

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
JOSEPH S.; STEVEN W.;
DISABILITY ADVOCATES, INC.;
and SIDNEY HIRSCHFELD, Director, Mental
Hygiene Legal Service, Second Judicial Department

Plaintiffs,

v.

MICHAEL F. HOGAN, in his official
capacity as Commissioner of the New York State
Office of Mental Health; THE NEW YORK STATE
OFFICE OF MENTAL HEALTH; RICHARD F.
DAINES, in his official capacity as Commissioner
of the New York State Department of Health;
THE NEW YORK STATE DEPARTMENT OF
HEALTH; and ELIOT SPITZER, in his official capacity
as Governor of the State of New York,

Defendants.
-----X

**SECOND AMENDED
COMPLAINT**

**No. 06 CV 1042
(BMC/SMG)**

Plaintiffs Disability Advocates, Inc. (“ DAI”), a New York protection and advocacy agency, and Sidney Hirschfeld, Director, Mental Hygiene Legal Service, Second Judicial Department (“MHLS”) sue the Defendants on behalf of individuals with mental illness unnecessarily institutionalized in nursing homes. Plaintiffs Joseph S. and Steven W., each an individual with a mental illness residing in a nursing home, sue the Defendants on their own behalf. Together, plaintiffs allege:

PRELIMINARY STATEMENT OF THE ADA AND REHABILITATION ACT CLAIMS

1. Plaintiffs bring these claims under the Americans with Disabilities Act (“ADA”) and Rehabilitation Act on behalf of New Yorkers with mental illnesses who reside in nursing homes, who receive mental health services there, and who are unlawfully segregated there.

2. These nursing homes are de facto psychiatric institutions called by another name. They effectively function as locked wards of psychiatric hospitals. Scores or hundreds of individuals with mental illness live together on wards populated almost exclusively with others with mental illness; they have little privacy; they cannot leave without setting off alarms; and they have little access to the outdoors, much less to the community outside the institution. While they ostensibly have been consigned to these institutions for psychiatric rehabilitation, very little is offered in the way of rehabilitative services, and their chances of returning to the community are virtually nil, notwithstanding their ability to live in more integrated settings. These are dead end institutions—warehouses for forgotten human beings.

3. New York State operates a mental health system which provides mental health treatment and services to residents of New York with mental illness. This mental health system provides mental health treatment and services in a variety of settings, including: in state psychiatric hospitals; in private psychiatric hospitals; in outpatient community settings; in residential settings located in the community; and in nursing homes. The services of this mental health system are paid for in a variety of ways, including by direct state payment and by Medicaid.

4. Defendant New York State Office of Mental Health (“OMH”) has the state statutory duty to develop an effective, integrated and comprehensive service system for the delivery of all services to persons with mental illness. Defendant New York State Department of Health (“DOH”) is the state agency responsible for administering the Medicaid system, and is

responsible for paying for those expenses of the state's mental health system which are eligible for Medicaid payment.

5. As public entities under the ADA and Rehabilitation Act, OMH and DOH must administer the state's mental health system and Medicaid system in the most integrated setting appropriate to the needs of qualified individuals with disabilities. Thus, defendants may not operate the mental health system in a manner which unnecessarily provides mental health services in institutions such as nursing homes when the services can be provided in more integrated settings such as community-based mental health housing licensed and/or funded by defendant OMH ("OMH community housing"). Moreover, the state may not administer its Medicaid system in a manner which unnecessarily pays for mental health services in institutions such as nursing homes when the services can be paid for in more integrated settings such as OMH community housing.

6. In violation of the ADA and Rehabilitation Act, defendants operate the mental health system and the Medicaid system in a manner which results in persons with mental illness receiving mental health services in nursing homes when they are qualified to receive such services in OMH community housing.

7. Defendants operate the mental health system and the Medicaid system in a manner which makes it very difficult or impossible for a person with mental illness who is receiving mental health services in a nursing home to obtain mental health services in a more integrated setting.

8. Defendants use eligibility criteria which effectively screen out individuals with mental illness living in nursing homes from OMH community housing, although such individuals meet the essential eligibility criteria for OMH community housing.

9. Defendants further exclude the needs of such individuals from their planning for and development of OMH community housing.

10. The obligation to provide services in the most integrated setting appropriate is an ongoing obligation—if the individual with mental illness is currently qualified for care in a more integrated setting; the state has a n obligation to provide such care in the m ost integrated, appropriate setting within a reasonable time.

11. Defendants know, or reasonably should know, that there are hundreds, and perhaps thousands, of persons with mental illness residing in nursing homes who could receive mental health services in more integrated, appropriate settings. Defendants have not taken reasonable steps to identify such persons and to offer them more integrated services in a timely manner. Therefore, defendants have no defense to the claim that continuing to institutionalize individuals with mental illness in nursing homes is discrimination.

PRELIMINARY STATEMENT OF THE NURSING HOME REFORM ACT CLAIMS

12. Plaintiffs' Nursing Home Reform Act ("NHRA") claim is brought on behalf of individuals with mental illness who were unlawfully discharged to nursing homes from New York State Psychiatric Centers and from psychiatric wards of New York hospitals which are licensed pursuant to New York Public Health Law Article 28 ("Article 28 psychiatric wards") in violation of the NHRA. This claim is also on behalf of individuals with mental illness who are in such hospitals and at risk of such unlawful discharge to nursing homes.

13. The NHRA requires the defendants to conduct a preadmission screen of persons with mental illness who are proposed for admission to a nursing home. As part of the preadmission screen, defendants must arrange for an independent evaluation of the appropriateness of the nursing home admission, which must include an independent evaluation

of whether the individual could receive care in a community setting rather than a nursing home. If nursing facility care is required, the preadmission screen must determine that the nursing facility is capable of providing the needed treatment. Notably, the determination of a hospital treatment team that a nursing home placement is appropriate is entitled to no deference, and a nursing home admission is unlawful unless there has been a preadmission screen that complies with the NHRA.

14. Defendants' preadmission screen procedures do not contain an independent evaluation of whether the individual could receive care in a community setting rather than a nursing home and does not determine whether the nursing facility is capable of providing needed treatment, and thus every admission of an individual with mental illness to a nursing home violates the NHRA.

15. The NHRA also requires defendants to conduct a review of every resident of a nursing home who experiences a significant change of condition while residing in a nursing home. The change of condition review must include an independent evaluation of continued nursing home residence, which must include an independent evaluation of whether the patient could receive care in a community setting rather than a nursing home and whether the nursing facility is capable of providing needed treatment. The determination of a nursing home treatment team that a nursing home placement is appropriate is entitled to no deference in the resident review. Continued treatment in a nursing home is unlawful unless there has been a change of condition review that complies with the NHRA.

