

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

LEAH JIMMIE, JOSETTE HALECHKO,
LEWIS BOWERS, and JANICE SLATER,
by and through their next friend, Carl
Mosier; RONALD PEARSON and
WILLIAM SACKS, by and through their
next friend, Connie Hammann; EDWARD
NAUSS and BENJAMIN PERRICK, by
and through their next friend, Akhnaton
Browne, on behalf of themselves and all
others similarly situated,

Plaintiffs,

v.

DEPARTMENT OF PUBLIC WELFARE
OF THE COMMONWEALTH OF
PENNSYLVANIA and ESTELLE B.
RICHMAN, in her official capacity as
Secretary of Public Welfare of the
Commonwealth of Pennsylvania,

Defendants.

Filed via ECF System

Civil Action No. _____

Class Action

COMPLAINT

I. Introduction

1. Plaintiffs are individuals with mental retardation who are institutionalized in Pennsylvania’s state psychiatric hospitals. Plaintiffs bring this lawsuit on behalf of themselves and over 100 other people with mental retardation who are confined in Pennsylvania’s state psychiatric hospitals.

2. Plaintiffs and many other putative class members are appropriate for placement in community settings and are not opposed to such placements. Defendants, however, have not offered them any alternative to remaining institutionalized, even though the costs of providing community services to them would be far less than the costs of continuing to institutionalize them. Defendants also have not developed or implemented an integration plan with concrete timelines and benchmarks to offer and provide community alternatives to Plaintiffs and other individuals with mental retardation who are unnecessarily institutionalized in state psychiatric hospitals and are not opposed to community placement. These actions and inactions violate Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.

3. Defendants also have violated Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act by failing to modify their policies, practices, and procedures to assure that the mental health treatment provided to individuals with mental retardation at state psychiatric hospitals is adapted to meet their needs so as to afford them the same opportunity to benefit from such treatment as individuals who do not have mental retardation.

4. Defendant Richman has failed to assure that Plaintiffs and the putative class members receive appropriate and essential habilitation services at the state psychiatric hospitals and has failed to adapt the mental health treatment provided at

state psychiatric hospitals to meet the needs of people with mental retardation. Defendant Richman also has failed to implement professional recommendations for community placement. These actions and inactions violate the substantive due process rights of Plaintiffs and putative class members guaranteed by the Fourteenth Amendment of the Constitution by failing to assure that they are safe and free from unnecessary restraints and that they receive minimally adequate or reasonable training to ensure safety and their freedom from undue restraint in accordance with the judgment of qualified treatment professionals.

5. Plaintiffs seek appropriate declaratory and injunctive relief.

II. Jurisdiction and Venue

6. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343(a)(3), and 1343(a)(4).

7. Plaintiffs' claims are authorized by 42 U.S.C. §§ 1983 and 12133, 29 U.S.C. § 794a(a)(1), and 28 U.S.C. §§ 2201 and 2202.

8. Venue is appropriate in this district pursuant to 28 U.S.C. § 1391(b) since Defendants reside in this District.

III. Parties

9. Plaintiff Leah Jimmie is 28-year-old resident of Luzerne County, Pennsylvania who has been institutionalized in a state psychiatric hospital since 2007.

She brings this lawsuit by and through her next friend, Carl Mosier, pursuant to Federal Rule of Civil Procedure 17(c).

10. Plaintiff Josette Halechko is a 26-year-old resident of Luzerne County, Pennsylvania who has been institutionalized in a state psychiatric hospital since April 2007. She brings this lawsuit by and through her next friend, Carl Mosier, pursuant to Federal Rule of Civil Procedure 17(c).

11. Plaintiff Lewis Bowers is a 43-year-old resident of Tioga County, Pennsylvania who has been institutionalized in a state psychiatric hospital since 1994. He brings this lawsuit by and through his next friend, Carl Mosier, pursuant to Federal Rule of Civil Procedure 17(c).

12. Plaintiff Janice Slater is a 19-year-old resident of Lackawanna County, Pennsylvania who has been institutionalized in a state psychiatric hospital since 2008. She brings this lawsuit by and through her next friend, Carl Mosier, pursuant to Federal Rule of Civil Procedure 17(c).

13. Plaintiff Ronald Pearson is a 56-year-old resident of Lehigh County, Pennsylvania who has been institutionalized in a state psychiatric hospital since 2006. He brings this lawsuit by and through his next friend, Connie Hammann, pursuant to Federal Rule of Civil Procedure 17(c).

14. Plaintiff William Sacks is a 49-year-old resident of Lehigh County, Pennsylvania who has been institutionalized in a state psychiatric hospital since 2002. He brings this lawsuit by and through his next friend, Connie Hammann, pursuant to Federal Rule of Civil Procedure 17(c).

15. Plaintiff Edward Nauss is a 59-year-old resident of Delaware County, Pennsylvania who has been institutionalized in a state psychiatric hospital since 1998. He brings this lawsuit by and through his next friend, Akhnaton Browne, pursuant to Federal Rule of Civil Procedure 17(c).

