

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

CAROL ANN DOROHOVECH, by and
through her next friend, Jeannie Lally,
and JEROME MADESKY, by and through
his next friend, Jeannie Lally, on behalf of
themselves and all others similarly situated,

Plaintiffs,

v.

Civil Action No. _____

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

Defendants.

COMPLAINT -- CLASS ACTION

I. Introduction

1. Plaintiffs Carol Ann Dorohovech and Jerome Madesky are individuals with mental retardation who live in personal care homes. Until December 2006, Plaintiffs had been determined to be eligible for and received services under the

Consolidated Waiver, a Medical Assistance home and community-based waiver that affords participants an entitlement to a broad array of residential and non-residential mental retardation services.

2. In December 2006, Defendants, the Pennsylvania Department of Public Welfare and the Secretary of Public Welfare (collectively, DPW), received federal approval to amend the Consolidated Waiver to exclude from eligibility all individuals who reside in personal care homes.

3. In January 2007, DPW's agents informed Plaintiffs and approximately 75 other personal care home residents who had received services under the Consolidated Waiver that their enrollment in that Waiver had been terminated in December 2006 and that they had no right to appeal that decision. DPW transferred these individuals to another Medical Assistance home and community-based waiver program that confers a far more limited entitlement to services than the Consolidated Waiver.

4. Due to their mental retardation, Plaintiffs (and, on information and belief, others similarly situated) did not understand the notice sent by DPW concerning their termination from the Consolidated Waiver or the consequences of that action.

5. DPW did not afford Plaintiffs and others similarly situated any assistance to find alternative housing options -- including options funded by the Consolidated Waiver -- that would have allowed them to retain their entitlement to services under the Consolidated Waiver.

6. Defendant Richman's failure to provide Plaintiffs and others similarly situated with advance notice of the decision to terminate their Consolidated Waiver benefits in a manner they could understand and the opportunity to appeal violates the Due Process Clause of the Fourteenth Amendment and the due process rights embodied in the federal Medical Assistance statute, 42 U.S.C. §§ 1396a(a)(3) and 1983. In addition, Defendant Richman violated the federal Medical Assistance statute by terminating Plaintiffs and others similarly situated from the Consolidated Waiver without affording them the option to retain their eligibility by relocating to other residential programs. 42 U.S.C. §§ 1396a(a)(10)(A), 1396n(c)(2)(A), and 1983. Defendant Richman also violated the Americans with Disabilities Act, 42 U.S.C. § 12132, and Defendants DPW and Richman violated Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, by failing to make reasonable modifications in their policies, practices, and procedures to assure that Plaintiffs and others similarly situated understood the nature of the change to the Consolidated Waiver and its potential impact on their services now and in the future if they remained in personal care

homes and to assist them to retain their benefits under the Consolidated Waiver by relocating.

7. Plaintiffs seek declaratory and injunctive relief

II. Jurisdiction

8. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 1343.

9. Plaintiffs' claims are authorized by 42 U.S.C. §§ 1396, 1983, and 12133, 29 U.S.C. § 794, and 28 U.S.C. §§ 2201 and 2202.

10. Venue is appropriate in this district pursuant to 28 U.S.C. § 1391(b) since Defendants reside in this District and a substantial part of the events that give rise to this Complaint occurred in this District.

III. Parties

11. Plaintiff Carol Ann Dorohovech is a 42-year-old woman who resides in Scranton, Pennsylvania. Ms. Dorohovech, who is eligible for and receives Medical Assistance benefits, has mental retardation and a diagnosis of borderline personality disorder. Ms. Dorohovech brings this lawsuit through her next friend, Jeannie Lally, an advocate at The Arc of Northeastern Pennsylvania.

12. Plaintiff Jerome Madesky is a 45-year-old resident of Scranton, Pennsylvania. Mr. Madesky, who is eligible for and receives Medical Assistance benefits,

has mental retardation and bipolar disorder and a history of depression and obsessive behaviors. Mr. Madesky brings this lawsuit through his next friend, Jeannie Lally, an advocate at The Arc of Northeastern Pennsylvania.

13. Defendant, the Department of Public Welfare of the Commonwealth of Pennsylvania (DPW), is the public entity that is the single state agency with responsibility to implement Pennsylvania's Medical Assistance Program. 42 U.S.C. § 1396a(a)(5); 55 Pa. Code § 101.1(e). DPW receives federal financial assistance from the United States Department of Health and Human Services for its Medical Assistance Program.

