

William Emmett Dwyer  
**NEW JERSEY PROTECTION  
& ADVOCACY, INC.**  
210 South Broad Street, 3rd Floor  
Trenton, New Jersey 08608  
(609) 292-9742

R. Scott Thompson  
Bernard J. Cooney  
**LOWENSTEIN SANDLER PC**  
65 Livingston Avenue  
Roseland, New Jersey 07068  
(973) 597-2500

*Attorneys for Plaintiff*

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY**

NEW JERSEY PROTECTION AND  
ADVOCACY, INC.,

Plaintiff,

v.

JENNIFER VELEZ, in her official capacity  
as Commissioner of the New Jersey  
Department of Human Services,

Defendant.

Civil Action No. 08-01858 (AET) (JJH)

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

Plaintiff NEW JERSEY PROTECTION AND ADVOCACY, INC., 210 South  
Broad Street, 3rd Floor, Trenton, New Jersey 08608, by and through its undersigned  
attorneys Lowenstein Sandler PC and New Jersey Protection & Advocacy, Inc., alleges  
as follows:

### **PRELIMINARY STATEMENT**

In 1999, the United States Supreme Court in *Olmstead v. L.C.*, 527 U.S. 581 (1999), held that Title II of the Americans with Disabilities Act requires states to provide services to individuals with developmental disabilities in the most integrated setting possible. The integration mandate of *Olmstead* requires the development of an array of community resources and services for individuals with developmental disabilities. States, however, have not been left only to their own resources to fund the development of their community services. The federal government has created a “waiver” program whereby states can apply for a waiver of the Medicaid requirement that an individual must reside in a developmental center in order to qualify for federal funding.

Under the home and community-based waiver program, states can submit a waiver application that details who they will serve and how these recipients, who would otherwise become institutionalized, will be served in the community. Upon the granting of a waiver application, states receive reimbursement for the cost of providing services to people in the community. New Jersey receives approximately one-half of the cost of such services from the federal Medicaid waiver program. However, there are certain requirements imposed on states that choose to participate in the waiver program.

Federal law has long required states that use Medicaid funding to provide services to the developmentally disabled to do so with “reasonable promptness” once a qualifying individual has requested services. Despite these clear and unambiguous directions, more than 8,000 citizens in the State of New Jersey who have met all of the requirements for services are currently being denied access to home and community-based services. Instead, they have been diverted to a so-called “wait-list” for such services with no guarantee, and little hope, that they will ever have access to the services that they need.

Most of these individuals live at home or with relatives, with little or no assistance. Many have been on the waiting list for years. Despite the fact that they do not want or need institutionalization, many face the prospect of institutionalization because that is all the State of New Jersey offers. In fact, over the past three years approximately sixty individuals who were on the waiting list for residential placement in the community have instead become residents of New Jersey's developmental centers. As for those individuals who remain at home with their aging parents, the prospect of institutionalization becomes all the more real, and all the more frightening.

In this lawsuit, Plaintiff seeks a ruling by this Court that New Jersey's practice of "waitlisting" eligible citizens is not a substitute for providing services that the State is required to provide. Plaintiff asks this Court to direct Defendant to offer and provide home and community-based services with reasonable promptness to eligible individuals, instead of waitlisting any such citizen who refuses institutionalization. Plaintiff also asks this Court to direct Defendant to provide the community supports, programs, and other services which Defendant, in its waiver application to the federal government, has represented that it will provide to eligible citizens. These citizens want only the opportunity to live in a community setting with access to such services as they need, and they ask only that the State of New Jersey abide by the Constitution and laws of the United States.

### **JURISDICTION AND VENUE**

1. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 in that claims are asserted under the laws of the United States, and 28 U.S.C. § 1343 in that claims are asserted under laws providing for the protection of civil rights.

2. This Court has personal jurisdiction over Defendant in that she is a resident of the State of New Jersey.

3. Plaintiff's claims are authorized by 42 U.S.C. § 1983, 42 U.S.C. § 12132 and 29 U.S.C. § 794a.

4. Venue is appropriate in this District pursuant to 28 U.S.C. § 1391(b) as the matter arose in the District of New Jersey and all of the parties reside in this District.

5. Declaratory relief is authorized under 28 U.S.C. § 2201 *et seq.*, and injunctive relief is authorized by 28 U.S.C. § 2202. Defendant's actions have resulted in irreparable injury to Plaintiff, for which there is no adequate remedy at law.

## **PARTIES**

### **A. Plaintiff**

6. Plaintiff New Jersey Protection & Advocacy, Inc. ("NJP&A"), a non-profit corporation, is the federally funded agency designated since 1994 to serve as New Jersey's protection and advocacy system for people with disabilities. Pursuant to this designation, NJP&A serves as the agency to implement, on behalf of the State of New Jersey, the Protection and Advocacy System for the Developmentally Disabled ("PADD") established pursuant to the Developmental Disabilities Assistance and Bill of Rights Act of 2000, 42 U.S.C. § 15001 *et seq.*

7. NJP&A is part of a nationwide network of protection and advocacy agencies located in all fifty states, the District of Columbia, Puerto Rico, and the federal territories. The protection and advocacy system comprises the nation's largest provider of legally-based advocacy services for people with disabilities.

