

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT HUNTINGTON**

BENJAMIN H., by his next friend, Georgann H.; DAVID F., by his guardian, Carolyn B.; LORI BETH S., by her next friend, Janie J.; THOMAS V., by his next friend, Patricia V.; JUSTIN E., by his next friend, Sherry E., individually and on behalf of all others similarly situated.

Plaintiffs,

v.

CIVIL ACTION NO. 3:99-0338

JOAN OHL, Secretary of the Department of Health and Human Resources,

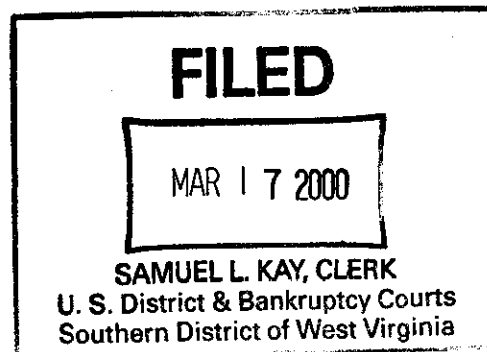
Defendant.

SECOND AMENDED COMPLAINT

I. PRELIMINARY STATEMENT

1. This is an action on behalf of several hundred adults and children with mental retardation and developmental disabilities in West Virginia who depend on the Medicaid program for essential health services. They seek injunctive relief to remedy systemic violations of federal law. These violations result in the widespread failure of these adults and children to receive health and rehabilitative services at the level provided in an intermediate care facility for the mentally retarded/developmentally disabled (ICF/MR).¹ The unlawful deprivation of this

¹ ICF/MR level of care means that the client receives "a continuous active treatment program, which includes aggressive, consistent implementation of a program of specialized and



medically necessary care results in inappropriate hospitalization in state psychiatric facilities (for the mentally ill), separation of Medicaid beneficiaries from their families, needless deterioration and regression in health status, and the stunting of beneficiaries' chances to maximize self determination and independence.

2. Since 1982, the State of West Virginia has operated a Medicaid home and community-based care program that allows a limited number of persons with developmental disabilities to receive ICF/MR-level services while living at home or in home-like settings. For the first time, West Virginia's March 1999, renewal application for federal approval of the continuation of this program seeks to add just 25 individuals into this program for each of the next five years. West Virginia has statutorily halted the development of additional ICF/MR beds in the state. The combined effect of these actions is to limit ICF/MR-level services within ICF/MR facilities and in home and community settings to the point where these services are not and will not be available to the extent, and within the time frames, required by federal law.

II. JURISDICTION

3. Jurisdiction is conferred on this Court by 28 U.S.C. § 1434(3) and (4) and 42 U.S.C. § 1331.

4. Declaratory and injunctive authority are conferred pursuant to 28 U.S.C. §§ 2201 and 2202, and Fed. R. Civ. P. 57 and 65.

generic training, treatment, health services and related services." The goal of these services is to increase functional performance and prevent loss of self-determination or independence. 42 C.F.R. § 483.440(a).

5. This action arises under 42 U.S.C. § 1983 and 42 U.S.C. § 12131 et seq.

III. PARTIES

A. Plaintiffs

6. Benjamin H. is a five-year-old boy with autism who currently lives in Cabell County, West Virginia with his father and his mother, Georgann, his next friend in this proceeding. Benjamin is a Medicaid recipient. The comprehensive behavioral health center has determined that he meets the eligibility criteria for the MR/DD Home and Community- Based Waiver. Thus, Benjamin's needs for behavioral and occupational therapies can be met in his home, which will avoid his being institutionalized.

7. David F. lives with his sister in Upshur County, West Virginia. David is a 31-year-old man with mental retardation and mental illness. He is a Medicaid recipient who was previously institutionalized at an ICF/MR, but currently receives no active treatment. The comprehensive behavioral health center has determined that David meets the eligibility criteria for the MR/DD Home and Community-Based Waiver.