14. Defendant, Estelle B. Richman, is the Secretary of Public Welfare of the Commonwealth of Pennsylvania. Defendant Richman administers DPW and, as such, is responsible to assure that Pennsylvania's Medical Assistance program is operated in compliance with federal law. Defendant Richman is sued in her official capacity only for actions and omissions under color of state law.

IV. Class Action Allegations

15. Plaintiffs bring this action on their own behalf and on behalf of a class composed of all Pennsylvania Medical Assistance recipients who were enrolled in the Consolidated Waiver and whose enrollment in that Waiver was terminated as of the close of business on December 22, 2006 because they resided in personal care homes.

a. The action satisfies the prerequisites of Federal Rule of Civil Procedure 23(a):

(1) The size of the class is so numerous as to make joinder of all class members impracticable.

(a) According to DPW, approximately 77 Consolidated Waiver services recipients throughout Pennsylvania were terminated from that Waiver in December 2006 solely because they lived in personal care homes.

(b) Factors in addition to class size exacerbate the impracticability of joinder. Class members are geographically dispersed throughout Pennsylvania and they have intellectual disabilities and limited incomes that make it unlikely that they would pursue individual litigation.

(2) There are questions of fact and law common to all class members, including, but not limited to: (a) whether DPW terminated class members' participation in the Consolidated Waiver without advance and meaningful notice; (b) whether DPW terminated class members' participation in the Consolidated Waiver without affording them the right to appeal and the right to maintain their benefits pending appeal; (c) what steps, if any, DPW took to allow class members to remain in the Consolidated Waiver; (d) whether DPW's failure to provide advance notice and the opportunity to be heard with respect to her decision to terminate class members

from the Consolidated Waiver violated the Due Process Clause; (e) whether DPW's failure to provide advance notice and the opportunity to be heard with respect to her decision to terminate class members from the Consolidated Waiver violated the federal Medical Assistance statute; (f) whether DPW violated the federal Medical Assistance statute by stripping class members of their entitlement to Consolidated Waiver services; (g) whether DPW violated the class members' rights to have their health and safety safeguarded by terminating them from the Consolidated Waiver without affording them an opportunity to retain their eligibility by relocating and without affording them any assistance to do so; and (h) whether DPW violated the class members' rights under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act by failing to make reasonable modifications to DPW's policies, practices, and procedures to assist them to understand the actions taken and the impact on their benefits and to locate alternative housing options to remain in the Consolidated Waiver.

(3) Plaintiffs' claims are typical of the claims of class members.

(4) Plaintiffs will fairly and adequately protect the interests of class members. Plaintiffs have no interests adverse to or in conflict with those of class members. Plaintiffs' counsel have extensive experience in civil rights, disability, class action, and Medical Assistance litigation.

b. This action can proceed as a class pursuant to Federal Rule of Civil Procedure 23(b)(2). Defendants have acted or refused to act on grounds generally applicable to all members of the class, making final declaratory and injunctive relief appropriate with respect to the class as a whole.

V. Factual Background

A. Medical Assistance and HCB Waivers

16. Title XIX of the Social Security Act (Title XIX), 42 U.S.C. § 1396 *et seq.*, establishes the federal Medical Assistance program.

17. Medical Assistance is a cost-sharing arrangement under which the federal government reimburses more than 50% of the expenditures incurred by states that elect to furnish Medical Assistance to individuals whose income and resources are insufficient to cover the costs of their medical care.

18. The purpose of the Medical Assistance program is to provide medical services to eligible individuals, including services to help such individuals “attain or retain capability for independence or self-care” 42 U.S.C. § 1396.

19. States are not required to participate in the Medical Assistance program, but, if they choose to do so, they must adopt a “state plan” that delineates the standards for determining eligibility and identifies the extent of Medical Assistance benefits.

20. Pennsylvania has chosen to participate in the Medical Assistance program and has adopted a State Medical Assistance Plan.

21. Title XIX delineates the types of medical services that can be funded under a state's Medical Assistance plan. *See* 42 U.S.C. § 1396d. Certain types of specified medical services are mandatory (*e.g.*, inpatient hospital services, physicians' services, and nursing facilities) and must be included in every state's Medical Assistance program. Other types of specified medical services are optional (*e.g.*, hospice care, dental care, and medications) and each state has the discretion to choose whether to cover any particular optional service in its program.

