. § 794.

54. Regulations implementing Section 504 require a recipient of federal financial assistance to administer its services, programs, and activities in “the most integrated setting appropriate” to the needs of qualified individuals with disabilities. 28 C.F.R. § 41.51(d).

55. Regulations implementing Section 504 prohibit recipients of federal financial assistance from “[u]tiliz[ing] criteria or methods of administration ... (i) [t]hat have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap [or] (ii) [t]hat have the ... effect of substantially impairing accomplishment of the recipients’ program with respect to handicapped persons.” 45 C.F.R. § 84.4(b)(4); 28 C.F.R. § 41.51(b)(3)(i).

V. Legal Claims

Count I

Americans With Disabilities Act: Integration Mandate

56. The Named Plaintiffs and putative class members re-allege the foregoing paragraphs as though fully set forth herein.

57. Each of the Named Plaintiffs and putative class members is “a qualified individual with a disability” within the meaning of 42 U.S.C. § 12131(2). Each of the Named Plaintiffs and members of the putative class has a related condition, including cerebral palsy and/or epilepsy, which significantly limits his or her life activities in profound ways, including mobility, the ability to provide self-care, and the ability to communicate, among other major life activities.

58. Each of the Named Plaintiffs has requested and would benefit from receipt of community-based services, but is forced to remain in an overly restrictive nursing facility due to Defendant’s denial of community-based services adequate to meet the needs of the Named Plaintiffs. Members of the putative class have not been given the opportunity to request or obtain appropriate services in the community.

59. Each of the Named Plaintiffs and some of the putative class members desire to leave the nursing facility where s/he currently resides and live in a setting that is more integrated in the community, where s/he can have greater interaction with his or her peer community and where s/he can live an independent and fulfilling life.

60. Despite the Named Plaintiffs' attempt to engage in an interactive process with the Defendant, Defendant has not taken reasonable actions to determine and ensure that the MaineCare program and other disability support services are administered in the most integrated setting appropriate for Named Plaintiffs and the putative class.

61. Defendant's denial of community-based services that Named Plaintiffs and putative class members require to avoid segregation in an institution and remain in the integrated settings that are appropriate to their needs constitutes unlawful discrimination in violation of Title II of the ADA, 42 U.S.C. § 12132, and its implementing regulation, 28 C.F.R. § 35.130(d).

Count II
Americans With Disabilities Act: Methods of Administration

62. The Named Plaintiffs and members of the putative class re-allege the foregoing paragraphs as though fully set forth herein.

63. Regulations implementing Title II of the ADA provide that “a public entity may not, directly or through contractual or other arrangements, utilize criteria or other methods of administration: (i) that have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability; [or] (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the entity’s program with respect to individuals with disabilities” 28 C.F.R. § 35.130(b)(3).

64. Defendant has utilized criteria and methods of administering Maine’s long-term care system, including the nursing home program, which has subjected the Plaintiffs and putative class members to unnecessary and unjustified segregation in violation of the ADA integration mandate. These criteria and methods include (1) failing to assess properly the need for services and supports that would enable Plaintiffs and class members to remain in the community, and (2) failing to ensure that Plaintiffs and class members have access to medically necessary and appropriate services that will meet their needs in the community.

Count III
Americans With Disabilities Act:
Discrimination Based on Nature and Severity of Disability

65. The Named Plaintiffs and members of the putative class re-allege the foregoing paragraphs as though fully set forth herein.

66. The federal regulations implementing Title II of the ADA provide that public entities such as Defendant may not “deny a qualified individual with a disability the opportunity to participate or benefit” from a service and cannot “provide a ... service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others.” 28 C.F.R. § 35.130(b)(1)(i), (iii), (iv).

67. Defendant's PASRR program totally excludes Plaintiffs and class members from receiving appropriate specialized services by virtue of their disabilities. In addition, on the basis of their disabilities, Defendant's community programs either totally exclude the Named Plaintiffs and putative class members on the basis of their disabilities or are not of sufficient duration and intensity to allow the Named Plaintiffs and putative class members to live in the community. These failures relegate Named Plaintiffs and putative class members to segregated facilities in violation of Title II of the ADA and its implementing regulations.

