

THE HONORABLE JAMES L. ROBART

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

ADAM DUNAKIN by and through his parent  
and next friend, KIMBERLEE HOLLINGER  
individually, and on behalf of similarly situated  
individuals,

Plaintiff,

v.

KEVIN W. QUIGLEY, in his official capacity as  
Secretary of the Washington State Department of  
Social and Health Services, and DOROTHY F.  
TEETER, in her official capacity as Director of  
the Washington State Health Care Authority,

Defendants.

NO. 2:14-CV-00567 JLR

**FIRST AMENDED COMPLAINT  
FOR DECLARTORY AND  
INJUNCTIVE RELIEF**

CLASS ACTION

**I. OVERVIEW**

1. Defendants, and their agencies, the Health Care Authority and the Department of Social and Health Services, do not have an adequate system in place for persons with intellectual disabilities and related conditions living in privately-operated Medicaid-certified nursing facilities to be screened, assessed and/or receive specialized services, in violation of the Medicaid Act and the Nursing Home Reform Act (NHRA). Defendants' systemic failures have caused plaintiff and putative class members to languish in institutional facilities, segregated from

1 family and friends, without the services that they need to maximize their independence and  
2 without the opportunity to live in an integrated community-based setting.

3         2. Plaintiff's counsel, Disability Rights Washington, has raised this issue with  
4 defendants repeatedly. After Disability Rights Washington conducted an extensive investigation  
5 of Washington State's failure to comply with NHRA requirements at just the state-operated  
6 nursing facilities located at Lakeland Village, defendants disputed DRW's findings. Shortly  
7 thereafter, the federal government issued findings of over 40,000 violations of the NHRA  
8 requirements for just 27 individuals residing at Lakeland Village. The problems found at  
9 Lakeland Village are just the tip of the iceberg. Defendants' failure to implement NHRA  
10 requirements are systemic, statewide and occur in both state- and privately-operated nursing  
11 facilities.

12         3. Defendants took action to address its NHRA violations in state-operated Medicaid  
13 nursing homes. But they have left hundreds of Washington residents with developmental  
14 disabilities languishing without NHRA screening, assessment and specialized services at  
15 privately-operated nursing facilities.

16         4. This litigation seeks injunctive and declaratory relief to require defendants to  
17 establish an adequate system to provide PASRR screenings, assessments, specialized services,  
18 and, when appropriate, community-based integrated placement for plaintiff and class members,  
19 all of whom reside in privately-operated Medicaid-certified Nursing facilities. Without  
20 injunctive and declaratory relief, hundreds of individuals with developmental disabilities will  
21 continue to languish in institutions, isolated from their home communities, without the services  
22 they need to maximize their potential and live as independently as possible.

## II. PARTIES

1  
2           5.       ***Plaintiff Adam Dunakin.*** Plaintiff Dunakin is a thirty-four (34) year old adult  
3 with a developmental disability who resides at Everett Care and Rehabilitation Center, a  
4 privately-operated, Medicaid-certified nursing facility in Everett, Washington. Mr. Dunakin is  
5 eligible for Medicaid as well as for services from the Developmental Disabilities Administration  
6 of the Washington State Department of Social and Health Services (DSHS). Mr. Dunakin has  
7 been confined to a nursing home for nearly eight (8) years without being evaluated for the  
8 specialized services he needs to maximize his health and well-being as well as independence. He  
9 would prefer to live in his home community, if appropriate services to support him were offered  
10 by defendants.

11           6.       ***Defendant Kevin W. Quigley.*** Defendant Kevin Quigley is the Secretary of  
12 DSHS, the state agency that includes the Developmental Disabilities Administration. DSHS,  
13 through the Developmental Disabilities Administration, is responsible for implementing the  
14 screening, evaluation and service delivery requirements under the Nursing Home Reform Act  
15 (NHRA) and the Medicaid Act for developmentally disabled individuals living in privately-  
16 operated Medicaid-certified nursing homes. Mr. Quigley is sued in his official capacity only.  
17 All alleged acts by Mr. Quigley, DSHS and the Developmental Disabilities Administration were  
18 taken under color of state law.

19           7.       ***Defendant Dorothy F. Teeter.*** Defendant Dorothy Teeter is the Director of the  
20 Washington State Health Care Authority. The Health Care Authority is the designated single  
21 state agency for Washington's Medicaid programs. Ms. Teeter is responsible for ensuring that  
22 the Medicaid program is administered in a manner consistent with all state and federal laws,  
23

1 including the Medicaid Act and the NHRA. Ms. Teeter is sued in her official capacity only. All  
2 alleged acts by Ms. Teeter and the Health Care Authority were taken under color of state law.