22. Most community mental retardation services (such as habilitation services; vocational training; respite care; environmental modifications; and socialization/day programs) cannot be covered as either mandatory or optional services under Title XIX.

23. Title XIX permits a state to obtain a home and community-based services (HCB) waiver from the federal Centers for Medicare and Medicaid Services (CMS). 42 U.S.C. § 1396n(c). HCB waivers allow states to include in their state plans as "Medical Assistance" home or community-based services for individuals who, without such care, would require institutionalization in an intermediate care facility for persons with mental retardation, nursing facility, or similar institution. *Id.*

24. Under an HCB waiver, a state can provide an array of services, including services that are not identified in Title XIX as approved mandatory or optional services. 42 U.S.C. § 1396n(c)(4)(B); 42 C.F.R. § 440.180. A state, for example, can choose to provide habilitative services, vocational services, and respite services to persons with mental retardation under an HCB waiver, even though such services are not specified as mandatory or optional services under Title XIX. Thus, an HCB waiver gives the state the right to receive federal reimbursement when it provides services that otherwise could not be reimbursed under Title XIX and, in return, the state agrees to provide those specified services in accordance with the terms of the HCB waiver.

25. HCB waivers allow states to “waive” three specific Title XIX requirements that apply to mandatory and optional services -- the statewideness requirement (which requires the state to assure the availability of service in all geographic areas); the comparability requirement (which requires the state to assure that all eligible individuals have access to services in the same amount, duration, and scope); and income and resource rules. 42 U.S.C. § 1396n(c)(3). Thus, a state may limit eligibility for HCB waiver services in a variety of ways, including, for example: capping the number of eligible persons; restricting the geographic regions from which

eligible persons will be selected; and establishing qualifications for eligibility based on age, disability, or other criteria.

26. In sum, the purpose of Title XIX's home and community-based waivers is to encourage states to provide services to assist individuals with disabilities to avoid institutionalization. 42 U.S.C. § 441.300. As long as community-based services vis-a-vis institutional services are cost-neutral, *see* 42 U.S.C. § 1396n(c)(2)(D), the preference is to provide services in the community.

B. Pennsylvania's Consolidated Waiver and P/FDS Waiver

27. Pennsylvania has received CMS authorization to operate at least eleven HCB Waivers, including the Consolidated Waiver and the Person/Family Directed Support Waiver.

28. The Consolidated Waiver, established in 1986, is the largest HCB Waiver in the Commonwealth, both in terms of the number of individuals served and expenditures. Nearly 15,000 Pennsylvanians receive services under the Consolidated Waiver at a cost of more than \$900 million per year. The Consolidated Waiver is the primary funding source for community-based mental retardation services in Pennsylvania.

29. Pennsylvanians age 3 and older who have mental retardation and who would need the level of care provided by an intermediate care facility for persons

with mental retardation (ICF/MR) are eligible for services under the Consolidated Waiver if they meet the Medical Assistance income and resources criteria for the Waiver unless they reside in personal care homes.

30. The Consolidated Waiver offers a broad range of community-based mental retardation services, depending on the participant's needs, including:

a. Residential Habilitation, which provides services in specified licensed residential settings such as group homes, family living homes, and community residential rehabilitation programs.

b. Home and Community Habilitation, which assists individuals who live independently, with family, or with friends to acquire, retain, and improve self-help, socialization, and adaptive skills necessary to live successfully in the community. This includes the concept of "supported living" that enables individuals to live alone or with companions in apartments where supportive services, funded by the Waiver, are provided.

c. Day Habilitation, which provides services to individuals during the day (such as supervision, socialization, and community participation).

d. Vocational services, including pre-vocational services, job support, job finding, and transitional work services.

e. Home Finding to enable a participant to locate and maintain a home, including financial planning, assistance with moving, and managing home responsibilities.

f. Homemaker/Chore Services to enable a participant to maintain his or her private residence.

g. Environmental Accessibility Adaptations to enable a participant to make modifications to his or her home to make it physically accessible.

h. Transportation to enable a participant to gain access to waiver and other community services.

31. An Individual Service Plan (ISP) is created for each participant in the Consolidated Waiver that delineates what types of services the individual requires and will receive. The ISP must be re-evaluated at least once a year and changed to meet the changing needs and desires of the participant.

32. For individuals who participate in the Consolidated Waiver, there is no monetary cap on services. Participants are entitled to receive any services they need that are available under the Waiver. If their service needs increase or expand over time, their ISPs must be amended to reflect those changes and they must be provided with services that meet those needs regardless of cost.