16. For the vast majority of nursing home residents with mental illness who experience a change of condition, the defendants fail to provide a resident review.

17. The defendants know, or reasonably should know, that there are many individuals who experience a significant change of condition, yet in the vast majority of instances do not ascertain who they are, or make reasonable inquiries to nursing homes that fail to report any changes in condition.

18. Even when defendants are notified of a change in condition, they fail to conduct a change of condition review in the vast majority of cases.

19. For those few individuals who do receive a resident review, defendants' resident review procedure does not contain an independent evaluation of whether the patient could receive care in a community setting rather than a nursing home and does not evaluate whether the nursing facility is capable of providing needed treatment, and thus every such review violates the NHRA.

JURISDICTION

20. This action is brought pursuant to Title II of the ADA, 42 U.S.C. § 12133, the Rehabilitation Act, 29 U.S.C. § 794a, and 42 U.S.C. § 1983.

21. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 as a case arising under the laws of the United States and 28 U.S.C. § 1343(a) for actions under laws providing for the protection of civil rights.

22. Declaratory and injunctive relief are sought under 28 U.S.C. § 2201 et seq.

23. Venue in the Eastern District of New York is proper under 28 U.S.C. § 1391, as it is the judicial district in which a substantial portion of the events or omissions giving rise to the claims herein occurred.

PARTIES

A. Individual Plaintiffs

24. Plaintiff Joseph S. resides in the Far Rockaway Nursing Home in Far Rockaway, New York.

25. Plaintiff Steven W. resides in the Brookhaven Rehabilitation and Health Care Center in Far Rockaway, New York.

26. Joseph S. and Steven W. each has a history of and currently has a significant mental impairment that substantially limits one or more of his major life activities and each is therefore an individual with a disability for purposes of the Americans with Disabilities Act and the Rehabilitation Act.

27. Joseph S. and Steven W. each has no medical or mental condition that requires nursing home care.

28. Joseph S. and Steven W. are able to, qualified for, and wish to receive treatment and live in a more integrated setting than the nursing home in which they currently reside, but have not been able to do so because of defendants' operation of their public mental health system and Medicaid system.

29. When Joseph S. was proposed for admission to a nursing home in September 2003, his preadmission screen did not include an independent evaluation of whether he could receive care in the community and did not evaluate whether the nursing facility to which he was to be admitted could provide the services he required. Joseph S. did not receive a copy of the independent evaluation report.

30. When Steven W. was proposed for admission to a nursing home in June 2004, his preadmission screen did not include an independent evaluation of whether he could receive care in the community and did not evaluate whether the nursing facility to which he was to be

admitted could provide the services he required. Steven W. did not receive a copy of the independent evaluation report.

B. Associational Plaintiffs

31. Plaintiff Disability Advocates, Inc. is a not-for-profit corporation, authorized to practice law under New York State law. DAI is an authorized protection and advocacy agency under the Protection and Advocacy for Individuals with Mental Illness Act (“PAIMI”), 42 U.S.C. § 10801 et seq. DAI has statutory authority to pursue legal, administrative, and other appropriate remedies to ensure the protection of individuals with mental illness who are receiving care and treatment in New York State or who are residents of New York State and are receiving care and treatment outside of New York State. 42 U.S.C. § 10805.

32. Plaintiff Sidney Hirschfeld is the Director of Mental Hygiene Legal Service, Second Judicial Department, and brings this action in his official capacity. MHLS is a duly authorized agency of the State of New York created and governed by New York Mental Hygiene Law Article 47 to provide protection and advocacy services for individuals with a mental disability. MHLS has statutory authority to initiate and take any legal action on behalf of such individuals. N.Y. Mental Hyg. Law § 47.03(e). Plaintiff Hirschfeld, as Director of MHLS, is responsible for fulfilling this mandate. 22 N.Y.C.R.R. § 694.2.

33. The individuals on whose behalf DAI and MHLS bring claims are all “individual[s] with mental illness” as that term is defined in 42 U.S.C. § 10802(4), are “mentally ill” as that term is defined in 42 U.S.C. § 1396r(e)(7)(G)(i), and have a “mental disability” as that term is defined in N.Y. Mental Hyg. Law § 1.03(3). These individuals are DAI’s and MHLS’s constituents (collectively referred to herein as “constituents”).

34. In addition to being plaintiffs, Joseph S. and Steven W. each is also a constituent of DAI and MHLS.

35. The nursing homes in which these constituents reside are “facilities” rendering care and treatment for mentally ill individuals as that term is defined in 42 U.S.C. § 10802(3) and are “facilit[ies]” in which services for individuals with mental disabilities are provided as that term is defined in N.Y. Mental Hyg. Law § 1.03(6).

36. These constituents have mental impairments that substantially limit one or more major life activities, including but not limited to thinking, concentrating, learning, self-care, or interacting with others. They are therefore individuals with disabilities for purposes of the Americans with Disabilities Act and the Rehabilitation Act.

37. These constituents have each suffered injuries that would allow them to bring suit against defendants in their own right.

38. The interests DAI and MHLS seek to protect in this action are germane to DAI’s and MHLS’s purposes.

39. Neither the claims asserted nor the relief requested in this action requires the participation of individual constituents in the lawsuit.

40. DAI and MHLS bring their ADA and Rehabilitation Act claims on behalf of individuals with mental illness in nursing homes who, prior to their residence in nursing homes, resided either in state psychiatric hospitals or in Article 28 psychiatric wards. DAI and MHLS have constituents who have standing to bring such claims.

41. DAI and MHLS bring their ADA and Rehabilitation Act claims on behalf of individuals with mental illness who reside in nursing homes because defendants operate the state’s mental health system and Medicaid system in a manner which results in persons with mental illness receiving mental health services in nursing homes when they are qualified to

receive such services in OMH community housing. DAI and MHLS have constituents who have standing to bring such claims.

42. DAI and MHLS bring their NHRA claims on behalf of each and every individual with mental illness discharged from a state psychiatric hospital or an Article 28 psychiatric ward to a nursing home and who currently resides in a nursing home. Each such individual failed to receive an independent evaluation of whether he or she could receive care in a community setting rather than a nursing home and whether the nursing facility was capable of providing needed treatment because the state fails in every instance to conduct a preadmission screen that complies with the NHRA. DAI and MHLS have constituents who have standing to bring such claims.

43. DAI and MHLS also bring NHRA claims on behalf of individuals currently residing in state psychiatric hospitals and Article 28 psychiatric wards who are at risk of discharge to nursing homes because the state fails in every instance to conduct a preadmission screen that complies with the NHRA. DAI and MHLS have constituents who have standing to bring such claims.

44. DAI and MHLS further bring NHRA claims on behalf of individuals with mental illness residing in nursing homes who experienced or will experience a significant change of condition and did not or will not receive a resident review. DAI and MHLS have constituents who have standing to bring such claims.