8. As part of a nationwide network, NJP&A is required by 42 U.S.C. § 15043a(2)(D) to provide the public, including individuals with developmental disabilities, their representatives and, as appropriate, non-State agency representatives, with an opportunity to comment on the priorities and activities of the advocacy system. In order to implement this requirement, NJP&A has an advisory board composed of individuals who (i) have a developmental disability, (ii) are related to an individual who has a developmental disability, or (iii) are a professional who serves developmentally disabled individuals.

9. NJP&A has also established advisory boards to aid with advocacy activities and efforts undertaken in connection with the Protection and Advocacy for Individuals with a Mental Illness Act (“PAIMI”) established under 42 U.S.C §§ 10801 *et seq.*

10. NJP&A’s governing board of directors consists of the respective chairpersons from each of the advisory boards, along with developmentally disabled individuals, relatives of individuals with a disability, and professionals who serve the developmentally disabled community. 42 U.S.C. § 15044(a).

11. In addition to its board of directors and advisory boards, NJP&A is also statutorily required to maintain a grievance procedure for clients or prospective clients to ensure that individuals with developmental disabilities have full access to its services. 42 U.S.C. § 15043a(2)(E). It is the responsibility of NJP&A’s board of directors to be the final arbiter for all grievances filed on behalf of individuals who have a disability. The grievance procedure also provides for an opportunity to inform NJP&A’s

board of directors of significant issues that affect individuals who have a developmental disability, thereby helping to guide NJP&A in its work.

12. By virtue of its designation as an advocacy system, NJP&A has the statutory authority to pursue legal, administrative and other appropriate remedies to protect and advocate for the rights and interests of people with developmental disabilities who are or will be receiving care and treatment in New Jersey. 42 U.S.C. § 15043(a)(2)(A)(i).

13. NJP&A is not only empowered under federal law to represent individuals who have disabilities, but also to ensure that a protection and advocacy program operates in the State of New Jersey. The allotment of federal funds to New Jersey is premised on the State's assurance that it has established a protection and advocacy system with authority to pursue legal, administrative, and other appropriate remedies to protect and advocate for the rights of individuals who have a developmental disability. 42 U.S.C. § 15043(a).

14. NJP&A is pursuing this action to protect and advocate for the rights and interests of "individuals with developmental disabilities" as that term is defined in 42 U.S.C. § 15002, and for all individuals who are protected by the PAIMI Act due to having a dual diagnosis of a developmental disability and a mental illness. Specifically, NJP&A brings this action on behalf of individuals who reside in the community but who are in danger of unnecessarily being institutionalized in one of the State's seven large, congregate facilities (known as "developmental centers"), and who wish to reside in more integrated settings in the community. All of the individuals on whose behalf NJP&A brings this action are entitled to the right to be informed of

alternatives to institutionalized care and the right to choose among alternatives to institutionalized care pursuant to 42 U.S.C. § 1396n(c)(2)(c) and (d)(2)(c).

15. These individuals have each suffered injuries, or will suffer injuries, that would allow them to bring suit in their own right against Defendant. Such individuals, including those described in the following section, could all bring suit in their own name.

**B. Individuals Served By Plaintiff**

16. All of the individuals named herein are Medicaid recipients and have disabilities within the meaning of the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12131(2), and Section 504 of the Rehabilitation Act (“Section 504”), 29 U.S.C. § 794. These individuals are eligible for and receive services from the New Jersey Department of Human Services, Division of Developmental Disabilities (“DDD”) and meet the requirements for Medicaid’s home and community-based waiver services (“HCS”). The HCS program offers services and supports that enable eligible individuals to remain at home, live independently, or live in a small home-like setting. As such, the HCS waiver program helps persons with disabilities avoid institutional settings, including a nursing facility, state school, or other type of intermediate care facility (“ICF”).

17. All of the individuals named herein would be able to live in less restrictive settings with waiver supports and services provided with reasonable promptness. All of the individuals listed below are on a “wait-list” for services under the HCS waiver program. Though they have been on a “wait-list” for years, none of the individuals listed below have been informed of their status on the list, or how much longer they will have to wait for the services to which they are entitled to.

The individuals consist of the following:

(a) K.P. is 27 years old and lives with his mother and step-father in Lawrenceville, New Jersey. He has autism and severe obsessive compulsive disorder. K.P. has worked for many years in a supportive environment outside his home under the supervision of Project Higher. Exhibit (“Ex.”) A, Declaration of Kathleen Moore.

K.P. was placed on the waiting list because he needs a community residence with some supervision. K.P.’s parents are aging and fear that he will be institutionalized if they are incapable of caring for him. K.P. has been on DDD’s HCS wait-list since 1999, and his parents have received no indication that he will ever be given the opportunity to reside in a community-based residence. Ex. A, Declaration of Kathleen Moore.

(b) D.T. is 36 years old and lives with his parents in Voorhees, New Jersey. He has mild cerebral palsy, attention deficit disorder and obsessive compulsive disorder. In addition to working part-time at the Occupational Training Center, D.T. works seven hours a week for the New Jersey Self Advocacy Project as an advocate for people with disabilities. Ex. B, Declaration of D.T.

He has been on DDD’s HCS wait-list since 1998 and has not been informed by DDD how much longer he must remain on the wait-list before he receives appropriate residential placement services. D.T.’s parents are aging and fear that he will be institutionalized if they are incapable of caring for him. D.T. has lived his entire life in a community and does not wish to be institutionalized. Ex. B, Declaration of D.T.