16. Plaintiff Benjamin Perrick is a 65-year-old resident of Philadelphia, Pennsylvania who has been institutionalized in a state psychiatric hospital since 1955. He brings this lawsuit by and through his next friend, Akhnaton Browne, pursuant to Federal Rule of Civil Procedure 17(c).

17. Defendant Department of Public Welfare (DPW) is the Commonwealth agency that is responsible to provide services to Pennsylvanians with mental retardation, including Plaintiffs and putative class members, under the Mental Health and Mental Retardation Act of 1966, 50 P.S. § 4201(1). DPW operates seven psychiatric hospitals and funds community-based mental retardation and mental health services.

18. Defendant, Estelle B. Richman, is the Secretary of Public Welfare for the Commonwealth of Pennsylvania. Defendant Richman is responsible to administer and oversee DPW, including its mental health and mental retardation programs. Defendant Richman also is responsible to assure that DPW's programs and services comply with the United States Constitution and relevant federal laws, including the Americans with Disabilities Act and Rehabilitation Act.

IV. Class Action Allegations

19. Plaintiffs, Jimmie, Halechko, Bowers, Slater, Pearson, Sacks, Nauss, and Perrick, by and through their next friends, bring this lawsuit on behalf of themselves and all other persons who have mental retardation and are institutionalized in a state-operated psychiatric hospital with the exception of those subject to the jurisdiction of the criminal courts.

20. The size of the class makes joinder impracticable. DPW has identified approximately 115 individuals institutionalized in its psychiatric hospitals who have a diagnosis of mental retardation and who are not subject to the jurisdiction of the criminal courts. Individual lawsuits are impracticable due to the geographic dispersion of putative class members, their lack of resources, and their intellectual and mental health disabilities.

21. There are questions of fact and law common to class members, including, but not limited to:

a. whether Defendants have failed to offer and provide services and supports in more integrated settings to class members who are not opposed to discharge and, if so, whether that failure violates the integration mandates of Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act;

b. whether Defendants have used methods of administration that have the effect of discriminating against individuals with disabilities and, if so, whether doing so violates Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act;

c. whether Defendants have failed to modify their policies, practices, and procedures to adapt the mental health treatment provided at state hospitals to meet the needs of individuals with mental retardation and, if so, whether such failure violates Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act;

d. whether Defendants have failed to assure that state psychiatric hospital staff have adequate training and experience to serve individuals with mental retardation and, if so, whether such failure violates the Due Process Clause of the Fourteenth Amendment to the Constitution;

e. whether Defendants have institutionalized people with mental retardation who do not have mental illness in state psychiatric hospitals and, if so, whether that violates the Due Process Clause of the Fourteenth Amendment to the Constitution;

f. whether Defendants have failed to provide habilitation services to state psychiatric hospital residents with mental retardation and, if so, whether such failure violates the Due Process Clause of the Fourteenth Amendment to the Constitution;

g. whether Defendants have failed to adapt the mental health services they provide in state psychiatric hospitals so that individuals with mental retardation can benefit from it and, if so, whether such failure violates the Due Process Clause of the Fourteenth Amendment to the Constitution; and

h. whether Defendants have failed to provide community mental retardation services to state psychiatric hospital residents with mental retardation whose qualified treatment professionals have recommended such services and, if so, whether such failure violates the Due Process Clause of the Fourteenth Amendment to the Constitution.

22. The claims of the named Plaintiffs are typical of those of all putative class members.

23. The named Plaintiffs will adequately protect the interests of the class. They have no interests which conflict with other class members. Plaintiffs' counsel are experienced in litigating class actions, including enforcement of the civil rights of people with disabilities.

24. Defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate injunctive and declaratory relief with respect to the class as a whole.

V. Facts

A. Plaintiffs' Unnecessary Institutionalization

25. Plaintiff Leah Jimmie is 28 years old and has dual diagnoses of mental retardation and schizoaffective disorder.

26. Ms. Jimmie was involuntarily committed to Clarks Summit State Hospital (CSSH) in October 2007 where she remains involuntarily committed. Ms. Jimmie has been committed to CSSH twice prior to her most recent commitment and has been admitted to community psychiatric hospitals on multiple occasions.

27. Ms. Jimmie does not receive appropriate habilitation services at CSSH to maximize her self-care, functional, and social skills in light of her mental retardation. Ms. Jimmie's mental retardation undermines her ability to benefit from

mental health treatment at CSSH because it is not adapted to meet her intellectual disability.

28. Ms. Jimmie's treatment professionals at CSSH have concluded that, with appropriate supports and services, she can live in the community. CSSH is not the most integrated setting appropriate to meet her needs.

29. Ms. Jimmie wants to be discharged from CSSH and live in the community.

30. Plaintiff Josette Halechko is 26 years old and has dual diagnoses of mental retardation and schizoaffective disorder.