45. DAI and MHLS further bring NHRA claims on behalf of those individuals with mental illness in nursing homes who experienced a significant change of condition and who received a defective resident review because the state fails to conduct a resident review that

complies with the NHRA, or who will receive such a defective resident review. DAI and MHLS have constituents who have standing to bring such claims.

C. Defendants

46. Defendant Michael F. Hogan is the Commissioner of OMH. He is responsible for the operation and administration of OMH, including its planning, programs and services for individuals with mental illness in New York. He is sued in his official capacity.

47. OMH has the state statutory duty to plan for and develop an effective, integrated and comprehensive service system for the delivery of all services to persons with mental illness and to plan for such individuals. N.Y. Mental Hyg. Law §§ 5.07(b); 7.01; 7.07(a); 7.15.

48. As part of its system for persons with mental illness, OMH operates state psychiatric hospitals, see N.Y. Mental Hyg. Law Arts. 9, 29; licenses and funds Article 28 psychiatric wards, see id. §§ 1.03(6), (10); 31.02; 31.04; 31.05; and licenses and funds OMH community housing and support services, see id. §§ 31.02, 31.04, 31.05, 31.07, 31.09, 31.11, 31.13, 31.19, 41.33, 41.38, 41.44, 41.47.

49. OMH is the “State mental health authority” in New York State as that term is defined in 42 U.S.C. § 201(m).

50. As the State mental health authority, OMH must make a determination, based upon an independent evaluation, of the appropriateness of the nursing home admission proposed for any individual with mental illness, which must include an independent evaluation of whether the patient could receive care in a community setting rather than a nursing home and whether the nursing facility is capable of providing needed treatment. 42 U.S.C. § 1396r(e)(7); 42 C.F.R. §§ 483.106(d)(1); 483.110, 483.112, 483.126, 483.132, 483.134(b)(5).

51. OMH must also determine, based upon an independent evaluation, of the continued appropriateness of nursing home care for any individual with mental illness residing in

a nursing home who experiences a significant change of condition. This independent evaluation must include an independent evaluation of whether the patient could receive care in a community setting rather than a nursing home and whether the nursing facility is capable of providing needed treatment. 42 C.F.R. §§ 483.106(d), 483.110, 483.126, 483.132, 483.134(b)(5).

52. OMH is a public entity covered by Title II of the ADA. 42 U.S.C. § 12131(1).

53. OMH is a recipient of federal funds.

54. OMH is a program of state government.

55. Defendant Richard F. Daines is the Commissioner of the New York State Department of Health. He is responsible for the operation and administration of the Department of Health, including its activities regarding nursing homes, the New York State Medicaid program, and Article 28 hospitals. He is sued in his official capacity.

56. DOH is the single state agency that operates the New York State Medicaid program, which provides payment for individuals with mental illness to reside in nursing homes and community-based mental health treatment. N.Y. Soc. Serv. § 363-a.

57. As the single state agency that operates the New York State Medicaid program, DOH must assure that New York operates a preadmission screen and resident review program in conformity with the NHRA. 42 U.S.C. § 1396a(a)(28).

58. DOH licenses, supervises and enforces the laws and regulations applicable to nursing homes and determines whether nursing homes are permitted to alter or expand. N.Y. Pub. Health Law §§ 2801(2), (3); 2802; 2806-b; 10 N.Y.C.R.R. § 709.3.

59. DOH licenses, supervises and enforces the laws and regulations applicable to Article 28 hospitals, which include hospitals that have psychiatric units, and is responsible for

protecting the rights of the patients therein. N.Y. Pub. Health Law §§ 2801(1); 2803(1); 2805, 2806.

60. DOH is a public entity covered by Title II of the ADA. 42 U.S.C. § 12131(1).

61. DOH is a recipient of federal funds.

62. DOH is a program of state government.

63. Defendant Eliot Spitzer is the Governor of the State of New York, a public entity covered by Title II of the ADA. 42 U.S.C. § 12131(1). He is ultimately responsible for ensuring that New York operates its services, programs and activities in conformity with the Americans with Disabilities Act, the Rehabilitation Act, and the NHRA. His presence in this lawsuit is necessary to afford plaintiffs the full relief they seek. He is sued in his official capacity.

FACTS

ADA AND REHABILITATION ACT CLAIM

A. Legal Background

64. Title II of the Americans with Disabilities Act (“ADA”), 42 U.S.C. §§ 12131, 12132, and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, prohibit discrimination against individuals with disabilities, including those with mental illness.

65. In enacting the ADA, Congress explicitly identified unjustified segregation of persons with disabilities as a form of discrimination. See 42 U.S.C. § 12101(a)(2) (“historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem”); id. § 12101(a)(5) (“individuals with disabilities continually encounter various forms of discrimination, including ... segregation”).

66. To prevent unjustified segregation of persons with disabilities, regulations adopted under the ADA and Rehabilitation Act require that a public entity must administer its

services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities. See 28 C.F.R. § 35.130(d) (ADA); 45 C.F.R. § 84.4(b)(2) (Rehabilitation Act).

67. As described below, defendants' failure to administer their services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with mental illness has led to the unnecessary institutionalization in nursing homes of hundreds of New Yorkers with mental illness who do not require nursing care.

B. New York's Public Mental Health System

68. Under the New York State Mental Hygiene law, defendant New York State Office of Mental Health ("OMH") must "develop an effective, integrated, comprehensive system for the delivery of all services to the mentally ill." N. Y. Mental Hyg. Law § 7.01; see id. §§ 7.07(a); 7.15.

69. Significantly, "[s]uch a system should include, whenever possible, the provision of necessary treatment services to people in their home communities; it should assure the adequacy and appropriateness of residential arrangements for people in need of service; and it should rely upon improved programs of institutional care only when necessary and appropriate." N.Y. Mental Hyg. Law § 7.01.

70. The state public mental health system established under New York State law involves a number of residential settings, including state-operated psychiatric hospitals, psychiatric wards of general hospitals, residential treatment programs, single-site and scattered-site housing for persons with mental illness, and nursing homes.

71. Pursuant to the ADA and Rehabilitation Act, and consistent with its own statutory mandate, OMH must operate New York's public mental health system in order to serve individuals with mental illness in the most integrated setting consistent with their clinical needs.

72. Thus, the system may rely upon nursing home care only if such care is clinically appropriate and if more integrated OMH community housing is not appropriate.

C. OMH Community Housing

73. OMH licenses and funds several types of community housing programs, including single-site, scattered-site, licensed and unlicensed, community housing programs.

74. An individual in OMH community housing receives a housing subsidy and receives community-based mental health treatment and supports.

75. The goal of OMH community housing is to allow an individual with mental illness to live and receive mental health treatment in the community.