9. Lori Beth S. is a 15-year-old Medicaid recipient. She lives in Marion County, West Virginia with her mother, also her next friend in this proceeding. She has moderate mental retardation, some motor impairment, and demonstrates aggressive behaviors in the home. The comprehensive behavioral health center has determined that she meets the eligibility criteria for the MR/DD Home and Community-Based Waiver.

10. Justin E. is a sixteen-year-old boy. He lives in Cabell County, West Virginia with his mother, also his next friend in this proceeding. Justin has Down's Syndrome with mental retardation and a severe to profound hearing impairment. He requires twenty-four hour

supervision with aggressive and consistent training in areas of adaptive social functioning. The comprehensive behavioral health center has determined that he meets the eligibility criteria for the MR/DD Home and Community-Based Waiver.

11. Thomas V. is a 4-year-old boy with Downs Syndrome and Attention Deficit Disorder. He lives with his father and mother, also his next friend in this proceeding, in Putnam County, West Virginia. Tommy is a Medicaid recipient who needs intensive speech therapy and behavioral therapy. The comprehensive behavioral health center has determined that he meets the eligibility criteria for the MR/DD Home and Community-Based Waiver.

12. The named plaintiffs bring this action on their own behalf and on behalf of all other similarly situated persons pursuant to Fed. R. Civ. P. 23(a) and (b)(2).

13. The class consists of all current and future West Virginia residents with developmental disabilities who are West Virginia Medicaid recipients and who are eligible for the level of services funded under the ICF/MR program and/or the MR/DD Home and Community-Based Waiver Program.

14. The requirements of Fed. R. Civ. P. Rule 23(a) are satisfied in this case as follows:

(a) Numerosity: The class is so numerous that joinder of all members is impracticable. The proposed class consists of hundreds of individuals throughout the state, including 270 people on the waiting list for the Home and Community-Based Waiver program. Potential class members also include over 4,500 children with mental retardation or related developmental conditions who are taught in segregated, alternate settings and have intermediate care level needs.

(b) Commonality: There are questions of law and fact common to all named plaintiffs as well as to all members of the class.

(c) Typicality: The claims of the named plaintiffs are typical of the claims of the class as a whole.

(d) Adequate representation: By filing this action, the named plaintiffs, individually and through their guardians and next friends, have displayed an interest in vindicating their rights, as well as the claims of others who are similarly situated. The named plaintiffs will fairly and adequately protect and represent the interests of the class. Furthermore, the named plaintiffs are represented by legal counsel who are skilled and knowledgeable about the Medicaid program, civil rights litigation, practice and procedure in the federal court, and the prosecution and management of class action litigation. The relief sought by the named plaintiffs will inure to the benefit of the class generally.

15. The requirement of Fed. R. Civ. P. Rule 23(b)(2) is also satisfied in this case. The defendant has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief, and corresponding declaratory relief, with respect to the class as a whole.

B. Defendant

16. Joan Ohl is the Secretary of the Department of Health and Human Resources. Ohl has responsibility for the control and administration of human services, including the Bureau for Medical Services.

17. The defendant has acted and continues to act at all times relevant hereto in her official capacity under color of state law.

IV. STATEMENT OF FACTS

A. General Statutory Framework

18. The Medicaid program, established by Title XIX of the Social Security Act, 42 U.S.C. § 1396, et seq., is a cooperative federal-state program to enable the states to furnish medical assistance to individuals who are unable to meet the costs of necessary medical services. Costs of the program are shared by the federal and state governments, with the federal government contributing approximately 74% of the costs of services in West Virginia.

19. A state is not obligated to participate in the Medicaid program. If the state chooses to participate, however, it must operate its program in compliance with federal statutory and regulatory requirements, 42 U.S.C. § 1396(a). West Virginia has chosen to participate in the Medicaid Program.