31. Ms. Halechko was involuntarily committed to CSSH in April 2007 where she remains involuntarily committed. Ms. Halechko had been admitted to community psychiatric hospitals on multiple occasions prior to her commitment to CSSH.

32. Ms. Halechko does not receive appropriate habilitation services at CSSH to maximize her self-care, functional, and social skills in light of her mental retardation. Ms. Halechko's mental retardation undermines her ability to benefit from mental health treatment at CSSH because it is not adapted to meet her intellectual disability.

33. The treatment professionals at CSSH have determined that Ms. Halechko can live in the community with appropriate services and supports. They have recommended since at least April 2008 that Ms. Halechko should be discharged to a placement for individuals with mental retardation, but she remains institutionalized unnecessarily at CSSH. CSSH is not the most integrated setting appropriate to meet her needs.

34. Ms. Halechko wants to be discharged from CSSH and live in the community.

35. Plaintiff Lewis Bowers is 43 years old and has diagnoses of mental retardation and impulse control disorder NOS (not otherwise specified).

36. Mr. Bowers was involuntarily committed to CSSH in March 1994 where he remains involuntarily committed.

37. A physician at CSSH stated on his admission that he “is a management problem and primarily MR [mental retardation], that he is not psychotic, and inpatient treatment would not be [the] treatment of choice” and that he needs treatment appropriate for his mental retardation.

38. Mr. Bowers does not receive appropriate habilitation services at CSSH to maximize his self-care, functional, and social skills in light of his mental retarda-

tion. Mr. Bowers's mental retardation undermines his ability to benefit from mental health treatment at CSSH because it is not adapted to meet his intellectual disability.

39. Mr. Bowers, with appropriate supports and services, could live in the community. The Tioga County MH/MR Program has concluded that he is appropriate for discharge. CSSH is not the most integrated setting appropriate to meet his needs.

40. Mr. Bowers wants to be discharged from CSSH and live in the community.

41. Plaintiff Janice Slater is 19 years old and has diagnoses of mental retardation, bipolar disorder, and post-traumatic stress disorder.

42. Ms. Slater was involuntarily committed to CSSH in July 2008 where she remains involuntarily committed. Prior to her commitment to CSSH, she had been admitted to community psychiatric hospitals on multiple occasions.

43. Ms. Slater does not receive appropriate habilitation services at CSSH to maximize her self-care, functional, and social skills in light of her mental retardation. Ms. Slater's mental retardation undermines her ability to benefit from mental health treatment at CSSH because it is not adapted to meet her intellectual disability.

44. On information and belief, Ms. Slater, with appropriate supports and services, could live in the community. CSSH is not the most integrated setting appropriate to meet her needs.

45. Ms. Slater wants to be discharged from CSSH and live in the community.

46. Plaintiff Ronald Pearson is 56 years old and has diagnoses of mental retardation and schizoaffective disorder, bipolar type.

47. Mr. Pearson was admitted to Allentown State Hospital (ASH) in August 2006 where he remains. Mr. Pearson resides on a ward that is locked during weekdays except for limited access to the smoking pavilion. Mr. Pearson signed a document pursuant to 50 P.S. § 7206(a) that provides that ASH may hold him for up to 72 hours after he gives notice that he wants to leave to enable ASH to secure an involuntary commitment order. On information and belief, ASH would contact the police if Mr. Pearson left ASH without permission and the police would force him to return to ASH. Mr. Pearson is *de facto* involuntarily committed to state custody.

48. Mr. Pearson does not receive appropriate habilitation services at ASH to maximize his self-care, functional, and social skills in light of his mental retardation. Mr. Pearson's mental retardation undermines his ability to benefit from mental health treatment at ASH because it is not adapted to his intellectual disability.

49. Mr. Pearson's treatment professionals at ASH have concluded since approximately February 2007 that, with appropriate mental retardation and mental health services and supports, he could live in the community. ASH is not the most integrated setting appropriate to meet his needs.

50. Mr. Pearson wants to be discharged from ASH and live in the community.

51. Plaintiff William Sacks is 48 years old and has diagnoses of mental retardation and chronic undifferentiated schizophrenia.

52. Mr. Sacks was involuntarily committed to ASH in October 2002 where he remains involuntarily committed.

53. Mr. Sacks does not receive appropriate habilitation services at ASH to maximize his self-care, functional, and social skills in light of his mental retardation. Mr. Sacks's mental retardation undermines his ability to benefit from mental health treatment at ASH because it is not adapted to his intellectual disability.

54. Mr. Sacks's treatment professionals at ASH have concluded that, with appropriate supports and services, he could live in the community. ASH is not the most integrated setting appropriate to Mr. Sacks's needs.