76. Individuals with mental illness who do not require in-patient psychiatric care are qualified for OMH community housing if they have a Severe and Persistent Mental Illness (SPMI).

77. The particular types of such housing for which an individual with SPMI is appropriate depends upon the individual's needs and desires.

78. For an individual who does not reside in a state psychiatric hospital, including an individual residing in a nursing home, the state's treatment professionals do not determine whether that individual meets the SPMI criteria or is appropriate for one or more of the types of OMH community housing programs.

79. Based upon their clinical condition and history, Joseph S., Steven W. and all the constituents in nursing homes meet the SPMI criteria.

80. Joseph S., Steven W., and the vast majority of the constituents are appropriate for one or more types of OMH community housing.

D. Defendants' Failure to Serve Individuals with Mental Illness In the Most Integrated Setting

81. Despite meeting the essential eligibility requirements for OMH community housing, Joseph S., Steven W., and the constituents reside in nursing homes.

82. They reside in nursing homes because OMH has failed to develop sufficient OMH community housing to meet their needs.

83. Once in nursing homes, Joseph S., Steven W., and the constituents are effectively excluded from OMH community housing.

84. OMH designates priority populations for the community housing it develops and sets aside certain OMH community housing for designated populations, for example, homeless individuals with mental illness.

85. OMH has not designated nursing home residents as a priority population for any of the community housing it has developed and has not set aside any OMH community housing for individuals with mental illness residing in nursing homes.

86. Due to the high demand for OMH community housing, this failure to either designate nursing home residents as a priority population or to set aside any housing for nursing home residents effectively excludes nursing homes residents with mental illness from accessing OMH community housing.

87. Further, although defendants know, or reasonably should know, that hundreds and perhaps thousands, of individuals with mental illness unnecessarily reside in nursing homes, OMH and DOH exclude the needs of individuals with mental illness residing in nursing homes from their planning and do not consider whether such individuals could be served in more integrated settings.

88. OMH, DOH, and Governor Spitzer contribute to the unnecessary institutionalization of individuals with mental illness in nursing homes by failing to redirect the money currently spent on individuals with mental illness in nursing homes to care for such individuals in OMH community housing.

89. OMH, DOH and Governor Spitzer fail to redirect such funds despite the substantial cost savings defendants would achieve if individuals with mental illness in nursing homes were served in OMH community housing.

90. Upon information and belief, the vast majority of individuals with mental illness currently receiving services in nursing homes could live in OMH community housing and receive community-based mental health treatment for less money than the State currently spends on nursing home care.

91. Nevertheless, defendants do not make available those funds they currently expend on institutional nursing home care for individuals with mental illness to enable such individuals to receive care and treatment in the community.

92. As a result, individuals with mental illness spend years in nursing homes instead of the more integrated settings for which they are eligible.

E. Nursing Homes Are Highly-Segregated Institutions

93. In the nursing homes, Joseph S., Steven W., and the constituents have little privacy, cannot leave without setting off alarms, and have little access to the outdoors, much less to the community outside the institution.

94. These nursing homes are de facto psychiatric institutions called by another name.

95. They effectively function as locked wards of psychiatric hospitals.

96. While they have ostensibly been consigned to these institutions for psychiatric rehabilitation, very little is offered in the way of rehabilitative services, and they have little

chance of returning to the community notwithstanding their ability to live in more integrated settings.

97. Joseph S., Steven W., and the constituents are harmed by their continuing unnecessary institutionalization.

1. New Jersey Nursing Homes

98. Two large nursing homes in New Jersey—Andover Subacute and Rehabilitation Center, II, Inc. (“Andover”), located in Andover, New Jersey, and Lincoln Park Care Center L.L.C. (“Lincoln Park”), located in Lincoln Park, New Jersey—each house over 500 individuals, the majority of whom are New York residents with mental illness who do not require nursing care and are qualified to reside in OMH community housing.

99. Other nursing homes in New Jersey may also house individuals with mental illness who do not require nursing care and are qualified to reside in OMH community housing.

100. New York pays for New York residents with mental illness to live in nursing homes in New Jersey and other states through the New York Medicaid program.

101. Andover and Lincoln Park maintain separate floors for residents with mental illness segregated from the other residents of the nursing home. Residents with mental illness are not allowed to leave these floors unless they have special passes that entitle them to certain privileges. Even with special passes, all of the residents with mental illness have minimal contact with the outside world. Except for cigarette breaks and other pre-determined, limited time periods, most of these residents have no access to fresh air.

102. Andover and Lincoln Park maintain secured doors that must be activated by staff in order for anyone to leave the facility. Residents with mental illness can leave the facility only

with permission and when accompanied by facility staff and only on pre-determined, facility-organized, group activities.

103. All of these restrictions on freedom are typical of the limitations on freedom found in state-operated psychiatric centers and Article 28 psychiatric wards.

104. The services at Andover and Lincoln Park are administered with little expectation that residents will return to the community.

105. Staff at Andover and Lincoln Park administer medication for residents with mental illness and do not permit residents to administer their own medication.

106. Other than providing medication, Andover and Lincoln Park provide little psychiatric care.

107. Residents likewise receive almost no social work care. At Lincoln Park, there are three social workers for over 500 residents. These social workers do not provide individual or group therapy.

108. The programs at Andover and Lincoln Park do not promote the rehabilitation and recovery of individuals with mental illness, and do not assist them in becoming more independent.

109. Andover and Lincoln Park do not link residents to educational, pre-vocational, and vocational services intended to facilitate residents' return to the job market and/or their attainment of educational or career advancement goals.

110. When staff at Andover and Lincoln Park attempt to discharge residents to OMH community housing, they find that such residents are effectively excluded from such housing.

111. Therefore, staff at Andover and Lincoln Park prefer not to raise the subject of discharge with residents with mental illness because they know that there is very little hope that they in fact will be discharged to more integrated setting.

112. Of the hundreds of New York residents residing at Andover and Lincoln Park, few have transitioned to OMH community housing.

2. *New York Nursing Homes*

113. At least nine nursing homes in New York State house individuals with mental illness who do not require nursing home care and who could reside in OMH community housing.

114. Brookhaven Rehabilitation and Health Care Center LLC in Far Rockaway, New York; New Surfside Nursing Home LLC in Far Rockaway, New York; Woodmere Rehabilitation and Health Care Center in Woodmere, New York; Meadow Park Rehabilitation and Health Care Center in Flushing, New York; Lawrence Care Center LLC in Arverne, New York; Park Nursing Home in Rockaway Beach, New York; Horizon Care Center in Arverne, New York; Holliswood Care Center, Inc. in Queens, New York; and Haven Manor Health Care Center in Far Rockaway, New York each house individuals with mental illness who do not require nursing home care and who could reside in OMH community housing.