20. (a) Medicaid contains certain core-services that are mandatory for any state program. For example, children under the age of 21 are entitled to Early and Periodic Screening, Diagnosis and Treatment (EPSDT) services. 42 U.S.C. §1396(a)(4)(B), §1396a(a)(43), and §1396d(r). Under EPSDT, a state is obligated to provide "such other necessary health care, diagnostic services, treatment and other measures described in subsection (a) of this section [42 U.S.C. § 1396d(a)], to correct, or ameliorate defects and physical and mental illness and conditions discovered by screening services whether or not such services are covered under the State plan." Id. at § 1396d(r)(5).

(b) In addition to the mandatory services, states may choose to cover federally recognized/optional services which include intermediate care level services for the mentally

retarded/developmentally disabled (ICF/MR). West Virginia has chosen to include ICF/MR services in its Medicaid state plan.

(c) Once a state chooses to provide an optional Medicaid service, it must comply with all federal requirements for that service.

(d) All Medicaid services must be provided with reasonable promptness. 42 U.S.C. § 1396(a)(8).

21. Both the ICF/MR program and the Home and Community-Based Waiver Program are public services subject to Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12161-12165.

B. The ICF/MR Medicaid Option

22. The ICF/MR Program is an optional Medicaid service authorized by Title XIX of the Social Security Act, 42 U.S.C. § 1396d(a)(15). ICF/MRs provide residential, health, and rehabilitative services for individuals with developmental disabilities. An ICF/MR is defined as:

[A]n institution for the mentally retarded or persons with related conditions if

- (1) the primary purpose of such institution (or distinct part thereof) is to provide health or rehabilitative services for mentally retarded individuals and the institution meets such standards as may be prescribed by the Secretary;
- (2) the mentally retarded individual with respect to whom a request for payment is made under a plan approved under the subchapter is receiving active treatment under such program

42 U.S.C. § 1396d(d).

23. Federal law requires that individuals in ICF/MRs receive active treatment, including habilitation, occupational therapy, speech therapy, and physical therapy. 42 U.S.C. §

1396d(d); 42 U.S.C. § 483.00 et seq. "Active treatment" is a condition of participation in the ICF/MR program.

Each client must receive a continuous active treatment program, which includes aggressive, consistent implementation of a program of specialized and generic training, treatment, health services and related services described in this subpart, that is directed toward (i) the acquisition of the behaviors necessary for the client to function with as much self-determination and independence as possible; and (ii) the prevention or deceleration of regression or loss of current optimal functional status.

42 C.F.R. § 483.440.

24. The named plaintiffs and members of the plaintiff class are currently entitled to services at the level of care provided at an ICF/MR and/or through the Home and Community-Based Waiver Program.

C. The Home and Community-Based Waiver Program

25. The Home and Community-Based Waiver program (Waiver program) was adopted by Congress in order to allow individuals who would otherwise require care in a nursing home or ICF/MR to receive needed services in their own homes and in home-like settings. 42 U.S.C. §1396n. See Senate Report No. 97-139 and House Conference Report No. 97-208, 1981 U.S. Code Cong. & Admin. News 396. The regulations state that "section 1915(e) [1396n] of the Act permits states to offer, under a waiver of statutory requirements, an array of home and community based services that an individual needs to avoid institutionalization." 42 C.F.R. § 441.300.

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

27. Home and Community-Based Waiver funds may not be used to support services to individuals who reside in hospitals, nursing homes or ICF/MRs. 42 C.F.R. § 441.301(b)(1)(ii), 42 U.S.C. §1396n.

28. West Virginia first obtained and implemented a MR/DD Home and Community Based Waiver program in 1982 in a seven-county pilot project. Subsequently, additional counties were added. Since 1992, all fifty-five counties in West Virginia have participated. Each year, prior to 1999, the defendant has allocated approximately 200 slots to the comprehensive behavioral health centers ("BHCs") to be distributed to eligible individuals in their catchment areas.

29. (a) The defendant delegates to the comprehensive behavioral health centers ("BHCs") the determinations of eligibility for waiver services. Up until July 1, 1998, the defendant allocated a given number of slots to each of the regional comprehensive behavioral health centers.

