

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

BILL M., by and through his father and  
natural guardian, William M; JOHN DOE,  
by and through his mother and natural  
guardian, Jane Doe; HEATHER V., by and  
through her mother and guardian, Marcia V;  
JANE S.; KEVIN V., by and through his  
legal guardian, Kathy V.; JENNIFER T.,  
by and through her legal guardians, Sharon  
and Greg T.; LESLIE H.; CATHERINE M.;  
STEPHANIE B.; CONRAD J., by and through  
his legal guardian, C.W. J.; CHRISTOPHER H.,  
by and through his legal guardian, Sue H.;  
MICHAEL R., by and through his legal guardian,  
Susan R.; and on behalf of themselves and all other  
persons similarly situated,

Plaintiffs,

vs.

NEBRASKA DEPARTMENT OF HEALTH AND  
HUMAN SERVICES FINANCE AND SUPPORT,  
NEBRASKA DEPARTMENT OF HEALTH AND  
HUMAN SERVICES, RICHARD NELSON,  
in his official capacity as the Director of Nebraska  
Department of Health & Human Services Finance and  
Support; and NANCY MONTANEZ, in her official  
capacity as the Director of Nebraska Department of  
Health & Human Services;

Defendants.

Case No. 4:03CV3189

SECOND  
AMENDED  
COMPLAINT

(CLASS ACTION)

PRELIMINARY STATEMENT

1. This complaint, seeking declaratory and injunctive relief, challenges practices of the Defendants and their agents (hereinafter "Defendants") which violate provisions Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (hereinafter "Section 504"), as well as declaratory and injunctive relief as to practices of the Defendants Nelson and Montanez, in their official capacities,

for violations of certain provisions of the Americans with Disabilities Act (42 U.S.C. § 12101 et seq.), the Medical Assistance Act (hereinafter "Medicaid") 42 U.S.C. § 1396 et seq.; and 42 U.S.C. § 1983. The Plaintiffs individually named are each eligible for, desire, have applied for or have attempted to apply for home and community-based developmental disability services and supports, which are provided for under 42 U.S.C. § 1396n, and Neb. Rev. Stat. 68-1018 et seq., and their implementing regulations. However, Plaintiffs have been unable to gain access to these critical services because Defendants have unlawfully restricted funding resulting in unlawfully long waits to receive these services, and they have established an arbitrary, invalid, and inappropriate mechanism for determining individual funding, which mechanism is fundamentally flawed and incapable of accurately assessing and determining the scope of services for recipients. In addition, by violating applicable federal Medicaid laws, Defendants' actions place the individually named Plaintiffs, and all those who are similarly situated, at imminent risk of unnecessary institutionalization in Intermediate Care Facilities for the Mentally Retarded (hereinafter "ICF/MR") or other institutional settings in violation of the Americans With Disabilities Act and the Rehabilitation Act of 1973.

#### **JURISDICTION AND VENUE**

2. This action is authorized under 42 U.S.C. § 1983 and by the Supremacy Clause of the United States Constitution, Article 6; and as an action seeking relief from discrimination on the basis of disability in violation of Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794 ), and the Americans with Disabilities Act (42 U.S.C. § 12101 et seq.). This action is further authorized under 42 U.S.C. § 1983 and by the Supremacy Clause of the United States Constitution, Article VI, as an action seeking relief for a deprivation of certain rights, privileges, or immunities granted to

Plaintiffs under the Medical Assistance Act (“Medicaid”), 42 U.S.C. §1396 et seq. by the Defendants.

3. This action arises under federal law and involves deprivations under color of state law of rights secured under the United States Constitution and acts of Congress, and therefore, this Court has jurisdiction to determine the Plaintiffs’ claims pursuant to 28 U.S.C. §§1331 and 1343 (a)(3). This Court also has jurisdiction over Plaintiffs’ action for declaratory relief pursuant to 28 U.S.C. § 2201 and Rule 57 of the Federal Rules of Civil Procedure. Injunctive relief is authorized by 28 U.S.C. § 2202, 42 U.S.C. § 1983 and Rule 65 of the Federal Rules of Civil Procedure.

4. Pursuant to 28 U.S.C. §1391(b), venue is proper in this Court in that Defendants reside or are located in this judicial district, and a substantial part of the events or omissions giving rise to the claim occurred in this district.

**PLAINTIFFS**

5. Bill M. is a natural person and a resident of Lincoln County, Nebraska. Bill M. brings this suit through William M., his father and guardian.

6. John Doe is a natural person and resident of Valley County, Nebraska. John Doe brings this suit through Jane Doe, his mother and guardian.

7. Heather V. is a natural person and resident of Adams County, Nebraska. Heather V. brings this suit through Marcia V., her mother and guardian.

8. Jane S. is a natural person and resident of Douglas County, Nebraska.

9. Kevin V. is a natural person and resident of Lancaster County, Nebraska. Kevin V. brings this suit through Kathy V., his mother and legal guardian.

10. Jennifer T. is a natural person and resident of Lancaster, Nebraska. Jennifer T. brings this suit through Greg and Sharon T., her parents and legal guardians.

11. Leslie H. is a natural person and resident of Douglas County, Nebraska.

12. Catherine M. is a natural person and resident of Scotts Bluff County, Nebraska.

13. Stephanie B. is a natural person and resident of Douglas County, Nebraska.

14. Conrad J. is a natural person and resident of Douglas County, Nebraska.

Conrad J. brings this suit through C.W. J., his father and legal guardian.