33. The average cost of services under the Consolidated Waiver is approximately \$74,000 per year, but the costs for services for many recipients exceeds \$100,000 per year and in some cases more than \$200,000 per year.

34. The Consolidated Waiver cannot provide services to more than 15,000 individuals. On information and belief, the Consolidated Waiver is currently operating at or near capacity so that it could not provide services to any new participants unless current participants leave the Waiver.

35. There are more than 20,000 Pennsylvanians with mental retardation who are on a waiting list for community mental retardation services, including more than 4,400 on the “emergency” waiting list (*i.e.*, those in need of services immediately) and more than 9,300 on the “critical” waiting list (*i.e.*, those in need of services within no more than two years). More than 6,100 individuals on the emergency and critical waiting lists currently receive no services at all. Virtually all of these individuals would be eligible for services under the Consolidated Waiver.

36. The Person/Family Directed Support (P/FDS) Waiver was approved by CMS to begin in 1999.

37. There are more than 7,400 individuals who receive services under the P/FDS Waiver at an approximate aggregate cost of more than \$75 million per year.

38. Individuals are eligible for the P/FDS Waiver if they are age 3 or older; have mental retardation; do not need licensed community residential services; need the level of care provided by an intermediate care facility for persons with mental retardation (ICF/MR); and meet the Medical Assistance income and resources criteria for the Waiver.

39. Services available under the P/FDS Waiver include: habilitation services; vocational services; environmental accessibility services; homemaker/chore services; and transportation services.

40. The most significant differences between the Consolidated Waiver and the P/FDS Waiver are: (1) that community residential services can be funded by the former but not the latter; and (2) that there is no monetary cap on the costs of services in the Consolidated Waiver while the cost of services for each individual in the P/FDS Waiver cannot exceed \$22,225 regardless of the individual's needs. Thus, the entitlement under the P/FDS Waiver is far more circumscribed than that under the Consolidated Waiver.

41. DPW contracts with local "Administrative Entities" to perform operational and administrative functions to implement the Consolidated and P/FDS Waivers. In most instances, the Administrative Entities are the County Mental

Health/Mental Retardation (MH/MR) Programs. DPW, however, retains ultimate authority over the implementation and administration of those Waivers.

C. Plaintiffs' and Class Members' Termination from the Consolidated Waiver.

42. Plaintiff Carol Ann Dorohovech spent most of her youth in foster care. Since she became an adult, she has lived in a variety of residential placements in the Scranton area, including mental retardation groups homes, a homeless shelter, and a series of personal care homes.

43. Ms. Dorohovech has resided in her current residence, a personal care home in Scranton, Pennsylvania with more than 40 residents, since June 2006. For at least the last year, Ms. Dorohovech has been dissatisfied with her living arrangement. She does not like the behaviors of her housemates or how staff treat her. Ms. Dorohovech's Supports Coordinators (*i.e.*, case managers) at the Lackawanna-Susquehanna MH/MR Program have been aware of her dissatisfaction, but made no efforts to help her find an alternative living arrangement. When she expressed interest in relocating, Ms. Dorohovech's Supports Coordinators told her that her only residential options were the personal care home or a homeless shelter.

44. In June 2002, Ms. Dorohovech enrolled in the Consolidated Waiver. Until December 22, 2006, she received habilitation services (consisting of a "day program" approximately three days per week, six hours per day and shopping

assistance) and transportation services to take her to and from her day program. The estimated costs of these services is approximately \$16,800 per year.

45. Mr. Madesky has lived in his current residence, a personal care home, since October 2001. Mr. Madesky's challenging behaviors are difficult for the personal care home, with more than 60 residents, to handle and he has come close to eviction.

46. In June 2001, Mr. Madesky enrolled in the Consolidated Waiver through which he worked in a supported employment program, received support from a job coach, received in-home respite care, and received transportation to take him to and from his workplace. The estimated costs of these services was approximately \$85,200 per year.

47. HCB Waivers must be renewed by CMS at least every five years. 42 U.S.C. § 1396n(c)(3).

48. DPW's Consolidated Waiver as renewed in 2001 expired on June 30, 2005. DPW submitted to CMS a proposal to renew the Waiver prior to that date. Due to various issues and concerns raised by CMS, DPW had to revise its proposal which delayed renewal.