(b) These comprehensive behavioral health centers screen the applications for eligibility (Exhibit 1). The applications that the comprehensive behavioral health center feel meet the eligibility criteria, and meet the priority ranking provided by the defendant, are then forwarded to defendant for approval for Waiver services. Medicaid applicants who are denied at the local level are never reviewed by the state Medicaid agency or any authorized agent thereof, nor are they provided notice or opportunity to be heard regarding the finding.

(c) Some of these applicants denied at the local level meet the eligibility criteria.

30. (a) The first Waiver, approved and implemented in 1982, was valid for a period of three years. Since that time the defendant has filed and HCFA has approved renewals, each time adding approximately 200 slots per renewal year. The last renewal Waiver expired in June 1998.

(b) Up until July 1, 1998, the defendant allocated a given number of slots to each of the comprehensive behavioral health centers.

D. The Freedom of Choice Requirement

31. Congress requires individuals with developmental disabilities to have freedom to choose whether to receive services in an ICF/MR or in the community through the Waiver program. 42 U.S.C. § 1396n(2)(c). The state must assure that individuals who "are determined to be likely to require the level of care provided in a hospital, nursing facility, or intermediate care facility for the mentally retarded are informed of the feasible alternatives, if available under the waiver, at the choice of such individuals, to the provision of inpatient hospital services, nursing facility services, or services in an intermediate care facility for the mentally retarded [developmentally disabled]."

32. (a) The West Virginia MR/DD Home and Community-Based Waiver Program provides funding for community supports to individuals with mental retardation/developmental disabilities in lieu of services in an Intermediate Care Facility (ICF). West Virginia Title XIX MR/DD Waiver Home and Community-Based Services Handbook, April 1997, at 4. (Exhibit 1).

(b) ICF/MR facilities are required to have consumer protection and quality

regulations and standards.

(c) The waiver program is intended to be a community-based program in a home or home-like setting.

(d) West Virginia's State Plan for the MR/DD Home and Community-Based Waiver assures the Health Care Financing Administration (HCFA), the federal agency which reviews waiver applications, that Medicaid beneficiaries will be offered an informed choice of alternatives. Specifically, the state assures HCFA that "when a recipient is determined to be likely to require a level of care indicated [ICF/MR] ... the recipient or his or her legal representative will be informed of any feasible alternatives under the waiver, and given the choice of either institutional or home and community based services," West Virginia Application for Title XIX MR/DD Home and Community Based Waiver, p. 60. (Exhibit 2).

33. Since August 1989, there has been a moratorium on the development of any additional ICF/MR beds. W.Va. Code 16-2D-5(h). There are approximately 505 total ICF/MR beds in West Virginia and no institutions for the mentally retarded. Some ICF/MR facilities have long waiting lists.

(a) The average cost of providing services to an individual residing in an ICF/MR in West Virginia is \$83,327.00 per year. (Exhibit 3).

(b) The average cost of providing services to an individual through the MR/DD Home and Community-Based Waiver Program in West Virginia is \$41,509.00 per year. (Exhibit 3).

34. (a) The state psychiatric hospitals are "institutions for mental disease" ("IMDs") under the Medicaid regulations, and as such, the cost of services there are not covered by Medicaid. See 42 U.S.C. § 1396d(a).

(b) IMDs offer a more restrictive treatment setting than an ICF/MR or the Waiver program. The per patient cost of services in a state psychiatric hospital is approximately \$150,000 to \$250,000 per year, which is almost entirely state-funded.

(c) There are approximately 200 nonforensic beds in the state's two psychiatric hospitals, and these two facilities are usually at or close to capacity on any given day.

E. 1998 Freeze and 1999 Cutbacks

35. Freeze:

(a) Beginning on July 1, 1998, no new slots were made available to the BHCs. Administrators at these centers were informed by the Office of Behavioral Health Services (OBHS) that slots would be allocated directly by OBHS on an emergency basis only. Individuals who are eligible for services but who are not in a state psychiatric hospital, in an abusive situation, or in some other "emergency" situation, have been placed on waiting lists throughout the state.