Count IV
Section 504 of the Rehabilitation Act

68. The Named Plaintiffs and members of the putative class re-allege the foregoing paragraphs as though fully set forth herein.

69. The Named Plaintiffs and class members are qualified individuals with disabilities under Section 504 of the Rehabilitation Act. 29 U.S.C. § 794(a).

70. The Maine Department of Health and Human Services receives federal financial assistance.

71. The regulations accompanying Section 504 provide that: "[r]ecipients shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons." 28 C.F.R. § 41.51(d).

72. These regulations further prohibit recipients of federal financial assistance from "utiliz[ing] criteria or methods of administration ... (i) [t]hat have the effect of subjecting handicapped persons to discrimination on the basis of handicap; [or] (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to handicapped persons." 28 C.F.R. § 41.51(b)(3); 45 C.F.R. § 84.4(b).

73. The Named Plaintiffs and putative class members qualify for Defendant's program of long-term rehabilitative services, and would benefit from services provided in a community-based setting. Although the community is the most integrated setting appropriate to meet their needs, the Named Plaintiffs

and putative class members remain institutionalized in nursing facilities. By denying them access to existing community programs and by requiring that Named Plaintiffs and putative class members be confined in the segregated nursing facilities in order to receive needed rehabilitative services, Defendant violates Section 504.

Count V
Nursing Home Reform Act Amendments

74. The Named Plaintiffs and members of the putative class re-allege the foregoing paragraphs as though fully set forth herein.

75. The NHRA, 42 U.S.C. § 1396r(e)(7), requires that states develop and implement a PASRR program for all applicants to, and residents of, Medicaid-certified nursing facilities.

76. The nursing homes in which Plaintiffs and the putative class members have been placed are Medicaid-certified facilities licensed by DHHS.

77. DHHS is solely responsible for administering the PASRR program and providing individuals with specialized services. 42 U.S.C. § 1396r(e)(7); 42 C.F.R. §§ 483.100-138.

78. The specialized services that the Defendant identified after Plaintiffs filed suit, even if provided, when combined with the services currently provided by the nursing facility where the Named Plaintiffs reside, are grossly inadequate to meet the requirements of the NHRA. 42 C.F.R. §§ 483.120 (a)(2), 483.440. The services specified by the Defendant will not permit the Named Plaintiffs to acquire the behaviors “to function with as much self determination and independence as possible” nor do they adequately “prevent[] or decelerat[e] regression or loss of current optimal functional status.” 42 C.F.R. § 483.440. The Defendant has violated the regulations with respect to the Named Plaintiffs in at least the following ways:

- a. failed to develop a plan to ensure the opportunity for regular and continuous social and/or religious activities, in violation of 42 C.F.R. § 483.420 (a)(11);

- b. failed to provide any documentation that the staff would be trained to meet the Named Plaintiffs' needs, particularly their behavioral health needs, in violation of 42 C.F.R. § 483.430(e)(1);
- c. failed to identify any on-going monitoring program or other procedures to ensure that the active treatment program is aggressive and continuous, in violation of 42 C.F.R. § 483.440(a)(1);.
- d. failed to provide any evidence that the Named Plaintiffs' programs are developed and monitored by an interdisciplinary team that is appropriate to their needs, in violation of 42 C.F.R. § 483.440(c)(1);
- e. failed to produce any evidence that any plan for active and continuous treatment will be implemented by all staff, both professional and non-professional, in violation of 42 C.F.R. § 483.440(d)(3); and,
- f. failed to identify any methods or procedures to demonstrate how data would be collected, in violation of 42 C.F.R. § 483.440(e)(1).

79. In addition to the allegations made in the foregoing paragraph, the Defendant has also violated the NHRA with respect to Plaintiff Fletcher by failing to identify counseling services to reduce the need for antidepressant drugs, in violation of 42 C.F.R. § 483.420(a)(6).

80. Defendant's policies and practices as described herein, which have been repeated and knowing, violate Plaintiffs' and class members' rights under the NHRA to:

- a. an appropriate pre-admission PASRR Level I screening;
- b. a PASRR Level II evaluation to determine the need for nursing facility level of care and specialized services and to determine whether alternate community placements are appropriate;
- c. the choice of receiving services in the community rather than in nursing facilities; and

d. receipt of appropriate specialized services while residing in the nursing facility.