D.T. has been offered three residential placements. Two of these placements, however, are inappropriate for D.T. He continues to remain on the wait-list for final placement in the third residence offered. D.T. was initially offered a placement in a



group home. D.T., who does not have a guardian, wishes to maintain his independence and continues to work two jobs and arrange for his own transportation. The group home, which was inconveniently located far from D.T.'s employment, is tightly controlled and the residents are closely supervised. Such an environment is not suitable for D.T., who is in need of a supervised apartment. D.T. received a second offer for placement in a group home and rejected it for the same reasons. The latest offer for placement is in a supervised apartment. After visiting the apartment over a year ago, D.T. has still not received notification that he may reside in this apartment. Ex. B, Declaration of D.T.

(c) R.F. is 18 years old and lives with parents, who are her guardians, in Randolph, New Jersey. She has attention deficit hyperactivity disorder, a chromosomal translocation and is severely developmentally delayed. In addition, she has anaphylactic and environmental allergies. R.F. currently attends the Midland School, a special education program serving the needs of children with developmental disabilities. She has been on DDD's HCS wait-list for a community residential placement since 2002 and has not been informed by DDD how much longer she will have to wait for a residential placement. Despite being on the waiting list for over five years, R.F. has not received any offers for placement in a residential setting. R.F.'s parents spend over approximately \$33,000 per year to purchase additional services for R.F. because she is not receiving them from Defendant. R.F. would either receive these same services or would not need them if she were living independently in a community residence for which she is qualified. Ex. C, Declaration of D.F.

R.F.'s parents are aging and fear that she will be institutionalized if they are incapable of caring for her. She has lived her entire life in a community and does not wish to be institutionalized. Ex. C, Declaration of D.F.

(d) M.B. is 32 years old, has autism and is mentally retarded. M.B. is on medication to control his seizures and he lives with his parents, who are his legal guardians, in West Amwell, New Jersey. M.B. has a job working at the Jewish Community Center in Flemington, New Jersey four days per week. M.B. has been a client of Defendant since August of 1989, and he has been on a waiting list for residential services for over six years. Ex. D, Declaration of Elaine Buchsbaum.

M.B. has been assessed by Defendant without consideration of his autism. As a result of this incorrect assessment, he has been offered programs that are not adequate for his needs. M.B.'s parents were informed of a program developed by Defendant called Real Life Choices ("RLC"). Despite being eligible for enrollment in RLC, the services that would be provided to M.B. are inadequate to meet his needs. In addition, M.B.'s parents were informed that should their son be enrolled in RLC, he would not be notified of residential placement openings. M.B.'s parents attempted to obtain written information about RLC but were told that none was available. A decision regarding whether to place M.B. in RLC, the parents were told by DDD, could only be based upon a conversation they had with his case manager. Ex. D, Declaration of Elaine Buchsbaum.

M.B.'s parents are concerned about M.B.'s future welfare as they grow older and one day become unable to care for him. They are concerned that he will be needlessly placed in an institution far from where he now lives and where he will not be able to continue with his job. Ex. D, Declaration of Elaine Buchsbaum.

(e) S.G. is 31 years old and has autism and obsessive compulsive disorder. His parents are his legal guardians. With the help of a supported employment program, for the past fifteen years S.G. has worked for the Wawa chain of convenience stores. He works at several different Wawa stores, performing cleaning services and stocking shelves, and receives transportation to his job site from the employment program. Ex. E, Declaration of N.G.

Because of his particular needs, and the fact that his parents were both 55 years old at the time, S.G. was placed on DDD's urgent waiting list for residential services in 2000. Specifically, S.G. is in need of a residential placement, either in a group home or a supported apartment setting. However, since being placed on the wait-list in 2000, Defendant has not offered S.G. a suitable placement and he remains at home while his parents grow older and worry about their inability to care for S.G. in the future. Ex. E, Declaration of N.G.

S.G.'s parents know that unless S.G. is given a suitable community placement, he will likely be placed in a development center far from his home and will therefore be unable to continue his employment. Considering that he has have lived his entire life in the community, such institutionalization will be devastating to S.G. Placement in a developmental center will undo much of the progress that S.G. has achieved towards establishing a normal life for himself. Yet, after approximately seven years on the waiting list for residential placement, S.G has not been informed of when he will be placed, his status on the waiting list, or what he can do to enhance his position on the waiting list. Ex. E, Declaration of N.G.

(f) M.W. is 49 years and lives in Clifton, New Jersey with her siblings. M.W. suffered a traumatic brain injury acquired at birth and is a client of Defendant. Her symptoms indicate that she has the mental capacity and functions at the level of a two year-old child. M.W. has several self-abusive behaviors which are triggered when she feels frustrated, afraid, misunderstood or unable to communicate. Ex. F, Declaration of Mary de Lourdes Winberry.

M.W. has been on the “urgent priority” waiting list since November 22, 2002 for a residential placement. She continues to live in the house where she was raised by her family. Her mother, who was M.W.’s guardian, passed away on in April of 2007 at the age of 84. If M.W.’s two brothers had not chosen to reside with M.W., she would have been placed in a developmental center operated by Defendant. Ex. F, Declaration of Mary de Lourdes Winberry.