15. Christopher H. is a natural person and resident of Hall County, Nebraska.

Christopher H. brings this suit through Sue H., his mother and legal guardian.

16. Michael R. is a natural person and resident of Douglas County, Nebraska.

Michael R. brings this suit through Susan R., his mother and legal guardian.

#### **DEFENDANTS**

17. Defendant Nebraska Department of Health and Human Services Finance and Support (hereinafter "Finance & Support") is a department of the State of Nebraska established pursuant to the Nebraska Partnership for Health and Human Services Act, Neb. Rev. Stat. § 81-3001 et seq. The functions of Finance & Support and its powers are set forth at Neb. Rev. Stat. § 81-3007, § 81-3007.01, §§81-3301 to 3307. Of particular relevance to the present action, Finance & Support is authorized to contract with, and act as an agent of, the federal government in matters of mutual concern, and pursuant to Neb. Rev. Stat. § 68-1019 et seq. is charged with administering and regulating the Nebraska Medical Assistance Program (*i.e.*, Nebraska's Medicaid plan).

18. Defendant Nebraska Department of Health and Human Services (hereinafter "NDHHS") is a department of the State of Nebraska established pursuant to the Nebraska Partnership

for Health and Human Services Act, Neb. Rev. Stat. §§ 81-3001 et seq. The functions of NDHHS and its powers are set forth at Neb. Rev. Stat. § 81-3007, § 81-3007.01, §81-3101 to 3108. Of particular relevance to the present action, NDHHS is authorized by Neb. Rev. Stat. § 83-1214 to carry out the authority granted to it by Finance & Support, pursuant to Neb. Rev. Stat. §68-1035.01, and NDHHS is obligated to comply with all applicable provisions of the federal and state laws governing the Nebraska Medical Assistance Plan.

19. Defendant Richard Nelson (hereinafter "Nelson"), successor of Stephen B. Curtiss, is sued in his official capacity. As the Director of Finance and Support, Nelson is bound by the duties and responsibilities stated in Neb. Rev. Stat. §§ 81-3007, 81-3007.01, 81-3101 et seq., and 83-101.06, et seq., and their implementing regulations (Reissue 1999) and applicable federal and state laws and regulations. Nelson exercises overall responsibility and supervision over the formulation of policies, practices, and procedures of Finance & Support, and more specifically, the promulgation, administration, supervision, and control of the rules and regulations related to community-based services for Nebraska residents with developmental disabilities, including the Medicaid funding for the Waiver Program.

20. Defendant Nancy Montanez (hereinafter "Montanez"), successor of Ron Ross, is sued in her official capacity. As the Director of NDHHS, Montanez is bound by the duties and responsibilities stated in Neb. Rev. Stat. §§ 81-3007, 81-3007.01, 81-3101 et seq., and 83-101.06, et seq., (Reissue 1999), and their implementing regulations, as well as by all applicable federal laws and regulations. Montanez exercises overall responsibility and supervision over the formulation of policies, practices, and procedures of NDHHS, and more specifically, the promulgation, administration, supervision, and control of the rules and regulations related to community-based services for Nebraska residents with developmental disabilities.

**CLASS ACTION ALLEGATIONS**

21. The named Plaintiffs bring this class action on their own behalf and, pursuant to Rules 23 (a)(1)-(4), (b)(1)(A), (b)(2), and (b)(3) of the Federal Rules of Civil Procedure, on behalf of a class defined as follows:

All residents of Nebraska with developmental disabilities who have requested home or community-based services and who either have had the extent of their services determined by the State's use of the "Objective Assessment Process" ("OAP") or have been placed on a wait list (the "Register of Persons with Unmet Needs") for such services.

22. Due to the practices of NDHHS and Finance & Support, all class members have been, or are at risk of being, placed on a wait list and waiting an unlawfully long time for services for which they are eligible, and the extent of their home or community-based developmental disabilities services have been, or may in the future be, determined by an "objective assessment procedure" that violates applicable federal Medicaid law. As a further consequence of the State's practices with respect to provision of developmental disability services, all class members are at risk of unnecessarily restrictive placements as a means to receive appropriate services, including placements at ICF/MR facilities, nursing homes or other institutional settings, contrary to applicable law, including without limitation, the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.

23. The class is so numerous that joinder of all members is impracticable. Over two thousand eight hundred individuals are eligible for Home and Community-Based Services.

24. There are questions of law and fact common to the class. Common questions of law include, without limitation, (a) whether it is permissible under federal Medicaid law, the ADA and Section 504 for Defendants to adopt and use a practice, or practices, which fail to provide Medicaid-

funded community-based services within a reasonable time after request of an eligible individual; (b) whether it is permissible under the Due Process Clause of the Fourteenth Amendment and federal Medicaid law to deny Medicaid-funded home or community-based services without notice and an opportunity to be heard; (c) whether it is permissible under the ADA to fail to provide individuals who are eligible for developmental disabilities services with such services in the most integrated setting appropriate to them; and (d) whether it is permissible under federal Medicaid law, the ADA, and Section 504, as well as applicable state law, for Defendants to adopt and use practices (e.g., the "OAP" as devised and implemented by Defendants) to determine the funding they will provide each eligible individual for their developmental disabilities services when such practices are arbitrary, inflexible, and fail to obtain necessary input, and when those practices routinely result in the under funding of services.