81. If Defendant offered the Named Plaintiffs and putative class members support services appropriate to their needs, the Named Plaintiffs and some putative class members could live in alternative, integrated community settings.

Count VI
Medicaid Act- Reasonable Promptness

82. The Named Plaintiffs and members of the putative class re-allege the foregoing paragraphs as though fully set forth herein.

83. The Defendant has failed to provide the Named Plaintiffs and members of the putative class with medically necessary services with reasonable promptness. These services include, *inter alia*, specialized services while confined to the nursing facility and long-term care services and supports sufficient to permit them to live in the community. In so doing, the Defendant operates the MaineCare program in violation of 42 U.S.C. §1396a(a)(8), (a)(10)(A).

Count VII
Section 1983

84. The Named Plaintiffs and members of the putative class re-allege the foregoing paragraphs as though fully set forth herein.

85. Defendant's actions, taken under the color of state law, have deprived and will continue to deprive the Plaintiffs and class members of their federally protected rights.

Request For Relief

WHEREFORE, the Plaintiffs respectfully request that this Court:

1. Certify this case as a class action pursuant to Fed. R. Civ. P. 23 (b)(2);
2. Grant preliminary and permanent injunctive relief requiring Defendant to amend its policies, practices and procedures to ensure that the Named Plaintiffs and putative class members:
 - a. are properly screened and evaluated as required by the NHRA;
 - b. are provided with appropriate services with reasonable promptness;
 - c. are informed that they may be eligible for community services and, if eligible for such services, that they have the choice to receive such services in an institutional or an integrated community setting;
 - d. are provided comprehensive assessments, evaluations and screenings to determine their eligibility for community services, both prior to and after admission to nursing facilities; and
 - e. are provided, as appropriate, with long-term care services and supports in the community with reasonable promptness and that the Defendant refrain from providing long-term care only in institutional settings.
3. Issue a declaratory judgment stating that the Defendant has violated the Americans with Disabilities Act, the Rehabilitation Act, the Medicaid Act and the Nursing Home Reform Act in her failure to: provide specialized services to Plaintiffs and class members; prevent the unnecessary segregation and institutionalization of Plaintiffs and class members; and provide community-based services to Plaintiffs and class members;
4. Award the Plaintiffs costs of this litigation and their reasonable attorneys' fees; and
5. Grant such further and other relief as may be just and proper.

Dated: August 11, 2010

/s/ Jeffrey Neil Young
Jeffrey Neil Young
MCTEAGUE HIGBEE
4 Union Park P.O. Box 5000
Topsham, ME 04086
(207) 725-5581
jyoung@mcteahuehigbee.com

/s/ Jack Comart
Jack Comart
Maine Equal Justice Partners
126 Sewall Street
Augusta, ME 04330-6822
(207) 626-7058, ext. 202
jcomart@mejp.org

/s/ Staci K. Converse
Staci K. Converse
Sean P. Ociepka
Peter M. Rice
Disability Rights Center
24 Stone Street
P.O. Box 2007
Augusta, ME 04338
(207) 626-2774
sconverse@drcme.org
sociepka@drcme.org
price@drcme.org

/s/ Martha Jane Perkins
Martha Jane Perkins
National Health Law Program
211 N. Columbia St., Second Floor
Chapel Hill, NC 27516
(919) 968-6308
Perkins@healthlaw.org

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I, Jeffrey Neil Young, hereby certify that on August 11, 2010, I electronically filed Plaintiff's First Amended Complaint (Class Action) with the Clerk of the Court using the CM/ECF system which will send notification of such filing(s) to the following: James E. Fortin at James.Fortin@maine.gov; and Janine A. Raquet at Janine.Raquet@maine.gov.

/s/ Jeffrey Neil Young _____

McTEAGUE HIGBEE
Four Union Park
P.O. Box 5000
Topsham, ME 04086
T: (207) 725-5581
F: (207) 725-1090
jyoung@mctaguehigbee.com