M.W. is in a day program that does not provide speech therapy, music therapy, or horticulture therapy. Instead, she remains in a program that is designed to train her for employment. Yet, M.W. is simply unable to perform many of the employment-related activities of the program. The program does not afford her with the appropriate opportunities to improve her speech abilities. Ex. F, Declaration of Mary de Lourdes Winberry.

M.W. needs assistance in developing the basic skills that will help her to enhance her life. She is in an environment that is designed for employment and where her peers often communicate verbally. M.W., however, does not possess the same language skills as her peers in the program. M.W. is not realizing her potential because the program is not designed to address her needs. She participates in the day program, however, because

it is all that Defendant offers and she has no other option. Ex. F, Declaration of Mary de Lourdes Winberry.

When M.W. was a child, her parents were informed that she could only receive appropriate services if she was admitted to an institution. M.W.'s parents refused to have their daughter institutionalized and chose to raise her at home. M.W., who turned 49 years-old this past year, still does not receive the services she needs. Her siblings refuse to have her admitted to a developmental center. Instead, they seek a better life for their sister and want her to be provided with the services she has been entitled to receive for many years. Accordingly, as members of the group on whose behalf Plaintiff acts, M.W.'s siblings have chosen to support this Complaint. Ex. F, Declaration of Mary de Lourdes Winberry.

(g) A.C. is 21 years old and lives with his parents who are his guardians. A.C is a client of Defendant's and receives some services from Defendant but not enough for his needs. Prior to graduating from high school, A.C obtained employment at Wal-Mart and, upon graduation, received an offer from Wal-Mart to continue his employment there. In order for A.C. to continue his employment, he requires assistance from Defendant. Despite the documented assistance A.C. needs, however, he is currently not receiving any transitional or vocational services from Defendant because his parents will not agree to accept only the limited services Defendant has offered. Ex. G, Declaration of Deborah C.

A.C. is at a critical point in his life when he should be transitioning to full independence and a life that is as fully integrated into the community. One of the services that A.C. has qualified for is residential services under the Community Care Waiver. He qualified for residential services in June of 2007 and was placed on the

Priority Residential Waiting List at that time. Since then, A.C. has not been offered a single residential placement or even been presented with possible residential placements. From the time he was placed on the Priority Waiting List for Residential Services, DDD has offered no indication that they have begun the process to find a suitable residential placement. Nor has A.C. been given any services to assist him in preparation to live independently. As a result, even if a residential opportunity were to become available, A.C. would have difficulty taking advantage of it. Ex. G, Declaration of Deborah C.

On April 15, 2008, nearly one year after being placed on the Priority Waiting List for a residential placement, A.C. mother's received a letter from the Division of Developmental Disabilities stating the following:

Since Waiver services are accessed in chronological order and the Division of Developmental Disabilities (DDD) is currently serving those individuals placed on the list prior to May 1998, we are unable to reach [A.C.] at this time.

Unfortunately, A.C. cannot afford to wait ten years before he receives the residential services that he is qualified to receive. Waiting ten years to start his life will impede his ability to live an independent life that is as fully integrated into the community. Ex. G, Declaration of Deborah C.

In addition, there is no guarantee that A.C. will be able to continue to live with his parents while he waits for a community residence as his mother has a history of serious health issues and cannot guarantee she will be able to provide a residence for him. In the event A.C.'s mother is no longer able to provide a residence for him, he is at risk of being unnecessarily institutionalized. Ex. G, Declaration of Deborah C.

A.C. has lived his entire life in the community, has graduated from a public school, works in the community, and has many friends. Institutionalization would have a

terrible impact on A.C. by removing him from the community, his friends, his work, and from the only life he has known. Ex. G, Declaration of Deborah C.

**C. Defendant**

18. Defendant Jennifer Velez is the Commissioner of the New Jersey Department of Human Services (“DHS”), a public entity covered by, *inter alia*, Title II of the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12131(1).

19. Defendant Velez is ultimately responsible for ensuring that New Jersey operates its delivery of services to individuals with disabilities in conformity with the Constitution of the United States, with the ADA and its implementing regulations, and with Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and its implementing regulations.

20. DHS is authorized to administer New Jersey’s Medicaid program.

21. Defendant Velez is responsible for the establishment and maintenance of the New Jersey State plan for Medicaid services in compliance with federal law and regulations.

**GOVERNING STATUTES**

**A. The Anti-Discrimination Laws: The Americans with Disabilities Act and Section 504 of The Rehabilitation Act**

22. On July 26, 1990, the ADA was enacted, establishing the most important civil rights law for persons with disabilities in our nation’s history.

23. Title II of the ADA contains an integration mandate and non-discrimination provisions. 42 U.S.C. §§ 12131-12134.

24. Title II of the ADA prohibits public entities, such as that headed by Defendant, from discriminating against the individuals with disabilities whom they serve. 42 U.S.C. §§ 12131-12132.

25. Discrimination under the ADA includes the segregation of persons with disabilities from society as a result of unnecessary institutionalization.

26. The regulations promulgated under Title II specifically provide 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 regulations prohibit Defendant from administering programs in a discriminatory manner. 28 C.F.R. § 35.130(b)(3)(i)-(ii).

27. The regulations also prohibit discrimination caused by providing different or separate services to individuals based on the severity of their disability, unless necessary for the services to be effective. 28 C.F.R. § 35.130(b)(1)(iv).