25. Common questions of fact include, without limitation, (a) whether the Defendants have adopted and use a practice which fails to provide putative class members with funds for services in a timely manner; (b) whether the Defendants have a practice which denies putative class members notice of adverse determinations and an opportunity to be heard; (c) whether the Defendants have failed to provide putative class members who are eligible for developmental disabilities services with such services in the most integrated setting appropriate to them; and (d) whether Defendants have adopted practices which are arbitrary, inflexible, exclude necessary input, and routinely result in the under funding of services.

26. The representative Plaintiffs are typical of the class in that the representative Plaintiffs have each been wait-listed, will be subject to the Defendants' wait list practices in connection with any future request for a change in services or new services, and they have had, or will have, the

extent of the services they receive determined by the particular OAP Defendants have adopted and are using.

27. The representative Plaintiffs will fairly and adequately protect the interests of the class. The representative Plaintiffs have no interests in conflict with the class, and Plaintiffs have selected qualified, experienced, competent counsel.

28. The prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications establishing incompatible rules of law for the provision of services to members of the class.

29. Defendants, their agents, employees, predecessors, and successors in office have acted or will act on grounds generally applicable to the class, thereby making appropriate injunctive or declaratory relief with respect to the class as a whole.

#### **STATUTORY AND REGULATORY FRAMEWORK**

##### **Americans with Disabilities Act and Section 504**

30. On July 26, 1990, President Bush signed into law the ADA, 42 U.S.C. § 12101 et seq., establishing the most important civil rights laws for persons with disabilities in our nation's history.

31. In enacting the ADA, Congress was particularly concerned about the unnecessary segregation and institutionalization of people with disabilities and the resulting lack of full participation in and access to community services and activities. 42 U.S.C. § 12101(a)(2), (a)(5), (a)(8).

32. Title II of the ADA prohibits the Defendants Nelson and Montanez, in their official capacities, from discriminating against the individuals with disabilities they serve.

33. Pursuant to Olmstead v. L.C., 527 U.S. 581, 119 S. Ct. 2176, 144 L.Ed. 2d 540 (1999), in order to comply with the requirements of the ADA, the states are obligated to adopt a comprehensive, effective working plan for placing qualified persons with mental disabilities in less restrictive settings, and to move persons waiting for services into such services at a reasonable pace.

34. Section 504, on which the ADA is modeled, sets forth similar protections against discrimination by parties, such as the individual and agency Defendants here, against recipients of federal funds, including prohibiting unnecessary segregation. 29 U.S.C. § 794 et seq. State recipients of federal funds are required to administer all programs and activities receiving such funds in the most integrated setting appropriate to the needs of qualified disabled persons. 28 C.F.R. § 41.51(d).

#### **The Medicaid Act**

35. Medicaid is a joint state and federally funded program whose purpose is to provide medical services to low-income persons pursuant to Title XIX of the Social Security Act, and to provide rehabilitation and other services to help them attain or retain capability for independence or self care. 42 U.S.C. §§ 1396 et seq.

36. States are not required to participate in Medicaid. However, states choosing to participate in the Medicaid program receive federal matching funds for their medical assistance program. Once a state elects to participate, it must do so in accordance with the mandatory requirements of the federal Medicaid statutes and regulations. 42 U.S.C. § 1396 et seq., 42 C.F.R. § 430 et seq.

37. As a condition of participating in the federal Medicaid program, states must submit to the United States Department of Health and Human Services, a state Medicaid plan that fulfills

the requirements of the Medicaid Act and includes certain mandatory, as well as optional, Medicaid services. 42 U.S.C. §§ 1396 a(a) and d(a).

38. Federal Medicaid law requires every state to offer nursing facility services. 42 U.S.C. §§ 1396 a(a)(10)(A); 1396 d(a)(4)(A). The state plan must also provide for home health services for any individual who is entitled to nursing facility services. 42 U.S.C. § 1396 a(a)(10)(D).

39. Although not required to do so, states may offer ICF/MR services, as well as home health care services, private duty nursing services, community supported living arrangements, home and community care for functionally disabled elderly individuals, personal care services, and any medical and remedial care recognized under state law. 42 U.S.C. § 1396 d(a). Once a state elects to include such optional services in its plan, however, such services become subject to all the requirements of federal Medicaid law. 42 U.S.C. § 1396 a(a)(1).

40. In general, states must provide institutional services to all individuals who qualify for them, and Medicaid services must be furnished with reasonable promptness to eligible individuals. 42 U.S.C. § 1396 a(a)(8); 42 C.F.R. § 435.93(a).

41. Covered services are to be rendered by qualified providers to Medicaid-eligible persons, and beneficiaries are to have a free choice of qualified providers. 42 U.S.C. § 1396a (a)(23), 42 C.F.R. § 431.51.

42. The state makes payments directly to providers, and the provider cannot bill the beneficiary for services. Medicaid payments must be accepted as payment in full. 42 C.F.R. § 447.15.

43. Federal law allows states to waive certain, limited Medicaid requirements in order to enable people with disabilities to avoid institutionalization and receive Medicaid services in the

community. 42 U.S.C. § 1396 n(c). These waivable requirements are the requirements relating to comparability, statewideness, and eligibility standards for the medically needy. Nebraska currently operates several programs, with the ones of particular relevance to the present suit, being the Home and Community-Based Services Waivers for Adults with Developmental Disabilities.