55. Mr. Sacks wants to be discharged from ASH and live in the community.

56. Plaintiff Edward Nauss is 59 years old and has diagnoses of mental retardation and schizoaffective disorder.

57. Mr. Nauss was involuntarily committed to Norristown State Hospital (NSH) in September 1998 where he remains. Mr. Nauss has been admitted to psychiatric hospitals on multiple occasions, including several hospitalizations at Haverford State Hospital. Mr. Nauss was admitted to White Haven Center, a state-operated intermediate care facility for persons with mental retardation at age 14 and was transferred to Pennhurst State School and Hospital until he was discharged at age 18.

58. Mr. Nauss does not receive appropriate habilitation services at NSH to maximize his self-care, functional, and social skills in light of his mental retardation. Mr. Nauss's mental retardation undermines his ability to benefit from mental health treatment at NSH because it is not adapted to his intellectual disability.

59. Mr. Nauss's treatment professionals at NSH and in the Delaware County Office of Mental Retardation have concluded that, with appropriate supports and services, he can live in the community. NSH is not the most integrated setting appropriate to meet his needs.

60. Mr. Nauss wants to be discharged from NSH and live in the community.

61. Plaintiff Benjamin Perrick is 65 years old and has diagnoses of mental retardation and pervasive developmental disorder, an autism spectrum disorder.

62. In December 1955, when he was 12 years old, Mr. Perrick was admitted to NSH where he remains. Mr. Perrick resides on a locked ward at NSH. On information and belief, Mr. Perrick signed a document pursuant to 50 P.S. § 7206(a) that provides that NSH may hold him for up to 72 hours after he gives notice that he wants to leave to enable NSH to secure an involuntary commitment order. On information and belief, NSH would contact the police if Mr. Perrick left NSH without permission and the police would force him to return to NSH. Mr. Perrick, who has been institutionalized at NSH for over 53 years, is *de facto* involuntarily committed to state custody.

63. Mr. Perrick does not receive appropriate habilitation services at NSH to maximize his self-care, functional, and social skills in light of his intellectual and developmental disabilities. A 1995 Psychological Evaluation of Mr. Perrick noted that his IQ was “substantially lower” than that obtained in his 1959 evaluation and “does indicate that Mr. Perrick’s intellectual functioning has declined over the years.” A 2007 evaluation of Mr. Perrick indicated that his verbal, reading, and drawing skills have deteriorated since his admission to NSH.

64. Mr. Perrick's intellectual and developmental disabilities undermine his ability to benefit from mental health treatment at NSH because it is not adapted to those disabilities. The 1995 Psychological Evaluation made a number of recommendations for treatment designed to accommodate his intellectual disabilities and increase his ability to benefit from treatment (*e.g.*, limiting stimulation in his environment; limiting the length of his therapy sessions; participating in tasks that involve the simple discrimination of words and stimuli; having him assist -- with supervision and cuing -- to take care of his clothes; immediately reinforcing positive behavior). On information and belief, these recommendations were not implemented.

65. Mr. Perrick, with appropriate services and supports, could live in the community. At the request of DPW's Office of Developmental Programs, the Philadelphia Department of Behavioral Health and Mental Retardation assessed Mr. Perrick in 2007 and identified the supports and services that he would need to live in the community. The report was submitted to DPW, but, to date, DPW has not provided Philadelphia with further directions with respect to planning for the development of community services for Mr. Perrick. NSH is not the most integrated setting appropriate to meet his needs.

66. Mr. Perrick wants to be discharged from NSH and live in the community.

B. DPW's Failure to Provide Minimally Adequate Training to Plaintiffs and Class Members

67. The Mental Health and Mental Retardation Act of 1966 (MH/MR Act), 50 P.S. §§ 4101-4704, requires DPW “[t]o assure within the State the availability and equitable provision of adequate mental health and mental retardation services for all persons who need them” 50 P.S. § 4201(1).

68. The MH/MR Act requires DPW to operate any state facilities. 50 P.S. § 4202(a).

69. DPW directly operates seven psychiatric hospitals -- Allentown State Hospital in Lehigh County; Clarks Summit State Hospital in Lackawanna County; Danville State Hospital in Montour County; Norristown State Hospital in Montgomery County; Torrance State Hospital in Westmoreland County; Warren State Hospital in Warren County; and Wernersville State Hospital in Berks County.

70. There currently are approximately 1,720 individuals institutionalized in DPW's seven psychiatric hospitals. Of these 1,720 individuals, approximately 115 have diagnoses of mental retardation in addition to other diagnoses. There are individuals with mental retardation diagnoses in all of the state psychiatric hospitals.

71. The average length of stay for individuals with mental retardation in state psychiatric hospitals exceeds 10 years. More than 30 percent of these individuals have lengths of stay in excess of 10 years.

72. While mental illness is treated medically, mental retardation is not a medical problem and medical training, by itself, does not qualify staff to work with people with mental retardation. Proper assessment and treatment of individuals with dual diagnoses of mental retardation and mental illness requires professionals who have training and experience in serving this unique population.