28. Furthermore, the section of Title II of the ADA entitled, “Enforcement,” explicitly states that the “remedies, procedures, and rights set forth in section 794a of [the Rehabilitation Act] shall be the remedies, procedures, and rights this subchapter provides.” 42 U.S.C. § 12133. Section 504 of the Rehabilitation Act sets forth protections against discrimination by recipients of federal funds and also includes an integration mandate prohibiting unnecessary segregation. 29 U.S.C. § 794 *et seq.*; 45 C.F.R. §§ 84.4, 41.51.

**B. The Medicaid Act**

29. The Medicaid program, established by Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.*, is a cooperative federal-state program designed to



enable states to furnish medical assistance to families and individuals who are unable to meet the costs of necessary medical services.

30. States are not obligated to participate in the Medicaid program. However, if a state elects to participate, it must operate its program in compliance with federal statutory and regulatory requirements.

31. States that choose to participate in the Medicaid program receive federal matching funds for their Medicaid program. To receive federal funds, states must comply with the requirements of the federal Medicaid Act and with the federal regulations governing state Medicaid programs promulgated by the Center for Medicare and Medicaid Services (“CMS”) of the United States Department of Health and Human Services, the agency that administers Medicaid at the federal level.

32. Each state participating in the Medicaid program must receive approval for its plan for providing services. States must include certain mandatory services, including, among other things, inpatient hospital services, physician’s services, and nursing facility services. 42 U.S.C. §§ 1396a(a)(10)(A) and 1396d(a).

33. In addition to mandatory services, a state may elect to provide optional services. 42 U.S.C. § 1396d(a). Optional services include funding for intermediate care facilities for the mentally retarded (“ICF/MR”). 42 U.S.C. §§ 1396a(a)(10) and 1396d(a)(15).

34. States that provide ICF/MR services may also implement a Medicaid waiver program. This alternative to ICF/MR services includes an array of home and community-based services for eligible recipients who, in the absence of waiver services, would require institutionalization in an ICF/MR. This program is known as the

Medicaid home and community based waiver program (“the waiver program” or “the waiver”). 42 U.S.C. § 1396n(c). This program is called a “waiver” because CMS waives certain technical obligations otherwise incumbent on states electing to participate in the program.

35. Under the waiver program, if a state meets certain criteria, Medicaid requirements such as statewideness, 42 U.S.C. § 1396a(a)(1), and comparability of services, 42 U.S.C. § 1396a(a)(10)(B), may be waived to permit the state to provide a specific number of individuals within a defined disability group with services that provide such individuals with a community alternative to long-term institutional care. 42 U.S.C. § 1396n(c)(3).

36. Title XIX requires that when a state agrees to provide Medicaid waiver services, it also provide assurances that, *inter alia*, individuals are evaluated for their need for the level-of-care provided by an ICF/MR, and if found eligible for such a level-of-care, they are offered the option of Medicaid waiver services. 42 U.S.C. § 1396n(c)(2)(B)-(C); 42 C.F.R. § 441.302(c)-(d). States must assure HCFA that, “absent the waiver, recipients in the waiver [program] would receive the appropriate type of Medicaid-funded institutional care . . . that they require.” 42 C.F.R. § 441.302(g).

37. New Jersey participates in the Medicaid program.

38. The New Jersey Medicaid program is administered by Defendant.

39. Among the optional Medicaid services Defendant provides are ICF/MR services. These services are provided in institutions known in New Jersey as “developmental centers.”

40. In addition to mandatory and optional services, Defendant has received CMS approval to operate a home and community-based services waiver program for individuals with developmental disabilities. This allows Defendant to provide home and community-based services to a federally-approved maximum number of participants who require an ICF/MR level of care and who have applied for and received a waiver slot.

41. States must offer Medicaid services to eligible individuals with “reasonable promptness” and must give those interested in applying the opportunity to do so. 42 U.S.C. § 1396a(a)(8).

42. Persons with disabilities who live in or are at risk of being placed in an institution must be informed of and given a meaningful choice of institutional and community alternatives. They must also be permitted to receive services from any qualified provider. 42 U.S.C. §§ 1396a(a)(23)(A) and 1396n(c)(2)(c); 42 C.F.R. §§ 435.217 and 441.302(d)(1)-(2).

**C. The Home and Community Based Waiver Program**

43. The Medicaid waiver program, which includes the HCS program, was adopted by Congress in order to allow individuals who would otherwise require care in a nursing home or ICF/MR to receive needed services in their own homes and in home-like settings. 42 U.S.C. § 1396n. *See also* Senate Report No. 97-139, 1981 U.S.C.C.A.N. 396 and House Conference Report No. 97-208, 1981 U.S.C.C.A.N. 1010. The regulations state that “section 1915(c) [1396n] of the Act permits States to offer, under a waiver of statutory requirements, an array of home and community-based services that an individual needs to avoid institutionalization.” 42 C.F.R. § 441.300.

44. Federal law provides that the average cost per person in the community through the Medicaid waiver program must not exceed the average cost for the same level of services in facilities or institutions. 42 U.S.C. § 1396n (c)(2)(D).

45. Home and community-based waiver funds may not be used to support services to individuals who reside in an ICF/MR. 42 C.F.R. § 441.301(b)(1)(ii); 42 U.S.C. § 1396n.