49. Effective December 23, 2006, CMS approved DPW's request for renewal of its Consolidated Waiver. On information and belief, the final version of

the renewed Waiver was submitted by DPW to CMS at least several months prior to the effective date.

50. As renewed in December 2006, the Consolidated Waiver effected a significant change in eligibility criteria by providing for the first time that “[r]esidents of Personal Care Homes are excluded from enrollment in the waiver.”

51. On December 22, 2006, the Deputy Secretary for DPW’s Office of Mental Retardation (now the Office of Developmental Programs) issued a Memorandum to Administrators of County MH/MR Programs.

a. The Memorandum informed MH/MR Administrators that “waiver participants in licensed Personal Care Homes will be terminated from the Consolidated Waiver effective close of business December 22, 2006 and will be enrolled into the Person/Family Directed Support (P/FDS) Waiver effective December 23, 2006.”

b. The Memorandum acknowledged that current services provided under the Consolidated Waiver to personal care home residents may exceed the P/FDS Waiver’s \$22,225 cap on services, but stated that DPW “expects that counties will utilize other resources to ensure continuity of services.”

c. OMR developed standard letters to be used to notify personal care home residents of their termination from the Consolidated Waiver and transfer to the

P/FDS Waiver and asked MH/MR Administrators to send the letters within three business days after receipt of the Memorandum.

d. Since the Memorandum was not issued to the MH/MR Administrators until the effective date of personal care home residents' termination from the Consolidated Waiver so that the form letters could not be sent until after the effective date of their termination, personal care home residents could not possibly receive advance notice of their termination from the Consolidated Waiver.

e. The form letters indicated that personal care home residents terminated from the Consolidated Waiver did not have the right to a fair hearing because it is "a direct result of a change in the waiver conditions approved by CMS"

f. The form letters did not advise personal care home residents that they could remain in the Consolidated Waiver if they relocated to other residential settings or that they could receive assistance to relocate to other settings (including those funded by the Consolidated Waiver).

g. The form letters did not advise personal care home residents that their entitlement to services under the P/FDS Waiver would be far more limited than their entitlement under the Consolidated Waiver.

h. Neither the December 22, 2006 Memorandum nor any other communication from DPW to the MH/MR Administrators instructed or advised Administrators to offer personal care home residents the option to remain in the Consolidated Waiver if they relocated to other residential settings (including residential programs funded by the Consolidated Waiver) and to assist those personal care home residents to do so.

52. Although a few County MH/MR Programs took necessary steps to enable some personal care home residents to remain in the Consolidated Waiver by assisting them to relocate from personal care homes to other residential settings, most County MH/MR Programs simply followed DPW's instructions and terminated personal care home residents from the Consolidated Waiver with no opportunity or assistance to enable them to remain in the Consolidated Waiver.

53. By letters dated January 3, 2007 -- twelve days *after* her termination from the Consolidated Waiver, the Lackawanna-Susquehanna MH/MR Program informed Plaintiff Dorohovech that she had been terminated from the Consolidated Waiver effective December 22, 2006, that she had no right to appeal that decision, and that she was accepted into the P/FDS Waiver effective December 23, 2006.

54. When Ms. Dorohovech received these letters, she did not know what they meant, but she became upset and anxious because she believed they had some-

thing to do with her Social Security benefits. She took the letters to staff at United Cerebral Palsy of Northeastern Pennsylvania (UCP), which provides her with services under the Consolidated Waiver, who told her that it would only affect the way that UCP was paid (*i.e.*, UCP would be paid through the P/FDS Waiver rather than the Consolidated Waiver) and would not make any differences in her services or her Social Security benefits.

55. At no time did DPW or its agent, the Lackawanna-Susquehanna MH/MR Program, offer Ms. Dorohovech the opportunity to remain in the Consolidated Waiver if she relocated to another residential setting or offer her assistance to do so.

56. Given Ms. Dorohovech's intellectual disability and limited resources, she would not be able to understand the import of the change from the Consolidated Waiver to the P/FDS Waiver or to act on her own to find alternative housing that might have enabled her to retain her eligibility for the Consolidated Waiver.

57. Ms. Dorohovech would have been willing to relocate from a personal care home to another residential setting. Indeed, as her Supports Coordinators at the Lackawanna-Susquehanna MH/MR Program knew, Ms. Dorohovech had long wanted to relocate due to significant problems in her personal care home, but she was told that a homeless shelter was her only alternative to the personal care home.