44. Home and Community-Based Services are less expensive than services in an institutional setting, and thus in addition to the requirements of the ADA and Medicaid (see Olmstead), it is in the state's interest to provide such services as an alternative to institutionalization.

45. A great number of individuals with disabilities can live in the community so long as they have adequate supports and services. In addition, due to their ties to family and friends, there are many benefits to developmentally disabled individuals in receiving adequate supports which will enable them to live in the community rather than an institutional setting. Thus, it is in the interest of many individuals with developmental disabilities to receive such community-based services as an alternative to institutionalization.

46. 42 C.F.R. §440.230(b), promulgated pursuant to the Medicaid Act, provides that each service must be sufficient in amount, duration and scope to reasonably achieve its purpose. Related to this requirement, HCFA (now the Centers for Medicare and Medicaid Services) issued the following guidance to State Medicaid Directors in Olmstead letter number 4, dated January 10, 2001:

In exercising discretion to approve new waiver requests, we will apply the same sufficiency concept to the entire waiver itself, *i.e.*, whether the amount, duration, and scope of all the services offered through the waiver (together with the State's Medicaid plan and other services available to waiver enrollees) is sufficient to achieve the purpose of the waiver to serve as a community alternative to institutionalization and assure the health and welfare of the individuals who enroll.

... an exceptionally limited service design may prevent an existing waiver from being able to assure the health or welfare of the individuals enrolled. Where, subsequent to a HCFA review of quality in an existing waiver, it is very clear that the waiver design renders it manifestly incapable of responding effectively to serious threats to the health or welfare of waiver enrollees, we would expect the State to fulfill its assurance to protect health and welfare. At page 7.

47. As indicated in the foregoing passage, a participating state is obligated to protect the health and welfare of individuals who are provided services under the waiver. Specifically, 42 U.S.C §1396n(c)(2)(A) provides:

A waiver shall not be granted under this subsection unless the State provides assurances satisfactory to the Secretary that – (A) necessary safeguards (including adequate standards for provider participation) have been taken to protect the health and welfare of individuals provided services.

**Due Process Clause of the Fourteenth Amendment & Due Process Requirements under Federal Medicaid Law**

48. The due process clause of the Fourteenth Amendment prohibits a state from depriving a person of life, liberty or property without due process of law. Welfare benefits “are a matter of statutory entitlement for persons qualified to receive them” and thus are constitutionally protected. Goldberg v. Kelly, 397 U.S. 245, 90 S.Ct. 1011, 25 L.Ed. 2d 287 (1970). Due process requires, at a minimum, that persons eligible for Home and Community-Based Services be given notice and an opportunity for a hearing upon a denial or delay in providing those services.

49. Federal Medicaid law specifically requires a participating state’s medical assistance plan to “provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for medical assistance under the plan is not acted upon with reasonable promptness.” 42 U.S.C. §1396a(a)(3). *See also*, 42 C.F.R. §§ 431.200 - 431.250.

**Relevant Nebraska Law pertaining to the delivery of Home and Community-based Services**

50. Pursuant to Neb. Rev. Stat. § 83-1214, NDHHS is obligated to comply with all applicable provisions of Title XIX of the Social Security Act. Title XIX includes 42 U.S.C. §1396a, which provides for state plans for medical assistance (*i.e.*, Medicaid).

51. As described above, the amount, duration, and scope of all the services offered through the waiver programs (together with the state's Medicaid plan and other services available to waiver enrollees), must be sufficient to achieve the purpose of the waiver to serve as a community alternative to institutionalization and must assure the health and welfare of the individuals who enroll. To some extent, the purpose of particular services to individuals with developmental disabilities are suggested by the Nebraska Administrative Code. For example, with respect to day services, 205 NAC 4-017 states:

Day services provide persons with supports, services and interventions desired and needed to increase or maintain their capacity for independent functioning, self-determination, interdependence, productivity and community integration in the Day Service environment.

In addition, the intent and services of the Waiver Program, 480 NAC 2-002, states:

Nebraska's waiver allows for the provision of Habilitation Services and Family Support Services to promote client independence and integration and to support the family. 2-002.01 Habilitation Services: An aggregate set of essential interventions, designated in an IPP, which assist the client to develop and retain the capacity for independence, self-care, and social and /or economic functioning.

52. Neb. Rev. Stat. § 83-1202(1) states the intent of the Legislature that all persons with developmental disabilities shall receive services and assistance which present opportunities to increase their independence, productivity, and integration into the community.

53. The determination of the type and amount of specialized supports and services to be funded through the Department for individual, eligible persons is to be made by service coordination personnel in the Local Field Office. 205 NAC 2-011.08.

**THE NAMED PLAINTIFFS**

54. Bill M. is a resident of the State of Nebraska and is an individual with developmental disabilities.

55. Bill M. is eligible for Medicaid, qualifies for receipt of developmental disabilities services, and is a qualified individual with a disability under the protection of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.

56. Bill M. has requested home or community-based services, has been on the State's wait list, and has had services determined by the State's administration of the OAP. In addition, Bill M. may in the future request different or additional home or community-based services, and such request would be subject to the State's practices relative to the wait list and the OAP.

57. John Doe is a resident of the State of Nebraska and is an individual with developmental disabilities.

58. John Doe is eligible for Medicaid, qualifies for receipt of developmental disabilities services, and is a qualified individual with a disability under the protection of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.