3 **III. JURISDICTION AND VENUE**

4 8. Jurisdiction of this Court arises under 28 U.S.C. § 1331 because this action arises  
5 under the laws of the United States, and 28 U.S.C. § 1343(3) and (4) which confer on the federal  
6 district courts original jurisdiction over all claims asserted pursuant to 42 U.S.C. § 1983 to  
7 redress deprivations of rights, privileges or immunities guaranteed by Acts of Congress and the  
8 United States Constitution.

9 9. Venue is proper pursuant to 28 U.S.C. § 1391(b). A substantial part of the events  
10 or omissions giving rise to plaintiff's claims occurred in the Western District of  
11 Washington and defendants may be found here.

12 **IV. LEGAL FRAMEWORK**

13 10. More than twenty-five years ago, Congress passed the NHRA in order to end our  
14 nation's historical practice of inappropriately warehousing individuals with intellectual  
15 disabilities and related conditions in nursing facilities. Congress concluded that thousands of  
16 residents in nursing facilities were being abused, neglected and given inadequate care, while  
17 many could live in less restrictive living situations in their home communities. The NHRA  
18 mandated that Medicaid recipients with intellectual disabilities and related conditions in nursing  
19 facilities be assessed to determine whether they could be served in a community-based setting,  
20 and offered specialized services needed to maximize their skills, abilities and independence.  
21 Around the country, passage of NHRA "opened the door" to community placement for many  
22 persons with intellectual disabilities who previously had no alternative to life in an institution.

1 For others, the NHRA meant more fulfilling, more independent lives even if they continued to  
2 live in an institutional setting.

3 11. Under the NHRA, defendants are required to screen and assess individuals with  
4 intellectual disabilities and related conditions seeking admission or residing in Medicaid-  
5 certified nursing facilities, including privately-operated nursing facilities. This screening and  
6 assessment process is known as the Pre-Admission Screening and Resident Review (PASRR)  
7 process. 42 U.S.C § 1396r(e)(7)(A). Defendants must make two determinations: (1) whether  
8 nursing home placement is appropriate to the individual's needs; and (2) whether the individual  
9 would benefit from specialized services to meet their individualized needs for skill building and  
10 maintenance and/or to assist them to live in an integrated community setting. 42 U.S.C. §  
11 1396r(b); (e); 42 C.F.R. §§ 483.120; .126; .130; .132. Once an individual is assessed, NHRA  
12 obligates defendants to inform the individual about the availability of community based and  
13 specialized services and provide and/or arrange and pay for the specialized services that the  
14 individual is assessed to need. 42 U.S.C. § 1396r(e)(7)(A)-(C). In short, the NHRA provides a  
15 clear pathway to integrated, community-based placement and/or to services designed to  
16 maximize an individual's physical, mental and general well-being while living in a nursing  
17 facility.

18 12. In addition to the NHRA requirements, Title II of the Americans with Disabilities  
19 Act (ADA), 42 U.S.C. §§ 12131-12134, and the Rehabilitation Act of 1973, 29 U.S.C. § 794,  
20 are designed to ensure that individuals with disabilities receive their services in the least  
21 restrictive, most integrated setting appropriate. Defendants' failure to conduct the required  
22 NHRA screenings and assessments has resulted in the unnecessary and discriminatory  
23 segregation of plaintiff and the putative class in restrictive nursing facilities. Defendants' acts

1 and omissions contravene the integration and nondiscrimination mandates of the ADA and  
2 Rehabilitation Acts.

3 13. These federal laws, taken together, mandate that defendants establish a system for  
4 screening and assessing current and new privately-operated Medicaid-certified nursing home  
5 residents with intellectual disabilities and related conditions, and if needed, providing them with  
6 specialized services to promote their well-being and independence and/or community-based  
7 services as an alternative to nursing home placement.

8 **V. CLASS ALLEGATIONS**

9 14. *Definition of Class.* The class consists of all individuals who:

10 (a) are or will be residents of Medicaid-certified, privately-operated nursing  
11 facilities in the State of Washington; and

12 (b) who are Medicaid recipients with an intellectual disability or related  
13 condition(s) such that they are eligible to be screened and assessed pursuant to 42  
14 U.S.C. § 1396r(e)(7) and 42 C.F.R. § 483.112 et seq.

15 15. *Size of Class.* The class of Medicaid recipients who reside in privately-operated,  
16 Medicaid-certified nursing facilities who are eligible for screening, assessment and services  
17 under the NHRA is expected to be so numerous that joinder of all members is impracticable.