46. Under a Medicaid waiver, a state can provide an array of services, including services that are not identified in Title XIX as approved optional services. 42 U.S.C. § 1396n (c)(4)(B); 42 C.F.R. § 440.180. For example, a state can provide habilitative services, vocational services, and respite services even though these services are not a specified optional service. Thus, Medicaid waiver programs give the state the right to receive federal reimbursement when it agrees to provide services that it would not otherwise be reimbursed for under Title XIX.

47. Medicaid waiver programs allow states to “waive” certain Title XIX requirements. Specifically, a state’s waiver program may choose to provide services to specific groups of persons or in a limited geographic region, thus waiving comparability or statewideness requirements. 42 U.S.C. §§ 1396n(c)(3), (9)-(10).

48. In sum, the purpose of Title XIX’s Medicaid waivers is to encourage states to provide services to assist individuals with disabilities to avoid being institutionalized. 42 C.F.R. § 441.300. Moreover, as long as Medicaid services *vis-à-vis* institutional services are “cost-neutral,” the preference is to provide services in the community. *See* 42 U.S.C. § 1396n(c)(2)(D).

**D. New Jersey's Waiver Program**

49. New Jersey has offered the HCS waiver since 1982.

50. Individuals are eligible for HCS waiver services if they meet the standard of care for services in an ICF/MR, and are eligible for medical assistance.

51. Defendant's Division of Developmental Disabilities is the single New Jersey State agency whose responsibility it is to administer the HCS waiver program.

52. The services provided under the HCS waiver include case management, respite care, habilitation, minor home modifications, skilled nursing, adaptive aids, counseling and therapies, dental treatment, and residential assistance, i.e., supported home living, foster/companion care, and residential support and residential services.

**STATEMENT OF FACTS**

53. New Jersey's HCS waiver program currently serves approximately 9,600 recipients.

54. There are approximately 8,000 additional people who have requested HCS waiver services.

55. Individuals on the waiting list have developmental disabilities such as mental retardation, autism, cerebral palsy, spina bifida, and traumatic brain injuries, and are clients of the Division of Developmental Disabilities. Although they qualify for placement in an ICF, they do not want, and do not need, such institutionalization. Instead, they wish to live in the community. Because they have not been offered

placement in suitable residential community-based homes, they reside at home, usually with family.

56. Many of these people have been on the waiting list for more than five years. The average length of time these individuals have been on the waiting list is difficult to ascertain but, upon information and belief, it is in excess of three years.

57. In part because of the length of time that people stay on the waiting list, the family members and other caregivers for individuals on the waiting list are aging and will become unable to care for them with the passage of additional time.

58. New Jersey has not taken steps to insure that the waiting list decreases, or that those on the waiting list are kept informed about their status or prospects for placement in community residences.

59. In fact, according to the State's own figures, in September 2002 there were "almost 7,000" individuals on the waiting list, waiting for the State to provide HCS waiver services. Of this number, 4,000 were in the "urgent" category.

60. By December 31, 2004, the State had done nothing to alleviate the situation, despite its recognition in 2002 that "too many people are waiting for services." As of December 31, 2004, there were, according to the State's count, 7,447 people on the waiting list, with some 4,625 in a priority category.

61. As of January 31, 2006, the State's count stood at 7,800 people on the waiting list. Of this number, 4,936 were in a priority category.

62. The New Jersey State Legislature has expressly determined that every person receiving treatment through the Division of Developmental Disabilities has

a right to receive services in a setting and manner least restrictive of his or her right to personal liberty. N.J.S.A. 30:6D-9.

63. The manner in which Defendant operates her programs for eligible individuals violates Title II of the Americans with Disabilities Act and its implementing regulations, including the regulation requiring public entities to administer their programs in the most integrated setting appropriate to qualified individuals with disabilities, 28 C.F.R. § 35.130(d), and the requirement that services be provided with “reasonable promptness.”

64. Defendant fails to provide accurate and detailed assessments on a regular basis for all individuals wait-listed for services; fails to keep those waiting for services adequately informed about the availability of services; fails to provide services in the most integrated setting; and fails to provide services to all those entitled to services.

65. Despite Defendant’s plan for compliance with Title II of the Americans with Disabilities Act, as interpreted by the United States Supreme Court in *Olmstead*, 527 U.S. 581, Defendant has not engaged in any significant activity that would provide services to those who have been wait-listed, and, as a result, the waiting list has grown over the last ten years. Those on the waiting list are increasingly at risk of institutionalization as their caregivers grow older.

66. In fact, over the past three years at least fifty-eight individuals residing in the community who were on the waiting list for a residential placement were unnecessarily institutionalized in a developmental center because the defendant did not have a suitable community placement for them. Those fifty-eight individuals have suffered an injury in fact. Legal efforts to have those individuals returned to the

community, along with approximately 2,000 other individuals currently residing in the State's developmental centers, has been undertaken by NJP&A as the organizational plaintiff in the case *NJP&A et. al v. Velez*, Docket No. 3-05-CV-04723 (FLW/TJB), mentioned above in Paragraph 12 of this Complaint.

67. Upon information and belief, Defendant has not properly utilized Medicaid home and community-based waiver slots to comply with the integration mandate of the Americans with Disabilities Act and to end her ongoing discrimination against qualified individuals with developmental disabilities.

68. Defendant does not inform individuals of their right to choose integrated, less restrictive community supports and/or home and community-based waiver services. Defendant does not provide eligible individuals with the opportunity to reside in community settings with reasonable promptness.