(b) Applicants for MR/DD Home and Community-Based Waiver services are still required to apply at the comprehensive behavioral health center. Most of these applications are not sent to the defendant. Instead, defendant has instructed the comprehensive behavioral health centers to call the Office of Behavioral Health Services for a pre-determination of emergency status, and if at that time OBHS finds the applicant to be in an emergency situation, the Waiver packet is developed and sent to OBHS.

(c) Applicants who are eligible for MR/DD Home and Community Based Waiver services, but are not found by OBHS to be in an emergency situation, are placed on a waiting list at the local comprehensive behavioral health center. However, these applicants are not provided any notice or an opportunity to be heard regarding this finding.

36. Cut Backs and Waiting Lists:

(a) The defendant has developed a Waiver Renewal Application for another five year period which was filed with the Health Care Financing Administration on or about March 25, 1999. The current application for Waiver Renewal seeks only 25 additional slots each year (compared to the 200 per year previously) (Exhibit 2).

(b) As of January 28, 1999, the combined total of slots authorized state-wide was 1,869. The total number people receiving Waiver services was 1,779. (Exhibit 3).

(c) As of January 28, 1999, 270 individuals were eligible for MR/DD Home and Community-Based Waiver services but have been placed on waiting lists at the various comprehensive behavioral health centers. (Exhibit 3). Further, independent ICF/MR facilities themselves maintain significant waiting lists for residential services and day program services. Individuals on these waiting lists are not receiving the therapies, training and other active treatment required by federal law by virtue of their eligibility for ICF/MR-level of care. Individuals who do not have access to ICF/MR services through the Waiver program or through an existing ICF/MR must turn to the state psychiatric hospitals.

37. Certain Expansion of the Waiting List: There are 4,502 children with mental retardation or related developmental conditions currently in the school system who are served in alternate environments such as separate special education classrooms, residential facilities, or

homebound instruction. In the next five years, it is estimated that 1,875 children will age-out of the school system and require behavioral health care at an ICF/MR level. *See* West Virginia Department of Education, *Exceptional Students in West Virginia's County School Districts* at 63 (FY 1998). (Exhibit 4).

F. The Waiting List - The Plaintiffs

38. (a) Plaintiff Benjamin H. is five-years-old and has autism.

(b) Benjamin has significant problems associated with the behavioral manifestations of his disability. He does not recognize danger, will run off, and place himself at serious risk of harm. He requires constant supervision and attention. Benjamin's father has a heart condition and has had two heart attacks recently. The father's doctor has recommended that he not be in a situation where Benjamin's behavior causes undue stress. However, Benjamin's parents understandably want to raise their son at home. They could keep the family intact with specialized in-home services available through the MR/DD Home and Community-Based Waiver program and/or the Early and Periodic Screening Diagnosis and Treatment (EPSDT) service.

(c) Benjamin's family receives no behavioral therapies in the home, no respite relief and no case management assistance in addressing Benjamin's significant needs at home. He is a Medicaid recipient.

(d) Pursuant to defendant's procedure, Benjamin applied for MR/DD Home and Community-Based Waiver services in September 1998 at Autism Services Center (ASC) in Huntington, West Virginia. ASC found him to be eligible for the Waiver program through the

eligibility screening process developed by the defendant, but Benjamin was placed on a waiting list.

(e) As of the filing of this Complaint, Benjamin was on this waiting list without needed services.

(f) He has received no written notice from defendant that the services he needs are being delayed or denied.

39. (a) Plaintiff David F. is a thirty-one year old man with dual diagnosis of mental retardation, mental illness, and a seizure disorder. He lives with his disabled brother and his sister, who is his legal guardian, in Upshur County, West Virginia.

(b) David requires constant one-on-one training and supervision. He has a history of eloping, aggressive outbursts, and public masturbation. He requires intensive behavior support and training to address his socially inappropriate behavior. David is in need of vocational training. He is currently not receiving needed therapeutic services.