18 According to defendants, approximately 300 individuals have been identified as having a  
19 developmental disability and residing in privately-operated, Medicaid-certified nursing  
20 facilities. See DDA 2014 Supplemental Budget, RHC Medicaid Compliance report, attached as  
21 Appendix A.

22 16. *Class Representative Dunakin.* Named plaintiff Adam Dunakin is diagnosed  
23 with a developmental disability and is a client of the Developmental Disabilities Administration

1 of DSHS. He has been admitted twice to privately-operated, Medicaid-certified nursing facilities  
2 since May 31, 2006. At the first admission, the nursing facility identified that plaintiff Dunakin  
3 had a developmental disability and required further assessment. At the second admission, the  
4 nursing home failed to identify that Dunakin had a developmental disability. Despite the initial  
5 screenings, defendants failed to conduct any further evaluations to determine (1) whether Mr.  
6 Dunakin could be served in a more integrated community setting; and (2) whether Mr. Dunakin  
7 needed specialized services. No specialized services were ever provided. No notices about the  
8 availability of specialized services or alternative community- based placement were provided.  
9 For nearly eight years, Mr. Dunakin has languished in privately-operated nursing facilities  
10 without the services he needs to maximize his independence and, ultimately, live in the least  
11 restrictive setting in his home community. His claims are typical of the claims of the other  
12 members of the class, and, through his mother and next friend, he will fairly and adequately  
13 represent the interests of the class. There is no known conflict of interest among class members.

14 17. ***Common Questions of Law and Fact.*** This action requires the determination of  
15 whether defendants violate the requirements under the NHRA, the ADA, the Rehabilitation Act,  
16 the Medicaid Act and the Fourteenth Amendment by failing to have a system in place to (1)  
17 properly determine whether plaintiff and the proposed class can be served in an integrated, less-  
18 restrictive community-based setting and/or need specialized services to maximize their abilities  
19 and independence; (2) provide, with reasonable promptness, specialized services identified by  
20 any such determinations to plaintiff and the proposed class and (3) provide adequate notice and  
21 due process to plaintiff and the proposed class of their eligibility for Medicaid services  
22 (including placement in a less restrictive setting and specialized services) and their right to  
23 appeal any such determinations through an administrative fair hearing.



1 from its intermediate care facility to its nursing facility, and reduced programs and staffing at  
2 both types of programs.

3 22. Moving residents from an intermediate level of care to a nursing facility program  
4 resulted in a significant loss of services to the 27 individuals, since intermediate care facility  
5 placement requires that all residents receive “active treatment,” while residents in nursing  
6 facilities only receive “specialized services” once they are screened and assessed under the  
7 NHRA requirements.

8 23. Since 1989, CMS has forbidden states from making these types of cuts in  
9 services. “[P]lacement by the State of individuals with [mental illness or intellectual  
10 disabilities] in nursing facilities as a means of avoiding responsibility for provision of the active  
11 treatment these individuals need will no longer be tolerated.” CMS, State Medicaid Manual,  
12 CMS Pub. 45, Chap. 4 § 4250 at 4-244 (Rev. 42, Mar. 1989), attached as Appendix B.  
13 Nonetheless, defendants proceeded with the reductions in services.

14 24. DRW conducted an extensive investigation into what happened to the 27  
15 residents after their move. On October 31, 2012, DRW reported its findings to defendant  
16 Quigley’s predecessor, Robin Arnold-Williams. DRW concluded that defendants were not  
17 meeting the NHRA requirements at Lakeland Village. Defendants disagreed and hired a  
18 consultant to review their implementation of NHRA. Ultimately, Defendants informed the  
19 Center for Medicaid and Medicare Services (CMS), the federal agency overseeing Medicaid  
20 programs about DRW’s concerns. CMS then conducted its own review.

21 25. The federal agency concluded that defendants had systematically failed to comply  
22 with the NHRA requirements at Lakeland Village. “[W]e find that Lakeland Village nursing  
23 facility is not in compliance with Section 1919 of the Act, is not in compliance with 42 CFR Part

1 483, that the remaining transferred Lakeland residents are not in an appropriate setting, that the  
2 original transfer from the ICF/IID [Intermediate Care Facility for Individuals with Intellectual  
3 Disabilities] violated federal law and that as a consequence the state has received FFP [Federal  
4 Financial Participation, or the federal match for state payments for Medicaid services] in error.”  
5 See Letter from Carol J.C. Peverly of CMS to defendant Teeter, dated November 7, 2013,  
6 attached as Appendix C. CMS also announced that it would widen its investigation to other  
7 state-operated, Medicaid-certified nursing facilities.