59. John Doe has requested home or community-based services, has been on the State's wait list, and has had services determined by the State's administration of the OAP. In addition, John Doe may in the future request different or additional home or community-based services, and such request would be subject to the State's practices relative to the wait list and the OAP.

60. Heather V. is a resident of the State of Nebraska and is an individual with developmental disabilities.

61. Heather V. is eligible for Medicaid, qualifies for receipt of developmental disabilities services, and is a qualified individual with a disability under the protection of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.

62. Heather V. has requested home or community-based services, has been on the State's wait list, and has had services determined by the State's administration of the OAP. In addition, Heather V. may in the future request different or additional home or community-based services, and such request would be subject to the State's practices relative to the wait list and the OAP.

63. Jane S. is a resident of the State of Nebraska and is an individual with developmental disabilities.

64. Jane S. is eligible for Medicaid, qualifies for receipt of developmental disabilities services, and is a qualified individual with a disability under the protection of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.

65. Jane S. has requested home or community-based services, has been on the State's wait list, and has had services determined by the State's administration of the OAP. In addition, Jane S. may in the future request different or additional home or community-based services, and such request would be subject to the State's practices relative to the wait list and the OAP.

66. Kevin V. is a resident of the State of Nebraska and is an individual with developmental disabilities.

67. Kevin V. is eligible for Medicaid, qualifies for receipt of developmental disabilities services, and is a qualified individual with a disability under the protection of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.

68. Kevin V. has requested home or community-based services, and has had services determined by the State's administration of the OAP. In addition, Kevin V. may in the future request different or additional home or community-based services, and such request would be subject to the State's practices relative to the wait list and the OAP.

69. Jennifer T., is a resident of the State of Nebraska and is an individual with developmental disabilities.

70. Jennifer T. is eligible for Medicaid, qualifies for receipt of developmental disabilities services, and is a qualified individual with a disability under the protection of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.

71. Jennifer T. has requested home or community-based services and has had services determined by the State's administration of the OAP. In addition, Jennifer T. may in the future request different or additional home or community-based services, and such request would be subject to the State's practices relative to the wait list and the OAP.

72. Leslie H. is a resident of the State of Nebraska and is an individual with developmental disabilities.

73. Leslie H. is eligible for Medicaid, qualifies for receipt of developmental disabilities services, and is a qualified individual with a disability under the protection of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.

74. Leslie H. has requested home or community-based services and has had services determined by the State's administration of the OAP. In addition, Leslie H. may in the future request different or additional home or community-based services, and such request would be subject to the State's practices relative to the wait list and the OAP.

75. Catherine M. is a resident of the State of Nebraska and is an individual with developmental disabilities.

76. Catherine M. is eligible for Medicaid, qualifies for receipt of developmental disabilities services, and is a qualified individual with a disability under the protection of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.

77. Catherine M. has requested home or community-based services and has had services determined by the State's administration of the OAP. In addition, Catherine M. may in the future request different or additional home or community-based services, and such request would be subject to the State's practices relative to the wait list and the OAP.

78. Stephanie B. is a resident of the State of Nebraska and is an individual with developmental disabilities.

79. Stephanie B. is eligible for Medicaid, qualifies for receipt of developmental disabilities services, and is a qualified individual with a disability under the protection of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.

80. Stephanie B. has requested home or community-based services and has had services determined by the State's administration of the OAP. In addition, Stephanie B. may in the future request different or additional home or community-based services, and such request would be subject to the State's practices relative to the wait list and the OAP.

81. Conrad J. is a resident of the State of Nebraska and is an individual with developmental disabilities.

82. Conrad J. is eligible for Medicaid, qualifies for receipt of developmental disabilities services, and is a qualified individual with a disability under the protection of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.

83. Conrad J. has requested home or community-based services and has had services determined by the State's administration of the OAP. In addition, Conrad J. may in the future request different or additional home or community-based services, and such request would be subject to the State's practices relative to the wait list and the OAP.

84. Christopher H. is a resident of the State of Nebraska and is an individual with developmental disabilities. In the past, Christopher H. has been placed in institutional settings for short periods of time because no community-based services were available.

85. Christopher H. is eligible for Medicaid, qualifies for receipt of developmental disabilities services, and is a qualified individual with a disability under the protection of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.

86. Christopher H. has requested home or community-based services and has had services determined by the State's administration of the OAP. In addition, Christopher H. may in the future request different or additional home or community-based services, and such request would be subject to the State's practices relative to the wait list and the OAP.

87. Micheal R. is a resident of the State of Nebraska and is an individual with developmental disabilities.

88. Michael R. is eligible for Medicaid, qualifies for receipt of developmental disabilities services, and is a qualified individual with a disability under the protection of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.

89. Michael R. has requested home or community-based services and has had services determined by the State's administration of the OAP. In addition, Michael R. may in the future request different or additional home or community-based services, and such request would be subject to the State's practices relative to the wait list and the OAP.

**FIRST CLAIM FOR RELIEF**

(Wait List and Insufficient Level of Service Violation of the ADA against only Defendants Nelson and Montanez, in their official capacities)

90. The allegations of Paragraphs 1 through 89 above are fully incorporated in Plaintiffs' first claim for relief.

91. Plaintiffs are individuals with developmental disabilities who are eligible for ICF/MR services and alternative Home and Community-Based Services.