(c) David applied for the MR/DD Home and Community-Based Waiver at Appalachian Community Health Center in November of 1998. He has been placed on the waiting list.

(d) He has received no written notice from defendant that the services he needs are being delayed or denied.

41. (a) Plaintiff Justin E. is an adolescent boy who has Down's Syndrome, significant hearing impairment and mental retardation. Justin is non-verbal.

(b) He is in need of training and therapy to address his delays in communication and social skills. He is experiencing the frustration and struggle for increased

independence typical of adolescence, but this is complicated by his inability to express anger in appropriate ways. He has outbursts, and sometimes is physically aggressive at home. His mother is a single parent, and Justin receives no in-home supportive services.

(c) Justin applied for the MR/DD Home and Community Based Waiver in the summer of 1998, and has been on a waiting list since that time. He has not received service through the Waiver program or EPSDT.

(d) He has received no written notice from defendant that the services he needs are being delayed or denied.

42. (a) Plaintiff Lori Beth is a young girl with moderate mental retardation and other significant disabilities.

(b) Her mother is single, has no family support in the area and is the sole care giver for Lori Beth. Lori Beth is in need of intensive therapies in the areas of occupational therapy, speech therapy and behavior management. She receives no in-home supportive services to address her aggressive behavior toward her mother nor does she receive training in the activities of daily living.

(c) Lori Beth has been on a local waiting list for a MR/DD Home and Community Based Waiver slot since 1991. She was seven-years-old when she applied for this service pursuant to defendant's procedures. She is now fifteen. Lori Beth has not received needed services through EPSDT. She did not receive a written notice that the services she needed would be delayed or denied by the defendant Medicaid agency.

(d) She has received notification from the comprehensive behavioral health center that she is on the waiting list and she has been on this waiting list for years.

43. (a) Plaintiff Thomas V. is a five-year-old boy with Downs Syndrome. Tommy lives with his father and mother, also his next friend in this proceeding, in Putnam County, West Virginia.

(b) Last year, Tommy received speech therapy through a program which he has now aged out of. Tommy continues to need speech therapy. His ability to communicate has suffered significantly without the service. Tommy has behavioral problems and requires intensive specialty services to address his aggression and tendency to run away. He currently visits with a behavioral therapist one or two times per month. This level of service is inadequate and he is not progressing.

(c) Tommy applied for the MR/DD Home and Community Based Waiver in May 1998 pursuant to defendant's procedures. He has been on a local waiting list since that time and has not received services through EPSDT. Tommy received no written notice that the services he needs would be delayed or denied by defendant Medicaid agency.

(d) He has received no written notice from defendant that the services he needs are being delayed or denied.

G. The Waiting List - Effects in General

44. The established public policy in West Virginia has been the inclusion of individuals with developmental disabilities in mainstream society, as evidenced by the closure of state institutions for the mentally retarded, W.Va. Code §27-2-1b, and the moratorium on the development of new ICF/MRs, W.Va. Code §16-2D-5(h).

45. Without ICF/MR-level service, individuals with mental retardation or developmental disabilities will be forced to seek therapeutic services in institutional and segregated settings, such as state psychiatric hospitals. This move will cost the state a great deal more money and deny individuals treatment in the most appropriate and integrated settings.

46. As a condition for operating a MR/DD Home and Community-Based Waiver program, West Virginia must ensure that Medicaid recipients determined to be likely to require an ICF/MR level of care will be informed of any feasible alternatives under the waiver and given the choice of either institutional or home and community-based services.

47. Unnecessary Institutionalization: Individuals in need of ICF/MR-level services who are currently on waiting lists, and those individuals who will enter the adult behavioral health system over the next five years, do not have the option of alternatives under the waiver available to them. They will not be given a choice of institutional or home and community-based care. Instead, all but a small fraction of these individuals will be under-served in a community setting or forced to seek services in a state psychiatric hospital.