8 26. Since November 2013, DDA and HCA have operated under a corrective action  
9 plan with CMS related to state-operated Medicaid-certified nursing facilities. See e.g., DDA  
10 Pre-Admission Screening and Resident Review (PASRR) Status Report, February 26, 2014,  
11 located at <http://www.dshs.wa.gov/ddd> (last visited March 13, 2014). The DDA correction plan  
12 does not adequately address the needs of privately-operated nursing facility residents with  
13 intellectual disabilities and/or related conditions to be thoroughly assessed to determine most  
14 appropriate placement and provided with specialized services.

15 27. DDA admits as much. In its 2014 Supplemental Budget, DDA requested (and the  
16 Legislature approved) funds specifically allocated to provide required PASRR assessments and  
17 services in the state-operated nursing facilities. See Appendix A. DDA noted in the request that  
18 its corrective action plan (and the requested budget allocation) “do[es] not address the issue of  
19 the approximately 300 people with a developmental disability who are currently in  
20 community nursing facilities.”

21 28. Defendant’s efforts to establish a functional PASRR program did not include the  
22 approximately 300 people with intellectual disabilities and related conditions living in privately-  
23 operated nursing facilities. Instead, Defendant’s reform efforts focused on the state-operated

1 nursing facilities. This failure denied Plaintiff Dunakin and other Medicaid-eligible residents of  
2 private nursing facilities access to the screening, evaluation, specialized services, and  
3 community-based alternatives to nursing facility services that state-operated nursing facility  
4 residents would be able to obtain under the PASRR program reforms. By September, 2014, only  
5 a few private nursing facility residents were receiving any specialized services.

6 29. Nursing facility residents can only access specialized services that constitute  
7 “active treatment” provided to other similarly needy individuals placed in Defendants’  
8 intermediate care facilities through a PASRR evaluation. Therefore, Defendants’ failure to have  
9 in effect a functioning PASRR program for private nursing facility residents has denied Plaintiff  
10 Dunakin and other Medicaid-eligible private nursing facility residents with intellectual  
11 disabilities and related conditions the specialized services that constitute “active treatment,”  
12 which are provided to similarly needy intermediate care facility residents.

13 30. Plaintiff Dunakin’s experience is typical of the proposal class. He has a  
14 developmental disability that qualifies as an “intellectual disability or related condition” under  
15 the NHRA.

16 31. On May 31, 2006, Mr. Dunakin was admitted to a privately-operated NF.  
17 Consistent with the NHRA, a pre-admission screening was conducted. The screening properly  
18 identified that Dunakin was a person with a developmental disability and that additional  
19 evaluation was required.

20 32. Despite the initial screening, no further evaluation was ever conducted by  
21 defendants. No specialized services were provided to Mr. Dunakin. No notice about the NHRA  
22 assessment, its determination or the availability of specialized services through Medicaid was  
23 ever provided to Mr. Dunakin or his mother.



1 regulations by failing to establish adequate policies, practices and procedures to ensure that  
2 plaintiff and the class receive the required PASRR screening, assessment, the provision  
3 specialized services and their choice of receiving services in the community rather than in  
4 nursing facilities.

5 **SECOND CLAIM: DECLARATORY RELIEF FOR VIOLATIONS OF THE**  
6 **AMERICANS WITH DISABILITIES ACT**

7 37. Plaintiff re-alleges the paragraphs above.

8 38. Plaintiff and the putative class are all “qualified individuals with a disability”  
9 within the meaning of 42 U.S.C. § 12131(2). Plaintiff and class members have not been assessed  
10 to determine what kinds of services they would need to live in an integrated setting in the  
11 community. They have not been given the choice of remaining in the nursing facility or  
12 receiving appropriate services in the community.

13 39. Defendant’s acts and omissions effectively deny plaintiff and the proposed class  
14 the community-based services that they need in order to avoid continued segregation in an  
15 institution in violations of Title II of the ADA, 42 U.S.C. § 12132 and its implementing  
16 regulations.

17 40. Defendants’ “methods of administration” further have the effect of subjecting  
18 plaintiff and the class to discrimination on the basis of disability by subjecting them to  
19 unnecessary and unjustified segregation, in violation of 28 C.F.R. § 35.130 (b)(3).

20 41. Defendants further discriminate against plaintiff and the class by denying them  
21 access to services based upon the severity of their disabilities, in violation of 28 C.F.R §  
22 35.130(b)(1). As a result, defendants relegate plaintiff and the class to segregated facilities in  
23 violation of the ADA.