73. Mental retardation is treated by habilitation. Habilitation assists individuals with mental retardation to acquire, maximize, and maintain skills for self-care, social functioning, and functioning in their environment. Habilitation requires individualized, interdisciplinary evaluations and treatment by staff trained in a developmental (not medical) model. Habilitation should be provided in as normal and integrated a setting as possible so that the individuals can learn by observing and participating in everyday life activities. Habilitation includes training and activities in basic self-care skills, community living skills, vocational services, and therapies. Habilitation must be constantly provided to people with mental retardation to avoid regression and loss of skills.

74. People with mental retardation can have behavior disorders that are characterized by self-injury and aggressiveness. Habilitation for such individuals must include behavioral modification plans, developed and implemented in a manner

that is individualized to take into account the person's intellectual disability. Such behavioral modification plans can ameliorate these behavioral problems.

75. It is difficult to provide appropriate habilitation services in state psychiatric hospitals. Individuals in these facilities lack access to community activities necessary for habilitation. Indeed, most individuals in Pennsylvania's state psychiatric hospitals live on locked wards with little, if any, access to community life. In addition, people with mental retardation are likely to model the behaviors exhibited by people with mental illness if they are continually exposed to them.

76. To benefit from mental health services, people with dual diagnoses of mental retardation and mental illness must be provided with those services in a manner that takes into consideration their intellectual disabilities. For example, treatment plans that measure progress toward objectives in terms of weeks or months, as they do in state psychiatric hospitals, will not be of much value to people with mental retardation whose cognitive limitations generally require treatment strategies that have goals and consequences measured in days. In addition, individuals with mental retardation, whose abstract thinking and vocabulary may be limited, generally need to be provided with clear, concrete directions using basic vocabulary, offering explanations where needed, and avoiding use of sarcasm. Yet, the environment at DPW's state psychiatric hospitals makes it difficult, if not impossible, to assure that

treatment and interactions with clients with mental retardation are meaningful. The failure to provide meaningful access to mental health services to Plaintiffs and putative class members by adapting those services to their intellectual disabilities makes them more likely to be subject to longer institutional stays or to the “revolving door” of recurrent psychiatric readmissions.

77. On information and belief, DPW’s staff at its state psychiatric hospitals lack the experience and training necessary to make them qualified to: provide appropriate assessment of people with mental retardation; provide necessary habilitation services to people with mental retardation; provide any needed mental health treatment in a manner that is adapted to meet the needs of people with mental retardation; and to determine whether such individuals are appropriate for discharge to community-based mental retardation programs.

78. DPW’s institutionalization of people with no diagnosis of mental illness, such as Mr. Perrick and certain other putative class members, in a state psychiatric hospital is a substantial departure from professional judgment and deprives them of the minimally adequate training necessary to assure that they are safe and free from unnecessary restraints.

79. On information and belief, DPW does not provide state psychiatric hospital residents who have mental retardation, including Plaintiffs and putative class

members, with necessary and appropriate habilitation services to meet their needs. This constitutes a substantial departure from professional judgment and deprives such individuals of the minimally adequate training necessary to assure their safety and to assure that they are free from unnecessary restraints.

80. On information and belief, Defendants have failed to adapt the mental health services provided at state psychiatric hospitals to meet the unique needs of people with dual diagnoses of mental retardation and mental illness. This constitutes a substantial departure from professional judgment and deprives such individuals of the minimally adequate training necessary to assure their safety and to assure that they are free from undue restraints.

C. DPW's Failure to Provide Community Alternatives to Plaintiffs and Class Members

81. Plaintiffs and many putative class members, with appropriate services and supports that address all of their disabilities, could live in more integrated settings than the state psychiatric hospitals where they currently are institutionalized.

82. Many of the Plaintiffs and putative class members have been determined by treatment professionals in the state psychiatric hospitals and/or professionals employed by Defendants' agents at the County Mental Health and Mental Retardation (MH/MR) Programs to be appropriate for discharge to community mental retardation services.

83. The failure to implement community placement recommendations is a substantial departure from professional judgment and renders these individuals subject to unnecessary restraints and fails to provide them with the minimally adequate training necessary to avoid unnecessary restraints.

84. Those Plaintiffs and many putative class members who have not been determined by treatment professionals in the state psychiatric hospitals to be appropriate for discharge have not received evaluations that accord with professional judgment. Staff are not qualified to assess whether a person with mental retardation can receive community-based mental retardation services and, on information and belief, are influenced by what services are available, rather than what is appropriate to meet the needs of the individuals.

85. Plaintiffs and many putative class members are not opposed to discharge to the community as long as appropriate services and supports are provided.

86. Some putative class members who might currently be opposed to discharge to the community may not be familiar with the types of community services and supports that could be provided and, if they were provided with information and education about such services and supports, they might not be opposed to discharge.

87. Plaintiffs and putative class members who are appropriate for and not opposed to discharge have not been offered appropriate community mental retardation services by Defendants.

88. The MH/MR Act requires DPW to provide at least 90 percent of the funding for community-based mental retardation services. 50 P.S. § 4509(1).