115. Other nursing homes in New York State may also house individuals with mental illness who do not require nursing home care and who could reside in OMH community housing.

116. New York pays for New York residents with mental illness to live in these nursing homes through the New York Medicaid program.

117. Although the conditions vary in the New York nursing homes, all of the above-named homes do not permit the residents to leave the facility unescorted or without permission, and several restrict the residents' movements within the facility.

118. The New York nursing homes operate on a regimented time schedule with established meal and recreation periods, cigarette breaks and medication administration.

119. The New York nursing homes provide insufficient psychiatric and social work care. Other than medication management, the New York nursing homes do not provide individual or group therapy.

120. The programs in these homes do not promote the rehabilitation and recovery of individuals with mental illness, and do not assist them in becoming more independent.

121. The nursing homes do not link residents to educational, pre-vocational, and vocational services intended to facilitate residents' return to the job market and/or their attainment of educational or career advancement goals. Instead, the nursing homes treat residents with mental illness as if the nursing home was their final home.

122. When staff at the New York nursing homes attempt to find appropriate OMH community housing to which to discharge residents with mental illness, they find that nursing home residents are effectively excluded from such housing.

3. *Massachusetts Nursing Homes*

123. At least six nursing homes in Massachusetts house New Yorkers with mental illness who, upon information and belief, do not require nursing home care and who could reside in OMH community housing.

124. New York pays for New York residents with mental illness to live in nursing homes in Massachusetts through the New York Medicaid program.

125. These individuals, like individuals in New Jersey and New York nursing homes, are unable to access OMH community housing.

F. The Individual Plaintiffs

126. Joseph S. and Steven W. each reside in a nursing home because of defendants' failure to operate their public mental health system and Medicaid system in such a way as to serve these individuals in the most integrated setting appropriate to their clinical need.

1. Joseph S.

127. Plaintiff Joseph S. was born in 1952. He resided at the Meadow Park Nursing Home in Far Rockaway, Queens from September 2003 through December 2006 and currently resides at the Far Rockaway Nursing Home.

128. Joseph S. was discharged to Meadow Park from Creedmoor Psychiatric Center. Joseph S.'s discharge plan did not contain a medical reason for nursing home placement, indicating only that Joseph S. would benefit from training in community living skills and noting that he experienced occasional incontinence, for which he received medication and wore a protective undergarment.

129. While at Meadow Park, Joseph S. was evaluated by a Community Alternatives Systems Agency for the purpose of determining whether upon his return to the community he would be eligible for New York's Medicaid-funded home health services. It was determined that Joseph S. did not require nursing care, and was therefore ineligible for unnecessary home health services.

130. Nevertheless, because no OMH community housing was available to him, he continued to reside in a nursing home.

131. In December 2006, Joseph S. decided to move to Far Rockaway Nursing Home in Far Rockaway, Queens.

132. When he entered Far Rockaway, he continued not to require nursing home care.

133. At Far Rockaway, Joseph S. is not permitted to administer his own medications, receives little psychiatric care, and is not permitted to leave the facility unescorted.

134. Joseph S. is able to, qualified for, and would like to live in a more integrated setting than Far Rockaway Nursing Home.

2. *Steven W.*

135. Steven W. was born in 1946 and has resided at Brookhaven Rehabilitation and Health Care Center since June of 2004.

136. Steven W. was discharged to Brookhaven Rehabilitation and Health Care Center in June of 2004 from the Article 28 psychiatric ward at Montefiore Medical Center.

137. At the time of discharge, his discharge plan did not contain a medical reason for nursing home placement, indicating only that he would benefit from a rehabilitation program in preparation for community living.

138. Shortly after his arrival at Brookhaven, his treatment plan was changed, eliminating the plan for community reintegration.

139. At Brookhaven, Steven W. is unable to leave the facility unescorted and is unable to leave the floor without supervision. He wears a device on his wrist that triggers an alarm if he attempts to leave the floor or the facility without permission.

140. Steven W. is able to, qualified for, and would like to live in a more integrated setting than Brookhaven.

THE NURSING HOME REFORM ACT

A. Legal Background

141. The NHRA requires states to ensure that individuals with mental illness are not inappropriately placed in nursing homes and that they receive appropriate mental health

treatment while in a nursing facility. See 42 U.S.C. § 1396r; see also 42 U.S.C. § 1396a(a)(28) (state Medicaid plan must provide for compliance with NHRA).

142. The NHRA delineates State requirements for preadmission screening and resident review (“PASRR”). 42 U.S.C. § 1396r(e)(7). Regulations promulgated pursuant to the statute implement the NHRA’s PASRR requirements. See 42 U.S.C. § 1396r(f)(8)(A); 42 C.F.R. §§ 483.100-483.138.

143. These PASRR requirements apply to any individual proposed for admission to or who resides in a Medicaid-certified nursing facility. See 42 C.F.R. § 483.102(a).

144. For individuals with mental illness proposed for admission to a nursing facility, the NHRA requires that “the State must have in effect a preadmission screening program,” 42 U.S.C. § 1396r(e)(7)(A)(i), to determine “prior to admission that, because of the physical and mental condition of the individual, the individual requires the level of services provided by a nursing facility.” 42 U.S.C. § 1396r(b)(3)(F)(i).

145. The NHRA further provides that “in the case of each resident of a nursing facility who is mentally ill, the State mental health authority must review and determine . . . whether or not the resident, because of the resident’s physical and mental condition, requires the level of services provided by a nursing facility.” 42 U.S.C. § 1396r(e)(7)(B)(i).

146. For both the preadmission screen and the resident review, the “State mental health authority” makes the determination as to whether an individual meets nursing facility level of care based upon “an independent physical and mental evaluation performed by a person or entity other than the State mental health authority.” 42 U.S.C. § 1396r(b)(3)(F)(i); 42 U.S.C. § 1396r(e)(7)(B)(i); 42 C.F.R. § 483.106(d).

147. Unless the individual's physical and mental condition is determined to require the level of services provided by a nursing facility, the nursing facility must not admit the individual. 42 U.S.C. § 1396r(b)(3)(F)(i).

148. For individuals residing in nursing homes and not requiring nursing facility services, the state must arrange for and prepare the individual for discharge to a more integrated setting. 42 U.S.C. § 1396r(e)(7)(C)(ii)-(iii).

149. DOH, as the single state agency responsible for administration of New York's Medicaid program, must assure New York's compliance with federal PASRR requirements. See 42 U.S.C. § 1396a(a)(28).

150. OMH, as New York's state mental health authority, makes the determination, based upon an independent evaluation, as to whether individuals proposed for admission or residing in nursing homes require nursing facility level of care and specialized services.