1                   **THIRD CLAIM: DECLARATORY RELIEF FOR VIOLATIONS OF**  
2                   **SECTION 504 OF THE REHABILITATION ACT**

3           42.     Plaintiff re-alleges the paragraphs above.

4           43.     Plaintiff and class members are qualified individuals with disabilities under  
5 Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 (a). Defendants, HCA and DDA receive  
6 federal financial assistance.

7           44.     Defendants violate Section 504 of the Rehabilitation Act and its implementing  
8 regulations by denying plaintiff and class members access to integrated community-based  
9 programs appropriate to meet their needs and by requiring that plaintiff and class members be  
10 confined in segregated nursing facilities in order to receive the services that they need.

11                   **FOURTH CLAIM: DECLARATORY RELIEF FOR VIOLATIONS OF**  
12                   **TITLE XIX OF THE SOCIAL SECURITY ACT**

13           45.     Plaintiff re-alleges the paragraphs above.

14           46.     Plaintiff and the class are entitled to declaratory relief pursuant to 42 U.S.C. §  
15 1983 that defendants have violated Title XIX of the Social Security Act by failing to provide  
16 Medicaid benefits to plaintiff and class members (1) with reasonable promptness, 42 U.S.C. §

17           1396a(a)(8); (a)(10)(A) and its implementing regulations; (2) in compliance with  
18 Medicaid comparability requirements, 42 U.S.C. § 1396a(a)(10)(B)(i) and (ii); 42 C.F.R. §  
19 440.240; (3) with a meaningful choice of providers, including a choice between institutional and  
20 community based services, 42 U.S.C. § 1396n(c)(2)(B); (C); and (4) with adequate written  
21 notice of defendants' determinations, as well as their right to appeal to defendants'  
22 administrative hearing process, pursuant to 42 C.F.R. § 431.200 et seq.  
23

1                                   **FIFTH CLAIM: DECLARATORY RELIEF FOR**  
2                                   **CONSTITUTIONAL DUE PROCESS VIOLATIONS**

3           47.     Plaintiff re-alleges the paragraphs above.

4           48.     Defendants' actions deprive plaintiff and the class of rights, privileges and/or  
5 immunities secured to them by the Constitution, in violation of 42 U.S.C. § 1983. Defendants'  
6 failure to provide adequate notice and access to an administrative hearing violates federal  
7 constitutional due process.

8                                   **SIXTH CLAIM: INJUNCTIVE RELIEF**

9           49.     Plaintiff re-alleges the paragraphs above.

10          50.     Plaintiff and the class are entitled to preliminary and permanent injunctive relief  
11 pursuant to 42 U.S.C. § 1983 to require defendants to fully implement the NHRA, ADA,  
12 Rehabilitation Act and Medicaid requirements as they apply to plaintiff and the proposed class.

13                                   **VIII. DEMAND FOR RELIEF**

14           WHEREFORE, plaintiff requests that this Court:

15           1.     Certify this case as a class action; designate the named plaintiff as class  
16 representative; and designate DISABILITY RIGHTS WASHINGTON, Susan Kas, and  
17 SIRIANNI YOUTZ SPOONEMORE HAMBURGER, Eleanor Hamburger, as class counsel;

18           2.     Declare that that defendants' failure to implement an adequate system for  
19 ensuring that PASRR screening, assessments, specialized services, due process notice and the  
20 choice of integrated community based services results in unnecessary segregation and  
21 institutionalization of plaintiff and the class, and violates the NHRA, Title II of the ADA,  
22 Section 504 of the Rehabilitation Act, the Medicaid Act and the 14th Amendment of the United  
23



**SIRIANNI YOUTZ  
SPOONEMORE HAMBURGER**

/s/ Eleanor Hamburger

Eleanor Hamburger (WSBA #26478)

999 Third Avenue, Suite 3650

Seattle, WA 98104

Tel. (206) 223-0303; Fax (206) 223-0246

Email: [ehamburger@sylaw.com](mailto:ehamburger@sylaw.com)

Attorneys for Plaintiff

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23

**CERTIFICATE OF SERVICE**

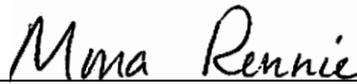
I hereby certify that on May 8, 2015, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

**Angela D. Coats McCarthy**  
[AngelaC3@atg.wa.gov](mailto:AngelaC3@atg.wa.gov)

**Matthew S. King**  
[MatthewK1@atg.wa.gov](mailto:MatthewK1@atg.wa.gov)

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

DATED this 8<sup>th</sup> day of May, 2015.

  
\_\_\_\_\_  
Mona Rennie, Legal Assistant