92. Plaintiffs' treating professionals consider community-based placement to be appropriate for Plaintiffs.

93. Despite the appropriateness of community-based placement, as to only the Defendants Nelson and Montanez, in their official capacities, such Defendants have either failed to provide funding or have used a methodology for determining funding that is arbitrary, inflexible, excludes necessary input, and routinely results in the systematic under funding of services.

94. Due to practices which deny funding, Defendants Nelson and Montanez, in their official capacities, have not moved individuals placed on the "waiting list," also known as the

“register of persons with unmet needs,” to community-based placements at a reasonable pace or in a reasonably timely manner.

95. Defendants Nelson and Montanez, in their official capacities, do not have a comprehensive, effective working plan for placing Plaintiffs and other similarly situated qualified individuals in home and community-based services.

96. Defendants Nelson’s and Montanez’s, in their official capacities, failure to develop a sound, valid, and flexible methodology for determining funding or to provide any funding in a reasonably timely manner, places individuals with developmental disabilities at risk of institutionalization, even though such individuals would be better served in a less restrictive community setting.

97. Defendants Nelson’s and Montanez’s, in their official capacities, foregoing actions and inactions constitute a violation of the ADA, 42 U.S.C. §12101 et seq., and such violation is continuing.

98. Defendants Nelson’s and Montanez’s, in their official capacities, violation of the ADA is causing harm to Plaintiffs and all similarly situated individuals with developmental disabilities, which harm partially can be remedied by declaring Defendants Nelson’s and Montanez’s, in their official capacities, actions unlawful and enjoining Defendants Nelson and Montanez, in their official capacities, from further violation of the ADA.

**SECOND CLAIM FOR RELIEF**

(Wait List and Insufficient Level of Service Violation of the Rehabilitation Act)

99. The allegations of Paragraphs 1 through 98 above are fully incorporated in Plaintiffs’ second claim for relief.

100. Plaintiffs are “disabled individuals” under 29 U.S.C. § 794 (*i.e.*, Section 504 of the Rehabilitation Act of 1973).

101. Plaintiffs are otherwise qualified to participate in Nebraska’s medical assistance plan and to have the medical assistance plan pay for any ICF/MR services they might receive.

102. Nebraska’s medical assistance plan receives federal funding, and ICF/MR services provided in Nebraska to the state’s population of individuals with developmental disabilities are in part, paid by federal funds through the state’s medical assistance plan. In addition, Home and Community-Based Services, are in part, paid by federal funds through the state’s medical assistance plan.

103. Plaintiffs’ treating professionals consider community-based placement to be appropriate for Plaintiffs. However, despite the appropriateness of community-based placement Defendants have either failed to provide funding or have used a methodology for determining funding that is arbitrary, inflexible, excludes necessary input, and routinely results in the systematic under funding of services.

104. Defendants’ failure to develop a sound, valid, and flexible methodology for determining funding or to provide any funding in a reasonably timely manner, places individuals with developmental disabilities at risk of institutionalization, even though such individuals would be better served in a less restrictive community setting.

105. Defendants’ foregoing actions and inactions constitute a violation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, as well as 28 C.F.R. §41.51(d), and such violation is continuing.

106. Defendants' violation of the Rehabilitation Act is causing harm to Plaintiffs and all similarly situated individuals with developmental disabilities, which harm partially can be remedied by declaring Defendants' actions unlawful and enjoining Defendants from further violation of the Rehabilitation Act.

**THIRD CLAIM FOR RELIEF**

(Pursuant to 42 U.S.C. § 1983, Defendants Nelson and Montanez, in their official capacity, while acting under color of state law and their state authority deprived Plaintiffs and the Plaintiff class of their federally protected rights under Medicaid and the due process clause of the U.S. Constitution)

A. Denial of an Opportunity to Apply for Medical Assistance Covering ICF/MR or Community-Based Services and Failure to Furnish Assistance with Reasonable Promptness Violates the Medicaid Act.

107. The allegations of Paragraphs 1 through 89 above are fully incorporated in Plaintiffs' third claim for relief.

108. All the Plaintiffs, and other similarly situated individuals, have requested ICF/MR or Home and Community-Based Services from their NDHHS service coordinators, and they are eligible for such services.

109. Despite their request and eligibility for such services, in many cases Plaintiffs, and other similarly situated individuals, have not been given an opportunity to apply for medical assistance which would cover such services. Specifically, Defendants Nelson and Montanez, in their official capacity, while acting under color of state law and their state authority deprived Plaintiffs and the Plaintiff class of their federally protected rights under the Medicaid Act and the due process clause of the U.S. Constitution as specifically hereinafter enumerated in ¶¶ 110-123.

110. Plaintiffs, and other similarly situated persons, have not been furnished with medical assistance for ICF/MR or Home and Community-Based Services with reasonable promptness.

111. Defendants Nelson's and Montanez's, a). denial of an opportunity to apply for medical assistance which would cover the services sought by Plaintiffs, and other similarly situated individuals, and b). failure to furnish Plaintiffs, and other similarly situated individuals, with medical assistance for either ICF/MR or Home and Community-Based Services with reasonable promptness are violations of 42 U.S.C. §1396a(a)(8), and such violations are continuing.

112. Defendants Nelson's and Montanez's violations of 42 U.S.C. §1396a(a)(8) are causing harm to Plaintiffs and all similarly situated individuals with developmental disabilities, which harm partially can be remedied by declaring Defendants' actions unlawful and enjoining Defendants from further violation of 42 U.S.C. §1396a(a)(8).