1. Independent Evaluation of Need for Nursing Facility Level of Care

151. In conducting an independent evaluation of whether an individual meets nursing facility level of care, the independent evaluator must first assess whether "[t]he individual's total needs are such that his or her needs can be met in an appropriate community setting." 42 C.F.R. § 483.132(a)(1).

152. The evaluation must examine "the level of support that would be needed to assist the individual to perform ... activities of daily living while living in the community," and "determine[s] whether this level of support can be provided to the individual in an alternative community setting or whether the level of support needed is such that NF [Nursing Facility] placement is required." 42 C.F.R. § 483.134(b)(5).

153. If the individual's needs cannot be met in a community setting, the evaluation examines if "[t]he individual's total needs are such that they can be met only on an inpatient basis, which may include the option of placement in a home and community-based services waiver program." Id. § 483.132(a)(2).

154. If institutional care is required, the evaluation examines whether a nursing facility is an appropriate placement, id. § 483.132(a)(3), including whether the particular nursing facility is capable of providing the services the individual requires. Id. § 483.126.

155. If nursing home care is required, the independent evaluation must examine whether the individual requires specialized services for treatment of mental illness. See 42 C.F.R. § 483.134.

2. *Evaluation Report and Notice of Findings*

156. Upon conclusion of the required evaluation, the NHRA requires that the independent evaluator create an evaluation report, which:

- (1) Identifies the name and professional title of person(s) who performed the evaluation(s) and the date on which each portion of the evaluation was administered;
- (2) Provides a summary of the medical and social history, including the positive traits or developmental strengths and weaknesses or developmental needs of the evaluated individual;
- (3) If NF services are recommended, identifies the specific services which are required to meet the evaluated individual's needs, including services required in paragraph (i)(5) of this section;
- (4) If specialized services are not recommended, identifies any specific mental retardation or mental health services which are of a lesser intensity than specialized services that are required to meet the evaluated individual's needs;
- (5) If specialized services are recommended, identifies the specific mental retardation or mental health services required to meet the evaluated individual's needs; and

(6) Includes the bases for the report's conclusions.

42 C.F.R. § 483.128(i).

157. The evaluator must send a copy of the evaluation report to the individual or resident and his or her legal representative, the appropriate State authority, the admitting or retaining NF, the individual's attending physician, and the discharging hospital if the individual is seeking NF admission from a hospital. 42 C.F.R. § 483.128(l).

158. Upon completion of the independent evaluation, the state mental health authority must also notify the individual of the results of the review. See 42 C.F.R. § 483.130(k). This notice must include:

- (1) Whether a NF level of services is needed;
- (2) Whether specialized services are needed;
- (3) The placement options that are available to the individual consistent with these determinations; and
- (4) The rights of the individual to appeal the determination.

42 C.F.R. § 483.130(l).

3. *Resident Review Upon Significant Change of Condition*

159. The nursing facility must “notify the State mental health authority or State mental retardation or developmental disability authority, as applicable, promptly after a significant change in the physical or mental condition of a resident who is mentally ill or mentally retarded.”

42 U.S.C. § 1396r(b)(3)(E).

160. Upon receipt of such notice, the State mental health authority must review the need for nursing facility level of care and/or for specialized services. See 42 U.S.C. § 1396r(e)(7)(B)(iii).

4. *Sending State Responsibility for Out-of-State Placement*

161. When an individual is placed outside his state of residence, “[t]he State in which the individual is a State resident (or would be a State resident at the time he or she becomes eligible for Medicaid) . . . must pay for the PASARR and make the required determinations.” 42 C.F.R. § 483.110(a).

162. A State can meet its ongoing obligations to residents in out-of-state nursing homes by making “arrangements for PASARR in its provider agreements with out-of-State facilities or reciprocal interstate agreements.” 42 C.F.R. § 483.110(b).

B. Defendants’ Violations of NHRA

163. Defendants’ PASRR system violates the requirements of the NHRA in each of the following ways:

1. *Evaluation of Nursing Facility Level of Care*

164. When an individual with mental illness is referred for an independent evaluation, the independent evaluation does not consider whether the individual requires nursing facility level of care or whether they could receive treatment in the community

165. Each of the constituents in nursing homes, including plaintiffs Joseph S. and Steven W., received a deficient preadmission screen at the time of admission to the nursing home.

166. Each of the constituents at-risk of entering a nursing home will not receive a proper preadmission screen prior to their entry into the nursing home.

167. The constituents evaluated, or at-risk of evaluation, under defendants’ defective preadmission screen are deprived of the benefits of the preadmission screen, namely, the opportunity to live in and receive community-based mental health housing and treatment.

2. *Determination That Nursing Facility Is Capable of Providing Needed Treatment*

168. Joseph S., Steven W., and virtually all of the constituents were discharged to nursing homes for the purpose of receiving psychiatric rehabilitation.

169. The regulations implementing NHRA, 42 C.F.R. § 483.126, state that a nursing facility admission may be considered appropriate only when the individual's needs are such that they do not exceed the level of services which can be delivered in the NF.

170. The nursing facilities to which the named plaintiffs and the constituents have been admitted cannot and do not provide the prescribed psychiatric rehabilitation services.

171. Nevertheless, the defendants' preadmission screen permits admission to such facilities in violation of the NHRA.

172. The constituents at-risk of entering a nursing home will not receive a proper preadmission screen which determines whether the nursing facility to which the individual is proposed for admission is capable of providing the services such individual requires.

173. The constituents evaluated, or at-risk of evaluation, under defendants' defective preadmission screen are deprived of the benefits of the preadmission screen, namely, the opportunity to receive appropriate mental health treatment in the nursing home.

3. *Evaluation Report and Notice of Findings*

174. Once the independent evaluation has been completed, defendants' PASRR system does not provide the affected individual with a copy of the independent evaluation.

175. As a result, each and every constituent with mental illness residing in a nursing home, including Joseph S. and Steven W., has not received notice of the basis for the determination that they require nursing facility level of care rather than treatment in the community.

176. Further, each of the constituents at-risk of entering a nursing home will not receive notice of the basis for the determination that they require nursing facility level of care rather than treatment in the community.

4. *Resident Review Upon Significant Change of Condition*

177. Defendants fail to conduct resident reviews for individuals with mental illness residing in nursing homes who experience a significant change of condition as required under the NHRA.

178. Upon information and belief, DAI and MHLS have constituents for whom nursing homes have provided notification of a significant change of condition to defendants and for whom defendants have failed to provide any resident review.

179. Further, upon information and belief, DAI and MHLS have constituents for whom nursing homes have provided notification of a significant change of condition to defendants and for whom defendants have failed to provide a proper resident review to independently evaluate whether the individual requires nursing facility level of care, including whether they could receive treatment in the community, and to whom defendants have failed to provide a copy of the evaluation report.