89. DPW funds an array of home and community-based services for persons with mental retardation. The provision of community-based mental retardation services is administered through Defendants' agents, the County MH/MR Programs. *See* 50 P.S. § 4301.

90. On information and belief, Defendants require Supports Coordinators (i.e., case managers) to be provided to all individuals with mental retardation in state psychiatric hospitals. However, the ratio of Supports Coordinators to clients in those institutions is significantly higher than the ratio of Supports Coordinators to clients who live in the community since DPW does not pay for supports coordination services provided to residents of the state psychiatric hospitals. The high ratio, combined with the distance between many Supports Coordinators and the clients living in isolated state psychiatric hospitals, undermines the ability of Supports Coordinators to provide effective services to clients in those facilities.

91. The average cost to provide services for a resident in DPW's psychiatric hospitals is approximately \$208,000 annually.

92. DPW cannot receive federal Medical Assistance funding for the costs of providing care to residents of state psychiatric hospitals with the exceptions of residents under age 21 and residents age 65 and older. Accordingly, the Commonwealth pays approximately 90 percent of the overall costs to fund state psychiatric hospitals.

93. People with dual diagnoses of mental retardation and mental illness, including the named Plaintiffs and putative class members, are eligible to receive community-based mental retardation services in Pennsylvania.

94. The joint federal-state Medical Assistance program provides nearly 90 percent of the funding for all community-based mental retardation services in Pennsylvania through home and community-based services (HCBS) waivers, including the Consolidated Waiver and the Person/Family Directed Support Waiver.

a. These HCBS Waivers are approved by the federal Centers for Medicare and Medicaid Services (CMS) pursuant to 42 U.S.C. § 1396n(c).

b. With adjustments under the American Recovery and Reinvestment Act of 2009, the federal government currently pays approximately 63.1 percent of the

costs of Medical Assistance services in Pennsylvania, including the costs of the HCBS Waivers.

95. The Commonwealth could receive an even higher federal Medical Assistance match to fund community-based services to state psychiatric hospital residents through implementation of its “Money Follows the Person” (MFP) Rebalancing Demonstration Project that was approved by CMS. Under this Project, the federal government authorized Pennsylvania to receive an enhanced federal match of approximately 77 percent to provide community alternatives to 165 residents of state psychiatric hospitals who are 65 years old or older (26 in calendar year 2008, 69 in calendar year 2009, and 13 in calendar year 2010). Such an increased match would defray the costs involved in transitioning people from institutional to community services (including the costs of funding, for a short period of time, both institutional and community services for the individuals). On information and belief, DPW has not implemented and has no plans to implement this initiative for state psychiatric hospital residents.

96. The average annual cost of community-based residential services for an individual with mental retardation in Fiscal Year 2008-09 is approximately \$80,200. The average annual costs of non-residential community-based services for an individual with mental retardation in Fiscal Year 2008-09 is approximately \$15,300.

Accordingly, the average annual cost of community-based services for a person with mental retardation who receives both residential and non-residential supports is less than \$100,000 -- less than 50 percent of the cost of the \$208,000 average annual cost of services for an individual in a state psychiatric hospital.

97. Because most community-based mental retardation services are funded by the Medical Assistance program, the Commonwealth pays only about 37 percent of the approximately \$100,000 average annual cost of providing community-based mental retardation services. In contrast, for most residents of state psychiatric hospitals, the Commonwealth must pay 100 percent of the costs.

98. There is a waiting list for community-based mental retardation services in Pennsylvania.

a. Defendants divide individuals on the waiting list into three categories: “emergency” (i.e., those who need services immediately); “critical” (i.e., those who need services within two years); and “planning” (i.e., those who are anticipated to need services more than two years but less than five years away).

b. Defendants’ agents give priority to persons living in the community who are on the emergency and critical waiting lists over those, like Plaintiffs and putative class members, who are institutionalized.

99. Defendants' agents complete Prioritization of Urgency of Need for Services (PUNS) assessments for each individual with mental retardation who apply for community mental retardation services and are not fully served.

100. PUNS assessments are completed for some state psychiatric hospital residents with diagnoses of mental retardation, but not for all such residents. Most individuals who have received PUNS assessments and are placed on waiting lists are unlikely to be removed from the waiting lists despite their categorization of need.

a. On information and belief, Plaintiffs Perrick and Slater do not have PUNS assessments and, therefore, have not been placed at all on the waiting list for services.

b. On information and belief, Plaintiff Jimmie has had no PUNS assessment after her admission to CSSH and the PUNS assessment completed prior to her admission to CSSH indicated that all of her needs were met so that she was not on the waiting list for services.

c. Plaintiffs Nauss and Bowers have been placed on the "emergency" waiting list based on their PUNS assessments.

d. Plaintiffs Halechko, Pearson, and Sacks have been placed on the "critical" waiting list based on their PUNS assessments.