48. Lack of Informed Choice: The waiting list denies class members the choice between ICF/MR services.

49. Waiver group homes do not have the consumer protection and quality regulations and standards governing treatment and habilitation of the ICF/MR facilities.

51. Congregate residential settings:

(a) Large residential placements for recipients of Waiver services

unnecessarily segregates individuals with developmental disabilities and deny them the normalcy of homelike settings.

(b) Services provided in large congregate residential settings are institutional in nature. Services and activities are provided to the group and not driven by individual needs or desires.

(c) The Waiver program anticipates the delivery of services based on the individual and his or her treatment plan.

(d) Segregated congregate settings undermine the purpose of the Waiver program (Exhibit 1), and contradict the goal the integration mandated by the Americans with Disabilities Act.

CLAIMS FOR RELIEF

COUNT I (Medicaid amount, duration and scope)

52. Plaintiffs incorporate by reference paragraphs 20 through 50.

53. Defendant's policies and practices violate federal requirements for an adequate amount, duration, and scope of ICF/MR-level services, including 42 U.S.C. § 1396a(a)(10), 42 C.F.R. § 440.200, et seq.

COUNT II (Medicaid Requirements for Informed Choice)

54. Plaintiffs incorporate paragraphs 20 through 50.

55. Defendant's failure to provide recipients who require an ICF/MR level of care

with a choice of feasible alternative services violates 42 U.S.C. § 1396(n)(c)(2) and implementing regulations.

COUNT III
(Medicaid Early Periodic Screening Diagnosis and Treatment)

56. Plaintiffs incorporate by reference paragraphs 20 through 50.

57. Defendant's failure to cover health care services needed by plaintiffs under the age of 21 violates federal law 42 U.S.C. §§ 1396a(a)(43), 1396d(a)(4)(B), and 1396d(r) and implementing regulations.

COUNT IV
(Medicaid requirements for the "opportunity to apply")

58. Plaintiffs incorporate by reference paragraphs 20 through 50.

59. Defendant's refusal to accept applications for the MR/DD Home and Community-Based Waiver from eligible Medicaid applicants denies these applicants the opportunity to apply for medical assistance and violates of federal law 42 U.S.C. § 1396a(a)(8) and implementing regulations.

COUNT V
(Medicaid reasonable promptness)

60. Plaintiffs incorporate by reference paragraphs 20 through 50.

61. Defendant's failure to assure an adequate amount, duration and scope of ICF/MR-level services with reasonable promptness violates federal law, including 42 U.S.C. § 1396a(a)(8).

**COUNT VI
(Medicaid and Constitutional Due Process)**

62. Plaintiffs incorporate by reference paragraphs 20 through 50.

63. Defendant's failure to provide written notices and an opportunity to be heard when Plaintiffs' requests for ICF/MR-level services are denied or not acted upon with reasonable promptness violates federal law, including 42 U.S.C. § 1396a(a)(3), 42 C.F.R. § 431.200 et seq., and the Due Process Clause of the United States Constitution.

**COUNT VII
(Americans with Disabilities Act)**

64. Plaintiffs incorporate by reference paragraphs 20 through 50.

65. Defendant's failure to provide sufficient amount, duration and scope of ICF/MR-level services violates federal law, including 42 U.S.C. § 12101 et seq.

COUNT VIII

66. Plaintiffs incorporate by reference paragraphs 20 through 69.

67. The reimbursement rate paid for health providers to provide direct in-home services in three basic categories under the MR/DD Title XIX Waiver Program is between \$6 and \$8.55 per hour.

68. The rate is far too low to permit any provider to provide reasonable continuity in direct in-home services to the MR/DD Title XIX Waiver recipients. In June 1999, HCFA identified, in response to the defendant's application, reimbursement rates as a problem by stating, "Your reimbursement rate should be evaluated to make sure they are sufficient for providers to retain qualified and trained substitute staff."

69. (a) The rate for similar services under the parallel Medicaid Title XIX Waiver for the elderly is over \$11 per hour.

(b) The MR/DD Waiver pays \$13 per hour for outside of the home habilitation, which involve similar services but only in a different setting.