B. Failure to Provide Funding for Services Sufficient in Amount, Duration, or Scope To Fulfill the Purpose of Such Service Violates Federal Medicaid Regulations.

113. Defendants Nelson and Montanez have adopted a methodology (known as the objective assessment process or "OAP") for determining the level of funding for Home and Community-Based Services which will be provided to each recipient of such services, and this level of funding effectively determines the amount, duration and scope of the services furnished to Plaintiffs and similarly situated individuals.

114. Defendants Nelson's and Montanez's methodology results in Home and Community-Based Services which are not sufficient in amount, duration, and scope, to reasonably achieve the purpose of such services.

115. Defendants Nelson's and Montanez's methodology is arbitrary, inflexible, excludes necessary input, and routinely results in the under funding of services such that provided Home and

Community-Based Services are not sufficient in amount, duration and scope to reasonably achieve their purpose which violates 42 C.F.R. §440.230(b), promulgated pursuant to the Medicaid Act, and such violation is continuing.

116. Defendants Nelson's and Montanez's violation of 42 C.F.R. §440.230(b) is causing harm to Plaintiffs and all similarly situated individuals with developmental disabilities, which harm partially can be remedied by declaring Defendants' methodology unlawful and enjoining Defendants from further violation of 42 C.F.R. § 440.230(b).

C. Failure to Provide Funding for Services Sufficient in Amount, Duration and Scope to Ensure Plaintiffs Health and Safety Violates Medicaid Act.

117. Defendants Nelson and Montanez have adopted a methodology for determining the level of funding for Home and Community-Based Services which will provide to each recipient of such services, and this level of funding effectively determines the amount, duration and scope of the services furnished to Plaintiffs and similarly situated individuals.

118. Defendants Nelson's and Montanez's methodology is arbitrary, inflexible, excludes necessary input, and routinely results in the under funding of services such that provided Home and Community-Based Services are not sufficient in amount, duration and scope to protect the health and welfare of individuals provided such services.

119. Defendants Nelson's and Montanez's failure to provide Home and Community-Based Services sufficient in amount, duration and scope to protect the health and welfare of Plaintiffs receiving services, and all those individuals similarly situated, violates 42 U.S.C. § 1396n(c)(2)(A) and the guidance provided to the states by the federal government in Olmstead letter number 4, dated January 10, 2001.

120. Defendants Nelson's and Montanez's violation of 42 U.S.C. § 1396n(c)(2)(A) is causing harm to Plaintiffs and all similarly situated individuals with developmental disabilities, which harm partially can be remedied by declaring Defendants' methodology unlawful and enjoining Defendants from further violation of 42 U.S.C. § 1396n(c)(2)(A), and such violation is continuing.

D. Failure to Provide Notice and a Hearing to Persons Placed on the Wait List Violates the Due Process Clause of the Fourteenth Amendment, the Medicaid Act.

121. When Plaintiffs applied for Home and Community-Based Services and were determined eligible for such services, many of them, and many of those similarly situated, were informed that funds were not available for them to receive such services and they were told that they would be placed on the register of persons with unmet needs, also known as the wait list. At the time they were notified that funds for the services were unavailable, they were not given notice of a right to appeal such decision, nor were they afforded a hearing on the matter.

122. Defendants Nelson's and Montanez's failure to give notice of a right to appeal the decision to deny funds for services and Defendants' failure to afford a hearing on the matter to Plaintiffs and all other similarly situated individuals, violates 42 U.S.C. §1396a(a)(3), 42 C.F.R. §§ 431.200 - 431.250, and the due process clause of the United States Constitution.

123. Defendants Nelson's and Montanez's violation of 42 U.S.C. §1396a(a)(3), 42 C.F.R. §§ 431.200 - 431.250, and the due process clause of the United States Constitution is causing harm to Plaintiffs and all similarly situated individuals with developmental disabilities, which harm partially can be remedied by declaring Defendants' actions unlawful and enjoining Defendants from

further violation of 42 U.S.C. §1396a(a)(3), 42 C.F.R. §§ 431.200 - 431.250, and the due process clause of the United States Constitution.

**RELIEF REQUESTED**

**WHEREFORE**, Plaintiffs respectfully request that this Court grant the following relief:

- A. Assume jurisdiction over this action and maintain continuing jurisdiction until Defendants are in full compliance with every Order of this Court;
- B. Certify this case to proceed as a class action, pursuant to Federal Rule of Civil Procedure 23(b)(2);
- C. Order that the named Plaintiffs may proceed as representatives of a class of similarly situated individuals;
- D. Declare that Defendants Nelson's and Montanez's failure to develop a sound, valid, and appropriate methodology for determining funding or to provide any funding in a reasonably timely manner, places individuals with developmental disabilities at risk of institutionalization, even though such individuals would be better served in a less restrictive community setting, and violates the ADA, 42 U.S.C. §12101 as to only the Defendants Nelson and Montanez, in their official capacities; and to all the Defendants pursuant to Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, and 28 C.F.R. §41.51(d), in that all the Defendants' actions and inactions impermissibly favor the provision of services in an institutional setting;
- E. Issue appropriate injunctive relief prohibiting Defendants from further violation of the ADA, 42 U.S.C. §12101 as to only the Defendants Nelson and Montanez, in their official capacities; and to all the Defendants pursuant to Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, and 28 C.F.R. §41.51(d), and compelling Defendants to:

- i. Adopt practices and procedures reasonably calculated to provide all eligible persons with developmental disability services in home and community-based settings in a timely fashion and to avoid unnecessary institutionalization or continued unnecessary segregation;
  - ii. Provide funding for Home and Community-Based Services to those on the wait list within ninety (90) days, so long as Nebraska has available waiver slots in Adult Home and Community-Based Waiver Program;
  - iii. Notify all individuals who are currently eligible for or who will apply for Medicaid funded long-term services of the existence of the Home and Community-Based Waiver Program;
  - iv. Request, and in good faith, take all necessary action to obtain increased waiver slots within six months from the federal government in an amount sufficient to accommodate all immediate demand for community-based services and all additional demand anticipated over the next three years;
  - v. Request additional waiver slots from time to time to allow for, and anticipate, any increased demand for Home and Community-Based Services;
  - vi. Adopt a sound, valid methodology for properly determining payment levels for Home and Community-Based Services provided to each eligible individual which ensures that each individual will receive a level of service appropriate to their needs;
- F. Declare that (i) Defendants Nelson's and Montanez's denial to Plaintiffs, and all similarly situated individuals, an opportunity to apply for medical assistance which would cover the services sought by Plaintiffs, and all similarly situated individuals, and (ii) Defendants Nelson's and Montanez's failure to furnish Plaintiffs, and all similarly situated individuals, with medical

assistance for either ICF/MR or Home and Community-Based Services with reasonable promptness (*i.e.*, within 90 days), are violations of 42 U.S.C. §1396a(a)(8);

G. Issue appropriate injunctive relief prohibiting Defendants Nelson and Montanez from further violations of 42 U.S.C. §1396a(a)(8), and compelling Defendants Nelson and Montanez to, i) adopt clear, written regulations setting forth practices, policies and procedures ensuring that all eligible individuals with developmental disabilities have the opportunity to apply for medical assistance which would cover the services they require, and ii) to furnish all eligible individuals with developmental disabilities with medical assistance for either ICF/MR or Home and Community-Based Services within 90 days of request or application;

H. Declare that Defendants Nelson's and Montanez's methodology for determining the level of funding for Home and Community-Based Services which Defendants will provide to recipients of such services, results in Home and Community-Based Services that are not sufficient in amount, duration and scope to reasonably achieve the purpose of such service, and such methodology therefore violates 42 C.F.R. §440.230(b);

I. Issue appropriate injunctive relief prohibiting Defendants Nelson and Montanez from further violations of 42 C.F.R. §440.230(b), and compelling Defendants to adopt a sound, valid and appropriate methodology for properly determining payment levels for Home and Community-Based Services provided to eligible individuals so that eligible recipients will receive a level of service sufficient to achieve the purpose of such service;

J. Declare that Defendants Nelson's and Montanez's methodology for determining the level of funding for Home and Community-Based Services which will provide to each recipient of such services, results in Home and Community-Based Services which are not sufficient in amount,

duration, and scope to ensure the health and safety of such recipients, and such methodology therefore violates 42 U.S.C. §1396n(c)(2)(A);

K. Issue appropriate injunctive relief prohibiting Defendants Nelson and Montanez from further violations of 42 U.S.C. §1396n(c)(2)(A), and compelling Defendants Nelson and Montanez to adopt a sound, valid and appropriate methodology for properly determining payment levels for Home and Community-Based Services provided to eligible individuals so that eligible recipients will receive a level of service sufficient to ensure the health and safety of such individual;

L. Declare that Defendants Nelson's and Montanez's failure to provide notice and a hearing to individuals placed on the wait list violates the due process clause of the United States Constitution, 42 U.S.C. §1396a(a)(3), 42 C.F.R. §§ 431.200 - 431.250.

M. Issue appropriate injunctive relief requiring Defendants Nelson and Montanez to adopt policies and procedures providing notice and a hearing to anyone denied funding for services for which they are otherwise eligible.

N. Issue such other injunctive relief as shall be necessary to enjoin Defendants from continuing to violate the individual Plaintiffs' rights to community-based services, pursuant to the the ADA and the Medicaid Act, as to only the Defendants Nelson and Montanez, in their official capacities; and to all the Defendants pursuant to Section 504 of the Rehabilitation Act.

O. Award Plaintiffs any additional relief that this Court may deem just, proper, and equitable; and

P. Award Plaintiffs reasonable litigation expenses, costs, and attorneys' fees, pursuant to 29 U.S.C. § 794a(b), 42 U.S.C. § 1988, and 42 U.S.C. § 12205.

**PLACE OF TRIAL REQUESTED: LINCOLN, NEBRASKA**

This 16th day of June, 2006.

Respectfully submitted,

**BILL M., by and through his father and natural guardian, William M; JOHN DOE, by and through his mother and natural guardian, Jane Doe; HEATHER V., by and through her mother and guardian, Marcia V.; JANE S.; KEVIN V., by and through his mother and legal guardian, Kathy V.; JENNIFER T., by and through her legal guardians, Sharon and Greg T.; LESLIE H.; CATHERINE M.; STEPHANIE B.; CONRAD J., by and through his legal guardian, C.W. J.; CHRISTOPHER H., by and through his legal guardian, Sue H.; MICHAEL R., by and through his legal guardian, Susan R.; and on behalf of themselves and all other persons similarly situated,**

**Plaintiffs,**

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