101. In at least the past five fiscal years, DPW has sought and received funding for initiatives to provide community-based services for individuals with mental retardation on the waiting list for community services, including: more than 3,400 individuals in FY 2007-08 and more than 1,300 individuals in FY 2008-09. DPW has requested funding for FY 2009-10 to provide community services to nearly 800 persons with mental retardation on the waiting list.

102. On information and belief, more than 1,000 of the approximately 5,500 persons who have received or will receive funding for community services under the waiting list initiatives between FY 2007-08 and FY 2009-10 will receive both residential and non-residential services and supports.

103. In FY 2008-09, DPW funded community mental retardation services through HCBS Waivers for only 16 individuals who had been in the mental health system. For FY 2009-10, DPW has requested funding to provide community mental retardation services through HCBS Waivers for only 3 individuals who are in the mental health system.

104. The costs to Defendants of providing Plaintiffs and putative class members with appropriate, community-based mental retardation services, including residential services, would be less than the cost to Defendants to institutionalize them in state psychiatric hospitals.

105. DPW has no viable integration plan -- with specific time lines and benchmarks -- to develop and provide community alternatives to residents of state psychiatric hospitals who have mental retardation.

106. DPW does not have a waiting list that moves at a reasonable pace to provide community alternatives to state psychiatric hospital residents who have mental retardation.

D. Irreparable Harm

107. Plaintiffs and putative class members have suffered irreparable harm as a result of the Defendants' actions and inactions in this case.

VI. Claims

A. Violation of Title II of the Americans with Disabilities Act

108. Paragraphs 1 through 107 are incorporated by reference. This Count is brought solely against Defendant Richman in her official capacity for acts and omissions under state law.

109. Plaintiffs and putative class members have mental retardation, an impairment that substantially limits one or more major life activities, including but not limited to, caring for themselves, learning, concentrating, and thinking. Plaintiffs and putative class members also have other impairments, such as schizoaffective disorder, bipolar disorder, pervasive developmental disorder, and impulse control disorder that

substantially limit one or more major life activities, including but not limited to, caring for themselves, concentrating, thinking, and interacting with others. As such, they are persons with disabilities protected by the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12102(1)(A), 12102(2)(A).

110. Plaintiffs and putative class members are eligible for community-based mental retardation services and, as such, are qualified persons with disabilities under the ADA. 42 U.S.C. § 12131(2).

111. DPW, operated and administered by Defendant Richman, is a public entity subject to the requirements of Title II of the ADA. 42 U.S.C. § 12131(1)(B).

112. Defendant Richman violates Title II of the ADA, 42 U.S.C. § 12132 and 28 C.F.R. § 35.130(d), by unnecessarily segregating Plaintiffs and putative class members in institutions, by failing to offer them mental retardation services in the community, which is the most integrated setting appropriate to meet their needs, and by failing to provide such community services to Plaintiffs and those putative class members who are not opposed to discharge.

113. Defendant Richman violates Title II of the ADA, 42 U.S.C. § 12132 and 28 C.F.R. § 35.130(b)(3), by using methods of administration that subject Plaintiffs and putative class members to discrimination through continued unnecessary segregation and institutionalization, including, but not limited to:

a. failing to effectively assess all residents of state psychiatric hospitals who have diagnoses of mental retardation to determine what community supports and services they need and whether, if they received such services and supports, they would be appropriate for discharge;

b. not requiring DPW's agents to place state psychiatric hospital residents who have mental retardation on the waiting list for community mental retardation services; not placing all such residents who are appropriate for discharge on the emergency waiting list; and not giving priority to those state psychiatric hospital residents who are on the emergency waiting list;

c. not assuring that Plaintiffs and putative class members have access to effective Supports Coordination services to assist them in securing appropriate community services;

d. failing to provide adequate information to state psychiatric hospital residents who have mental retardation and their families about the community placements to enable them to make an informed choice if and when they are offered community services; and

e. failing to have a plan with specific and concrete benchmarks and timelines within which state psychiatric hospital residents who have mental retarda-

tion and their families will be offered and, if accepted, provided with community alternatives so that there is a waiting list that moves at a reasonable pace.

114. Defendant Richman violates Title II of the ADA, 42 U.S.C. § 12132 and 28 C.F.R. § 35.130(b)(7), by failing to make reasonable modifications in its policies, practices, and procedures necessary to enable Plaintiffs and putative class members to avoid discrimination against them based on their mental retardation. Specifically, Defendant has failed to assure that staff at state psychiatric hospitals have appropriate training and experience to provide mental health services to people with mental retardation and has failed to adapt the mental health services DPW provides to people with mental retardation in state psychiatric hospitals so that they can have the opportunity for the same benefit from the services as state psychiatric hospital residents who do not have mental retardation.