58. The Consolidated Waiver entitled Ms. Dorohovech to receive a variety of residential services, including group homes, family living, and supported living services.

59. By letters dated January 4, 2007 -- thirteen days *after* his termination from the Consolidated Waiver, the Lackawanna-Susquehanna MH/MR Program informed Plaintiff Madesky that he had been terminated from the Consolidated Waiver effective December 22, 2006, that he had no right to appeal that decision, and that he was accepted into the P/FDS Waiver effective December 23, 2006.

60. Mr. Madesky does not understand the import of his termination from the Consolidated Waiver and transfer to the P/FDS Waiver.

61. Given Mr. Madesky's intellectual disability and limited resources, he would not be able to understand the consequences of the change from the Consolidated Waiver to the P/FDS Waiver or to act on his own to find alternative housing that might have enabled him to retain his eligibility for the Consolidated Waiver.

62. At no time did DPW or its agent, the Lackawanna-Susquehanna MH/MR Program, offer Mr. Madesky the opportunity to remain in the Consolidated Waiver if he relocated to another residential setting or offer him assistance to do so.

63. Mr. Madesky would be willing to relocate from a personal care home to another residential setting.

64. The Consolidated Waiver entitled Mr. Madesky to receive a variety of residential services, including group homes, family living, and supported living services.

65. The costs of Mr. Madesky's services under the Consolidated Waiver (approximately \$85,200 annually) far exceed the monetary cap for services of \$22,225 per year under the P/FDS Waiver.

66. In addition to Plaintiffs Dorohovech and Madesky, DPW terminated approximately 75 other personal care home residents from the Consolidated Waiver without advance notice, the opportunity for a hearing, or the opportunity and assistance to relocate to other residential settings. Due to their intellectual disabilities and limited financial resources, it is unlikely that these individuals would understand the long-term consequences of their termination from the Consolidated Waiver and transfer to the P/FDS Waiver nor would they have the resources to locate other residential options on their own so that they could have retained their eligibility for services under the Consolidated Waiver. On information and belief, many of these individuals -- if they received assistance to relocate and help to understand their options and the importance of retaining eligibility for the Consolidated Waiver -- would choose to move from personal care homes to other residential settings.

67. In May 2007, the Disability Rights Network of Pennsylvania, the organization designated by the Commonwealth to advocate for and protect the rights of individuals with disabilities, contacted DPW after inadvertently learning that personal care home residents had been terminated from the Consolidated Waiver without advance notice or any opportunity to remain in the Waiver by relocating to other settings. Efforts to work with DPW to develop a strategy to remedy this problem without judicial intervention yielded no concrete results, resulting in this lawsuit.

D. Irreparable Harm

68. Plaintiffs and those similarly situated have suffered irreparable harm as a result of the Defendants' actions and inactions in this case.

a. The Consolidated Waiver confers on participants an entitlement to a broad array of services that can change and expand as their needs change and expand. The P/FDS Waiver, in contrast, is capped at \$22,225, which is a far more limited entitlement. "Base" funding, which DPW instructed the County MH/MR Programs to use to avoid any cuts in services for individuals in the Consolidated Waiver, is not an entitlement at all and depends upon the availability of state funding.

b. Given the waiting list for services under the Consolidated Waiver, Plaintiffs and putative class members cannot now simply reestablish eligibility for the Consolidated Waiver by moving from a personal care home to another residential

setting. In addition, Plaintiffs and putative class members, due to their intellectual disabilities, would find it difficult to find an alternative residential option. More importantly, Plaintiffs and putative class members are unlikely to have the financial resources to afford other residential options, particularly given the lack of funding for residential services under the P/FDS Waiver. To the extent that they must remain in personal care homes, they will never be able to re-attain on their own eligibility for the Consolidated Waiver.

c. Accordingly, the termination of Plaintiffs and putative class members from the Consolidated Waiver permanently stripped them of a vital and valued entitlement.

VI. Claims

A. Count I -- Violation of the Fourteenth Amendment

69. Count I is brought solely against Defendant Richman in her official capacity as Secretary of Public Welfare.

70. The Due Process Clause of the Fourteenth Amendment mandates that the state provide meaningful notice and an opportunity to be heard when it deprives an individual of a property interest.

71. Plaintiffs and putative class members have a property interest in the continued receipt of their Medical Assistance benefits generally and their entitlement to Consolidated Waiver services in particular.