180. Further, upon information and belief, DAI and MHLS have constituents for whom nursing homes have failed to provide notification of a significant change of condition to defendants due to defendants' failure to develop a system to assure that nursing homes notify them when an individual with mental illness experiences a significant change of condition.

181. Defendants' deficient resident review program deprives the constituents of the benefits of the review, namely, the opportunity to live in and receive community-based mental health housing and treatment.

C. The Individual Plaintiffs

182. Because of defendants' failure to operate a PASRR program that complies with the NHRA, when Joseph S. and Steven W. were admitted to a nursing home, the preadmission screen did not consider whether they required nursing facility level of care, including whether they could receive treatment in the community, or determine that the nursing facility was capable of providing needed treatment.

183. Joseph S. and Steven W. each did not receive a copy of the independent evaluation report.

184. As a result, Joseph S. and Steven W. were deprived of the benefits of the preadmission screen, namely, the opportunity to live in and receive community-based mental health housing and treatment, to receive appropriate mental health care in the nursing homes, and to receive notice of the basis for the determination that they required nursing facility level of care rather than treatment in the community.

FIRST CLAIM FOR RELIEF

(AGAINST ALL DEFENDANTS)

VIOLATION OF THE AMERICANS WITH DISABILITIES ACT

185. Plaintiffs repeat and reallege the above paragraphs.

186. This claim for relief is brought against each and every defendant.

187. Joseph S., Steven W., and the constituents are individuals with mental illness. They have mental impairments that substantially limit one or more major life activity.

188. Joseph S., Steven W., and the constituents are qualified individuals with disabilities within the meaning of 42 U.S.C. § 12131(2).

189. Joseph S., Steven W., and the constituents are qualified to participate in more integrated settings appropriate to their needs.

190. Defendants can reasonably accommodate serving plaintiffs Joseph S., Steven W., and the constituents in the most integrated setting appropriate to their needs.

191. Defendants OMH and DOH are public entities covered by Title I I of the ADA. 42 U.S.C. § 12131(1)(A), (B). Defendants Hogan, Daines, and Spitzer are responsible for the operation of public entities covered by Title II of the ADA.

192. Title II of the ADA prohibits defendants from discriminating against individuals with disabilities in connection with services, programs and activities. 42 U.S.C. §§ 12131, 12132.

193. Title II also requires 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).

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

195. Defendants have failed to meet these obligations. Defendants discriminate against Joseph S., Steven W., and the constituents. Defendants’ unlawful activities and omissions have resulted in Joseph S., Steven W., and the constituents living and receiving services in nursing homes rather than the most integrated setting appropriate to their needs.

196. Defendants' failure to administer services, programs, and activities in the most integrated setting appropriate to the needs of Joseph S., Steven W., and the constituents constitute continuing violations of law.

SECOND CLAIM FOR RELIEF

(AGAINST ALL DEFENDANTS)

VIOLATION OF THE REHABILITATION ACT

197. Plaintiffs repeat and reallege the above paragraphs.

198. This claim for relief is brought against each and every defendant.

199. Joseph S., Steven W., and the constituents are individuals with mental illness. They have mental impairments that substantially limit one or more major life activity.

200. Joseph S., Steven W., and the constituents are qualified individuals with disabilities within the meaning of 29 U.S.C. § 705(20).

201. Joseph S., Steven W., and the constituents are qualified to participate in more integrated settings appropriate to their needs.

202. Defendants can reasonably accommodate serving Joseph S., Steven W., and the constituents in the most integrated settings appropriate to their needs.

203. Defendants OMH and DOH are programs and conduct activities receiving federal financial assistance. Defendants Hogan, Daines, and Spitzer are responsible for the operation of programs receiving federal assistance.

204. Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, provides:

No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

205. Section 504 also requires:

For purposes of this part, aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.

45 C.F.R. § 84.4(b)(2).

206. Section 504 further provides that a “recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration: (i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap; [or] (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient’s program or activity with respect to handicapped persons” 45

C.F.R. § 84.4(b)(4).

207. Defendants are obligated under Section 504 of the Rehabilitation Act to administer New York State programs and to utilize methods of administration in a manner that supports the availability of services and programs in the most integrated setting for individuals with disabilities.

208. Defendants have failed to meet these obligations. Defendants discriminate against Joseph S., Steven W., and the constituents. Defendants’ unlawful activities and omissions have resulted in Joseph S., Steven W., and the constituents living and receiving services in nursing homes rather than the most integrated setting appropriate to their needs.

209. Defendants’ failure to administer services, programs, and activities in the most integrated setting appropriate to the needs of Joseph S., Steven W., and the constituents constitute continuing violations of law.

THIRD CLAIM FOR RELIEF

(AGAINST ALL DEFENDANTS)

VIOLATION OF THE NURSING HOME REFORM ACT

210. Plaintiffs repeat and reallege the above paragraphs.

211. This claim for relief is brought against each and every defendant.

212. The NHRA requires that states develop and implement a Preadmission Screening and Resident Review (“PASRR”) program for all applicants to, and residents of, Medicaid-certified nursing facilities. 42 U.S.C. § 1396a (a)(28); 42 U.S.C. § 1396r(e)(7); 42 C.F.R. §§ 483.100 - 483.138.

213. The nursing homes to which Joseph S., Steven W., and the constituents have been admitted or are at-risk of admission are Medicaid-certified facilities and receive payment from the New York State Medicaid program for their care.

214. Defendants’ preadmission screen unlawfully permits the admission to nursing homes of individuals with mental illness whose physical and mental conditions do not require the level of services provided by a nursing facility.

215. Defendants’ preadmission screen does not include an independent evaluation of whether an individual could receive care in a community setting rather than a nursing home.

216. Defendants’ preadmission screen does not evaluate whether a particular nursing facility is capable of providing needed treatment.

217. Defendants’ preadmission screen does not arrange for a copy of the independent evaluation report to be sent to the individual and his or her legal representative.

218. Defendants do not conduct a resident review upon receipt of notification from nursing homes that individuals with mental illness have experienced a significant change of condition.

219. Defendants fail to assure that nursing homes notify defendants when individuals with mental illness experience a significant change of condition in order for defendants to perform a resident review for such individuals.

220. For those individuals for whom defendants conduct a resident review, defendants' resident review does not include an independent evaluation of whether the patient could receive care in a community setting rather than a nursing home, does not evaluate whether a particular nursing facility is capable of providing needed treatment, and does not provide a copy of the independent evaluation to the evaluated individual.

221. Joseph S., Steven W., and each of the constituents residing in a nursing home did not receive a preadmission screen that complies with the NHRA in that it did not include an independent evaluation of whether the patient could receive care in a community setting rather than a nursing home.

222. Joseph S., Steven W., and the constituents residing in a nursing home did not receive a preadmission screen that complies with the NHRA in that it did not include an independent evaluation of whether a particular nursing facility is capable of providing services.