69. The relief Plaintiff seeks on behalf of individuals with disabilities is readily achievable if Defendant changes the manner in which it operates its already-existing programs without the creation of new programs.

70. Defendant's policies and practices have resulted in the failure to provide community living opportunities for individuals with disabilities in settings designed to maximize their potential in the least restrictive setting possible.

71. In short, Defendant has taken no steps to demonstrate a commitment to properly provide services to qualified individuals who seek waiver services rather than institutionalization. Instead, Defendant has used the waiting list as a way to forestall eligible, qualified individuals in need of services but unwilling to enter an ICF. The end results of these practices are (i) unequal access to services for those who



are unwilling to live at an ICF; (ii) compelling eligible individuals to choose between institutionalization or inadequate services; which ultimately results in (iii) forced institutionalization of people who can and should live in community settings, and increasing unjustified isolation and segregation of qualified individuals with developmental disabilities, as prohibited by federal law.

## **CLAIMS**

### **FIRST CAUSE OF ACTION** **(Violation of the Americans with Disabilities Act)**

72. Plaintiff incorporates and realleges the allegations contained in Paragraphs 1 through 71 of the Complaint.

73. People with developmental disabilities on the waiting list, including those on whose behalf this action is brought by Plaintiff, are “qualified individuals with a disability” within the meaning of 42 U.S.C. § 12131(2) (hereinafter referred to as “Qualified Individuals”). Qualified Individuals have a physical and/or mental impairment that substantially limits one or more major life activities, including their ability to live independently and without support.

74. Defendant violates the anti-discrimination provision of the ADA, 42 U.S.C. § 12132, by offering only institutional care instead of community-based care to Qualified Individuals who seek community-based care and who are appropriate for such care. The provision of community-based care would not entail a fundamental alteration of Defendant’s programs, services, or activities.

75. Defendant discriminates against Qualified Individuals with developmental disabilities by failing to properly assess them for community-based

services, and by failing to provide them with community living options. Instead, Defendant requires Qualified Individuals to accept confinement in segregated institutional facilities in order to receive the services they need.

76. Defendant does not have a comprehensive, effective working plan for serving Qualified Individuals with developmental disabilities in the most integrated setting appropriate to their needs.

77. As a result of Defendant's actions and inactions, Qualified Individuals are placed on a waiting list for needed services, and are forced to either forego services to which they are entitled or live in confinement in institutions rather than in the community. This constitutes a violation of Title II of the ADA and its implementing regulations.

**SECOND CAUSE OF ACTION**  
**(Violation of Medicaid Rules Regarding Provision of Services in a Reasonably Prompt Manner and Choice of Services)**

78. Plaintiff incorporates and realleges the allegations contained in Paragraphs 1 through 77 of the Complaint.

79. Defendant voluntarily participates in the federal Medicaid program under 42 U.S.C. § 1396 *et seq.* As a condition to participating, Defendant must ensure that medically necessary services for eligible individuals with developmental disabilities are provided in a reasonably prompt manner. Defendant's Medicaid program includes providing services to those individuals represented by Plaintiff through the HCS waiver program.

80. Federal law requires that any State which elects to participate in the Medicaid program under 42 U.S.C. §§ 1396 *et seq.*, provide all services, including HCS waiver services, to eligible individuals with reasonable promptness.

81. Plaintiff's constituents have not received these services despite applying for them years ago. Defendant has placed the individuals on a waiting list that includes all persons who have requested HCS waiver services but are waiting to receive such services.

82. Defendant has administered and continues to administer the State's Medicaid system in a manner that limits the availability of HCS waiver services to persons with developmental disabilities, and that precludes providing these services to such persons, including those on whose behalf this action is brought by Plaintiff, in a reasonably prompt manner, in violation of 42 U.S.C. § 1396a(a)(8).

83. This failure to provide Medicaid waiver services under HCS waiver programs is the result of arbitrary and unreasonable policies, practices, and decisions.

84. Defendant's failure to provide HCS waiver services to eligible individuals in a reasonably prompt manner violates the rights of the individuals on whose behalf this action is brought under the Medicaid Act and its implementing regulations, the ADA, *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999), Section 504 of the Rehabilitation Act, and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The violation of these rights creates a cause of action enforceable under 42 U.S.C. § 1983.

85. Under federal Medicaid law and the assurances made by Defendant in the HCS waiver program, Qualified Individuals with developmental disabilities have the freedom to choose whether to receive Medicaid services in an ICF/MR or in a waiver program. The freedom to choose includes more than the mere right to select a choice, but also the right to receive the services chosen.

86. Under the HCS waiver program there are a variety of feasible alternatives to ICF/MR care including residential support and habilitation, day services, family support, respite services and transportation.

87. Defendant's administration of the Medicaid program denies freedom of choice to the individuals on whose behalf this action is brought by failing to both (1) inform them of their feasible alternatives to Medicaid-funded ICF/MR facilities, including HCS waiver programs, and (2) implement their choices for Medicaid services in violation of 42 U.S.C. § 1396n(c)(2)(C) and (d)(2)(c).