(c) If that same direct service worker were providing support through the Medicaid Personal Care Program the reimbursement rate would be \$12.50 per hour.

(d) The community rate is \$10 to \$13 per hour for this type of direct care services.

70. The defendant's failure to adequately reimburse direct care in-home services as a part of a Title XIX MR/DD Waiver violates the defendant's duty to "assure that payments . . . are sufficient to enlist enough providers so that care and services are available under the [State Medicaid] Plan at least to the extent that such care and service are available to the general population. 42 U.S.C. § 1396a(a)(30)(A).

71. The Defendant requires an otherwise Medicaid-qualified provider of services under the home and community based waiver to obtain a certified of need (CON). The CON is enacted by W. Va. Code § 16-2D-2. CON requirements are invoked in an effort to prevent beneficiary access to providers and agencies wishing to provide the needed choice in Medicaid

providers, as required by 42 U.S.C. § 1396a(a)(23). To the extent that the CON law is being so used, it is a violation of the Medicaid Act and the Supremacy Clause of the United States Constitution.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray that this Court:

(a) Certify the class pursuant to Fed. R. Civ. P. Rule 23, and the plaintiffs so move.

(b) Declare defendant's in violation of the federal laws cited in this Complaint.

(c) Issue a preliminary and permanent injunction:

(i) enjoining defendant to reinstate sufficient amount, duration and scope of coverage to the Medicaid recipients in need of an ICF/MR level of care and pursue cost efficient means of reducing and/or eliminating the waiting list.

(ii) Enjoin defendant from adding additional eligible applicants to the waiting list and denying ICF/MR-level services to eligible applicants.

(iii) Enjoin the defendant from authorizing and funding "group homes" of eight to ten Waiver recipients because those "group homes" fail to provide a home or home-like setting as mandated by the federal regulations governing the MR/DD Home and Community Based Waiver Program and the Americans with Disabilities Act.

(iv) That the Court declare that defendant's failure to properly reimburse for direct care in-home services under a Medicaid Title XIX MR/DD Waiver is in

violation of 42 U.S.C. § 1396a(a)(30)(A) and implementing regulations and provide appropriate equitable relief.

(v) Enjoin the defendant from operating a policy which denies applicants for the MR/DD Waiver Program their right to be considered by the Medicaid agency for services.

(vi) Enjoin defendant to provide written notice and an opportunity to be heard before an impartial hearing officer where ICF/MR-level and EPSDT services are denied or delayed.

(vii) Require the defendant's use of the CON process to prevent adequate beneficiary access to providers.

(viii) Award plaintiffs their costs and reasonable attorneys fees.

(ix) Grant such other and further relief as this Court deems appropriate.

BENJAMIN H., et al.,
By Counsel.



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COUNSEL FOR PLAINTIFFS

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT HUNTINGTON**

**BENJAMIN H., by his next friend, Georgann
H.; DAVID F., by his guardian, Carolyn
B.; LORI BETH S., by her next friend,
Janie J.; THOMAS V., by his next
friend, Patricia V.; JUSTIN E., by his
next friend, Sherry E.,**

Plaintiffs,

v.

CIVIL ACTION NO. 3:99-0338

**JOAN OHL, Secretary of the Department of
Health and Human Resources,**

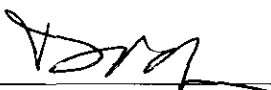
Defendant.

CERTIFICATE OF SERVICE

I, Daniel F. Hedges, counsel for the Plaintiffs in the above-styled matter, do hereby certify that I have served the foregoing "**SECOND AMENDED COMPLAINT**" upon counsel for Defendant by sending a true and exact copy there by U.S. Mail, postage prepaid and properly addressed to their address of record as follows:

Kimberly L. Stitzinger
Assistant Attorney General
Bureau for Medical Services
7012 MacCorkle Avenue, S.E.
Charleston, WV 25304

Dated this 1st day of March, 2000.



Daniel F. Hedges