223. Joseph S., Steven W., and each of the constituents did not receive a copy of the independent evaluation report.

224. The constituents at risk of discharge to a nursing home will not receive an independent evaluation as to whether their physical and mental condition requires nursing facility services, including whether they could receive community-based treatment, will not receive an independent evaluation evaluate as to whether a particular nursing facility is capable of providing needed treatment, and will not receive a copy of the independent evaluation report.

225. Constituents have not received a resident review upon notification from nursing homes to defendants that the constituents have experienced a significant change of condition.

226. For those constituents who have received a resident review, defendants' resident review did not include an independent evaluation of whether the patient could receive care in a community setting rather than a nursing home, did not evaluate whether a particular nursing facility is capable of providing needed treatment, and did not provide a copy of the evaluation report to the evaluated individual.

227. For those constituents who have experienced a significant change of condition and for whom nursing homes have failed to notify New York of this change, defendants have failed to put in place a system to assure that nursing homes notify New York of a significant change of condition.

228. Defendants' failure to operate a PASRR system consistent with the NHRA constitutes a continuing violation of law.

FOURTH CLAIM FOR RELIEF

(AGAINST ALL DEFENDANTS)

UTILIZING CRITERIA OR METHODS OF ADMINISTRATION THAT DEFEAT OR SUBSTANTIALLY IMPAIR THE OBJECTIVES OF THE PASRR PROGRAM

229. Plaintiffs repeat and reallege the above paragraphs.

230. This claim for relief is brought against each and every defendant.

231. Title II of the ADA prohibits defendants from discriminating against individuals with disabilities in connection with services, programs and activities. 42 U.S.C. §§ 12131, 12132.

232. Title II further provides that "a public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration: (i) That have the

effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability; [or] (ii) That have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities. . . ." 28 C.F.R. § 35.130(b)(3).

233. Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, provides:

No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

234. Section 504 further provides that a "recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration: (i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap; [or] (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program or activity with respect to handicapped persons" 45 C.F.R. § 84.4(b)(4).

235. The purpose of the PASRR program is to end the inappropriate placement of mentally ill individuals in nursing facilities and to assure appropriate mental health treatment

236. By failing to administer the PASRR program to assure that individuals with mental illness are not inappropriately placed in nursing homes, failing to assure that individuals with mental illness receive community-based treatment, and failing to assure appropriate mental health treatment in nursing homes, defendants utilize criteria or methods of administration that defeat or substantially impair the objectives of the PASRR program, thereby violating the ADA and Rehabilitation Act.

237. Joseph S., Steven W., and each of the constituents is harmed by defendants' utilizing criteria or methods of administration that defeat or substantially impair the objectives of the PASRR program.

WHEREFORE, Plaintiffs pray for the following relief

- a. A Declaration that defendants have violated the Americans with Disabilities Act, and the Rehabilitation Act by administering programs and providing services for individuals with mental illness in nursing homes rather than in the most integrated setting appropriate to their needs;
- b. A Declaration that defendants have violated the Nursing Home Reform Act by:
 - i. Failing to develop and implement a PASRR program which prevents the admission to nursing homes of individuals with mental illness whose physical and mental conditions do not require the level of services provided by a nursing home;
 - ii. Failing to develop and implement a PASRR program which makes an independent evaluation of whether an individual with mental illness proposed for admission to a nursing home can receive community-based treatment rather than treatment in a nursing home;
 - iii. Failing to develop and implement a PASRR program which makes an independent evaluation of whether the nursing facility to which an individual with mental illness is proposed for admission is capable of providing needed treatment;
 - iv. Failing to develop and implement a PASRR program which gives adequate notice of a PASRR decision to the individual with mental illness

- by providing the individual with a copy of the independent reviewer's evaluation report;
- v. Failing to conduct a resident review of individuals with mental illness in a nursing home who have a significant change in condition; and
 - vi. Failing to provide services in the community to those persons who would have been identified as suitable for community care outside a nursing home, had the defendants conducted preadmission screens and resident reviews as required by the NHRA.
- c. A Declaration that defendants have violated the Americans with Disabilities Act, and the Rehabilitation Act by utilizing criteria or methods of administration that defeat or substantially impair the objectives of the PASRR program;
 - d. An Order requiring defendants to administer programs and provide services for individuals with mental illness residing in nursing homes in the most integrated setting appropriate to their needs;
 - e. An Order requiring defendants to:
 - i. Develop and implement an effective plan for providing care and treatment in the most integrated setting appropriate to the needs of those individuals with mental illness who are in nursing homes, who are qualified to receive mental health services in more integrated settings, and who do not oppose receiving mental health services in a more integrated setting.
 - ii. Promptly identify, expand, develop and make available sufficient community-based care and treatment opportunities, including O MH community housing, to ensure that the most-integrated appropriate care

and treatment is provided without undue delay to those qualified individuals who desire it;

- f. An Order requiring defendants to:
- i. Operate a PASRR program which will identify whether individuals with mental illness proposed for admission to a nursing home require the level of services provided by a nursing facility and disapprove their admission to a nursing facility if they do not, as required by the NHRA;
 - ii. Operate a PASRR program which will determine whether an individual with mental illness proposed for admission to a nursing home could receive community-based treatment, and, if so, disapprove their admission to a nursing facility as required by the NHRA;
 - iii. Operate a PASRR program which will determine whether the nursing facility to which an individual with mental illness is proposed for admission is capable of providing needed treatment and, if not, disapprove their admission to the nursing facility as required by the NHRA;
 - iv. Operate a PASRR program which will provide adequate notice of PASRR decisions, including providing a copy of the independent evaluation report to the individual or resident and his or her legal representative;
 - v. Operate a PASRR program which will conduct a resident review of all individuals with mental illness in a nursing home who experience a significant change in condition
 - vi. Conduct a resident review of every nursing home resident with mental illness who has never received a lawful preadmission screen or a lawful

DISABILITY ADVOCATES, INC.
Cliff Zucker (CZ-2254)
Roger A. Bearden (RB-9491)
Amy Lowenstein (AL-6119)
5 Clinton Square, 3rd Floor
Albany, NY 12207
(518) 432-7861

NEW YORK LAWYERS FOR
THE PUBLIC INTEREST
Marianne Engelman-Lado (ML-6749)
Sandra DeValle (SD-1700)
151 West 30th Street, 11th Floor
New York, NY 10001-4007
(212) 244-4664

MENTAL HYGIENE LEGAL SERVICE,
SECOND JUDICIAL DEPARTMENT
Dennis B. Feld (DF-2803)
Lisa Volpe (LV-7953)
170 Old Country Road
Mineola, NY 11501
(516) 746-4373