### **THIRD CAUSE OF ACTION**

#### **(Americans with Disabilities Act and Section 504 of the Rehabilitation Act: Failure to Comply With The Integration Mandate)**

88. Plaintiff incorporates and realleges the allegations contained in Paragraphs 1 through 87 of the Complaint.

89. The ADA, 42 U.S.C. § 12101 *et seq.*, mandates that public entities like Defendant's Department of Human Services, provide services to persons with disabilities in the most integrated setting appropriate to meet the needs of Qualified Individuals, rather than segregated settings. It also requires that public entities ensure that available services are offered on a nondiscriminatory basis. Section 504 of the

Rehabilitation Act of 1973 contains a similar requirement for recipients of federal financial assistance. 29 U.S.C. § 794.

90. 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. The regulations implementing Title II of the ADA and Section 504 require a public entity 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. § 35.130(d).

91. Defendant’s failure to provide the Qualified Individuals on whose behalf this action is brought by Plaintiff with community developmental disability habilitation and support services in the most integrated setting appropriate violates 42 U.S.C. § 12132 and 28 C.F.R. § 35.130(d).

92. In addition to the above, Defendant’s failure to provide HCS waiver services to Qualified Individuals in ICF/MRs leaves them in jeopardy of receiving services in an institution rather than in a more integrated and appropriate community-based waiver program in violation of 42 U.S.C. § 12132, 29 U.S.C. § 794, and 28 C.F.R. §§ 35.130(d) and 41.51.

93. By the actions set forth above, Defendant has failed and continues to fail to afford the Qualified Individuals on whose behalf this action is brought by Plaintiff with residential services in the most integrated setting appropriate to the needs of the individuals with disabilities, in violation of the Americans with Disabilities Act, 42

U.S.C. § 12115 *et seq.*, 29 U.S.C. § 794 and the implementing regulations, and 28 C.F.R. §§ 35.130(d) and 41.51.

**RELIEF REQUESTED**

94. Plaintiff incorporates and realleges the allegations contained in Paragraphs 1 through 93 of the Complaint. Plaintiff brings this claim for declaratory relief pursuant to 28 U.S.C. § 2201.

95. An actual controversy exists between Plaintiff and Defendant with respect to the nature and extent of Plaintiff's rights under the Medicaid Act and its regulations, the ADA and its regulations, and Section 504 of the Rehabilitation Act and its regulations.

**WHEREFORE**, the Plaintiff respectfully requests that the Court:

A. Declare the rights and obligations of the respective parties under applicable federal Medicaid law and regulations, the ADA and regulations, and Section 504 of the Rehabilitation Act and regulations.

B. Declare, pursuant to 28 U.S.C. § 2201, that Defendant's practice of placing Qualified Individuals with developmental disabilities seeking services under the waiver program on a waiting list, instead of providing ICF/MR-level services in the most integrated setting appropriate to their needs with reasonable promptness, violates Title II of the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, and Title XIX of the Social Security Act.

C. Issue a permanent injunction:

(i) requiring Defendant to inform individuals with developmentally disabilities who are eligible for services from the Division of

Developmental Disabilities that they may be eligible for community services, that they have the choice of such services, and that the State will provide such services in accordance with specified reasonable timelines;

- (ii) requiring Defendant to promptly determine the eligibility for community services, including placement in community-based residences, of current and future individuals who are on the waiting list and informing them in writing of the determination;
- (iii) requiring Defendant to develop a community-based infrastructure that is responsive to individual needs through the use of individualized care plans that afford eligible Qualified Individuals the freedom to choose to reside in a preferred living arrangement in their community of choice;
- (iv) requiring Defendant to, at least six months prior to an eligible Qualified Individual's graduation from high school or other educational or vocational program, identify and provide the necessary information, referral and linkages to services for all eligible individuals with disabilities transitioning from the education system to adult services;
- (v) requiring Defendant to provide the necessary services and supports for the aging developmentally disabled population that affords continuity of care for individuals throughout their life span, maintaining preferred living arrangements in their communities, as appropriate; and
- (vi) requiring Defendant to eliminate the waiting list within three years and establish a plan with reasonable timelines for providing waiver services -- including placement in community-based residences for

those requesting such placement -- to all current and future residents deemed capable of living in the community; and requiring that such a plan be a viable integration plan that demonstrates the State's commitment to community placement, addresses the elements to effectuate such a plan, and includes provisions for Defendant to be held accountable to the Court.

D. Grant such other relief as this Court deems appropriate, including an award of reasonable attorneys' fees, litigation expenses, and costs pursuant to 42 U.S.C. § 1988 and by any other operation of law.

Respectfully submitted,

**LOWENSTEIN SANDLER PC**

By: /s/ R. Scott Thompson  
R. Scott Thompson

**NEW JERSEY PROTECTION & ADVOCACY, INC.**

By: William Emmett Dwyer

*Attorneys for Plaintiff*

Dated: September 26, 2008



**VERIFICATION AND CERTIFICATION PURSUANT TO L. Civ. R. 11.2**

I hereby verify that, to the best of my knowledge, information and belief formed after a reasonable inquiry, this action is not being presented for any improper purpose; the claims defenses and other legal contentions are warranted by existing law; and the allegations and factual contentions have evidentiary support.

**By: /s/ R. Scott Thompson**  
R. Scott Thompson

I hereby certify that the matter in controversy is not the subject of any other court, arbitration or administrative proceeding.

**By: /s/ R. Scott Thompson**  
R. Scott Thompson

Dated: September 26, 2008