72. Defendant Richman did not provide any notice to Plaintiffs and putative class of DPW's decision to terminate them from the Consolidated Waiver until nearly two weeks after the termination occurred. Had Plaintiffs and putative class members received advance notice, they might have had an opportunity to take steps that would enable them to remain in the Waiver by relocating from a personal care home to another residential setting.

73. The post-deprivation notice that Defendant Richman provided to Plaintiffs and putative class members was not meaningful. Defendant Richman was aware that Plaintiffs and putative class members all have mental retardation, which limits their ability to comprehend written information. The written notice provided by Defendant Richman was incomprehensible to Plaintiffs and putative class members due to their disabilities.

74. Defendant Richman did not afford Plaintiffs and putative class members any opportunity to challenge DPW's decision to terminate them from the Consolidated Waiver.

75. Defendant Richman's acts and omissions under color of state law violate the Fourteenth Amendment of the Constitution and 42 U.S.C. § 1983.

B. Count II -- Violation of Title XIX's Due Process Mandate

76. Count II is brought solely against Defendant Richman in her official capacity as Secretary of Public Welfare.

77. Title XIX of the Social Security Act, the federal Medical Assistance statute, mandates that states which participate in the Medical Assistance program must "provide for an opportunity for a fair hearing before the State agency to any individual whose claim for medical assistance under the plan is denied or not acted upon with reasonable promptness." 42 U.S.C. § 1396a(a)(3)

78. Title XIX's fair hearing mandate *a fortiori* requires that states: (a) must provide notice to Medical Assistance recipients before they terminate their benefits; (b) afford them the opportunity to be heard before their benefits are terminated unless the sole issue is a federal or state law that requires an automatic change adversely affecting some or all Medical Assistance recipients; and (c) continue to provide them with services if they appeal before the date the action is to take effect. *See* 42 U.S.C. § 1396a(a)(3); 42 C.F.R. §§ 431.211, 431.220, 431.230. Defendant Richman failed to afford any of these due process protections to Plaintiffs and putative class members.

79. Defendant Richman's acts and omissions under color of state law violate 42 U.S.C. §§ 1396a(a)(3) and 1983.

C. Count III -- Violation of Title XIX's Entitlement to Services

80. Count III is brought solely against Defendant Richman in her official capacity as Secretary of Public Welfare.

81. Under Title XIX, states that participate in the Medical Assistance program must make Medical Assistance available to eligible persons. 42 U.S.C. § 1396a(a)(10)(A). Medical Assistance includes services under HCB Waivers approved by the federal government. 42 U.S.C. § 1396n(c).

82. Pennsylvania participates in the Medical Assistance program and its State Plan includes eleven approved HCB Waivers, including the Consolidated Waiver.

83. Plaintiffs and putative class members are eligible for Medical Assistance benefits and, until December 23, 2006, had been determined to be eligible for and were enrolled in the Consolidated Waiver. Plaintiffs and putative class members, therefore, were entitled to receive Consolidated Waiver services under Defendant Richman's Medical Assistance program.

84. Plaintiffs and putative class members could have retained their entitlement to Consolidated Waiver services if they had relocated from personal care homes prior to December 23, 2006.

85. DPW was aware since at least the fall of 2006 that the renewal of the Consolidated Waiver would result in the loss of eligibility for personal care home residents such as Plaintiffs and putative class members.

86. DPW was aware or should have been aware that -- due to their intellectual disabilities and limited financial resources -- Plaintiffs and putative class members would not understand the consequences of the loss of their eligibility for the Consolidated Waiver nor would they be able on their own to relocate to other housing options to retain their eligibility for the Consolidated Waiver.

87. DPW failed to afford Plaintiffs and putative class members the opportunity to retain their entitlement to Consolidated Waiver benefits by providing them with advance notice of the change, the option to remain in the Consolidated Waiver by relocating, and assistance to relocate to other residential options (including those funded through the Consolidated Waiver). By terminating Plaintiffs and putative class members from the Consolidated Waiver without taking those steps, DPW unlawfully stripped them of their entitlement to Consolidated Waiver benefits.

88. Defendant Richman's acts and omissions under color of state law violate 42 U.S.C. §§ 1396a(a)(10)(A), 1396n(c), and 1983.

D. Count IV -- Violation of Title XIX's Health and Welfare Mandates

89. Count IV is brought solely against Defendant Richman in her official capacity as Secretary of Public Welfare.

90. Title XIX of the Social Security Act mandates that a state must provide assurances that "necessary safeguards ... have been taken to protect the health and welfare of individuals provided services under the waiver" 42 U.S.C. § 1396n(c)(2)(A).