B. Violation of Section 504 of the Rehabilitation Act

115. Paragraphs 1 through 114 are incorporated by reference. This Count is brought solely against Defendant DPW.

116. Plaintiffs and putative class members have mental retardation, an impairment that substantially limits one or more major life activities, including but not limited to, caring for themselves, learning, concentrating, and thinking. Plaintiffs and putative class members also have other impairments, such as schizoaffective

disorder, bipolar disorder, pervasive developmental disorder, and impulse control disorder that substantially limit one or more major life activities, including but not limited to, caring for themselves, concentrating, thinking, and interacting with others. As such, they are persons with disabilities protected by Section 504 of the Rehabilitation Act (RA). 29 U.S.C. § 705(20)(B).

117. Plaintiffs and putative class members are eligible for community-based mental retardation services and, as such, are qualified persons with disabilities pursuant to Section 504 of the RA.

118. DPW is a recipient of federal financial assistance and, as such, is subject to the requirements of Section 504 of the RA. 29 U.S.C. § 794(b).

119. Defendant DPW violates Section 504 of the RA, 29 U.S.C. § 794 and 28 C.F.R. § 41.51(d), by unnecessarily segregating Plaintiffs and putative class members in institutions, by failing to offer them mental retardation services in the community, which is the most integrated setting appropriate to meet their needs, and by failing to provide such services to Plaintiffs and those putative class members who are not opposed to discharge.

120. Defendant DPW violates Section 504 of the RA, 29 U.S.C. § 794 and 28 C.F.R. § 41.51(b)(3), by using methods of administration that subject Plaintiffs and

putative class members to discrimination through continued unnecessary institutionalization, including, but not limited to:

a. failing to effectively assess all residents of state psychiatric hospitals who have diagnoses of mental retardation to determine what community supports and services they need and whether, if they received such services and supports, they would be appropriate for discharge;

b. not requiring its agents to place state psychiatric hospital residents who have mental retardation on the waiting list for community mental retardation services; not placing all such residents who are appropriate for discharge on the emergency waiting list; and not giving priority to those state psychiatric hospital residents who are on the emergency waiting list;

c. not assuring that Plaintiffs and putative class members have access to effective Supports Coordination services to assist them in securing appropriate community services;

d. failing to provide information to state psychiatric hospital residents who have mental retardation and their families about the community placements to enable them to make an informed choice if and when they are offered community services; and

e. failing to have a plan with specific and concrete benchmarks and timelines within which state psychiatric hospital residents who have mental retardation and their families will be offered and, if accepted, provided with community alternatives so that there is a waiting list that moves at a reasonable pace.

121. Defendant DPW violates Section 504 of the RA, 29 U.S.C. § 794, by failing to make reasonable modifications in its policies, practices, and procedures necessary to enable Plaintiffs and putative class members to avoid discrimination against them based on their mental retardation. Specifically, DPW has failed to assure that staff at state psychiatric hospitals have appropriate training and experience to provide mental health services to people with mental retardation and has failed to adapt the mental health services it provides to people with mental retardation in state psychiatric hospitals so that they can have the opportunity for the same benefit from the services as state psychiatric hospital residents who do not have mental retardation.

C. Violation of the Fourteenth Amendment of the Constitution

122. Paragraphs 1 through 121 are incorporated by reference. This Count is brought solely against Defendant Richman in her official capacity as Secretary of Public Welfare for actions and inactions under color of state law.

123. Defendant Richman has violated the Due Process Clause of the Fourteenth Amendment to the Constitution and 42 U.S.C. § 1983 by failing to provide

Plaintiffs and putative class members with minimally adequate or reasonable training to ensure their safety and freedom from undue restraint in accordance with the judgment of qualified treatment professionals by, *inter alia*:

- a. failing to assure that staff at state psychiatric hospitals are qualified to properly assess and treat individuals with mental retardation;
- b. institutionalizing individuals with developmental disabilities who do not have diagnoses of mental illness;
- c. failing to provide necessary and appropriate habilitation services to state psychiatric hospital residents who have mental retardation; and
- d. failing to adapt the mental health treatment provided at state psychiatric hospitals so that residents with mental retardation can benefit from it.

124. Defendant Richman has violated the Due Process Clause of the Fourteenth Amendment to the Constitution and 42 U.S.C. § 1983 by failing to provide appropriate community supports and services to those Plaintiffs and putative class members who, in the opinion of qualified treatment professionals, could live in the community. This constitutes an unreasonable restraint of their liberty and a failure to provide minimally adequate training to assure that they are free from undue restraints on their liberty.

VII. Relief

125. Plaintiffs respectfully request that the Court award the following relief:

- a. exercise jurisdiction over this action;
- b. certify this case to proceed as a class action pursuant to Federal

Rule of Civil Procedure 23(b)(2);

- c. issue appropriate declaratory relief and injunctive relief;

- d. grant such other relief as may be appropriate, including awarding reasonable attorneys' fees, litigation expenses, and costs pursuant to 42 U.S.C. §§ 1988, 12205 and 29 U.S.C. § 794a(b).

Respectfully submitted,

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