91. In both the 2001 Consolidated Waiver and the renewed 2006 Consolidated Waiver, DPW assured that it would provide safeguards to protect the health and welfare of individuals who receive services under the waiver.

92. As individuals enrolled in the Consolidated Waiver, Plaintiffs and putative class members had a right to have their health and welfare protected.

93. When DPW terminated them from the Consolidated Waiver, Plaintiffs and putative class members lost their current and future entitlement to an array of services -- including residential services -- without limits. Continued eligibility for the Consolidated Waiver would assure that all of the Plaintiffs' and putative class members' service needs now and in the future as they change and expand.

94. The P/FDS Waiver, which caps services at \$22,225 per year, cannot assure that Plaintiffs and putative class members services needs will be met now or in the future.

95. Base funding, which affords no entitlement and is limited by state allocations, cannot assure that Plaintiffs and putative class members service needs will be met now or in the future.

96. DPW was aware since at least the fall of 2006 that the renewal of the Consolidated Waiver would result in the loss of eligibility for personal care home residents such as Plaintiffs and putative class members.

97. DPW was aware or should have been aware that -- due to their intellectual disabilities and limited financial resources -- Plaintiffs and putative class members would not understand the import of the loss of their eligibility for the Consolidated Waiver nor would they be able on their own to relocate to other housing options to retain their eligibility for the Consolidated Waiver.

98. By failing to provide Plaintiffs and putative class members with advance notice of the change, the option to remain in the Consolidated Waiver by relocating, and assistance to relocate to other residential options (including those funded through the Consolidated Waiver), DPW acted in utter disregard of its duty to safeguard those individuals' health and welfare.

99. Defendant Richman's acts and omissions under color of state law violate 42 U.S.C. §§ 1396n(c)(2) and 1983.

E. Count V -- Violation of the Americans with Disabilities Act

100. Count V is brought solely against Defendant Richman in her official capacity as Secretary of Public Welfare.

101. Plaintiffs have mental retardation and mental illnesses that substantially limit them in the major life activities of learning, caring for themselves, working, and interacting with others. As such, they are individuals with disabilities protected by the Americans with Disabilities Act (ADA). 42 U.S.C. §§ 12102(2)(A); 28 C.F.R. § 35.104.

102. Plaintiffs are qualified individuals with disabilities under the ADA because, with or without reasonable modifications, they met the essential eligibility requirements for services under the Consolidated Waiver before they were unlawfully terminated. 42 U.S.C. § 12131(2); 28 C.F.R. § 35.104.

103. DPW, operated by Defendant Richman, is a public entity subject to the ADA. 42 U.S.C. § 12131(1)(B).

104. Title II of the ADA requires a public entity, such as DPW, to make reasonable modifications in its policies, practices, and procedures when necessary to

avoid discrimination on the basis of disability unless doing so would constitute a fundamental alteration. 42 U.S.C. § 12132; 28 C.F.R. § 35.130(b)(7).

105. Due to the nature of their disabilities (of which DPW was well aware), Plaintiffs and putative class members could not understand the written notices sent by DPW concerning their termination from the Consolidated Waiver nor could they understand that they might have been able to remain in the Consolidated Waiver if they relocated to other housing options.

106. Defendant Richman violated Title II of the ADA, 42 U.S.C. § 12132, by failing to make reasonable modifications in DPW's policies, practices, and procedures to provide notice to Plaintiffs and putative class members in a manner designed in light of their disabilities to assure that they would understand that they would lose their entitlement under the Consolidated Waiver and the consequences of that loss if they remained in their personal care homes and to assist them to take steps to retain their entitlement by identifying and relocating to other housing options.

107. Defendant Richman's acts and omissions under color of state law violate 42 U.S.C. §§ 12131-12134 and 42 U.S.C. § 1983.

F. Count VI -- Violation of the Rehabilitation Act

108. Count VI is brought against Defendant DPW and Defendant Richman in her official capacity as Secretary of Public Welfare.

109. Plaintiffs have mental retardation and mental illnesses that substantially limit them in the major life activities of learning, caring for themselves, working, and interacting with others. As such, they are individuals with disabilities protected by the Rehabilitation Act (RA). 29 U.S.C. § 705(20)(B).

110. Plaintiffs are otherwise qualified individuals with disabilities under the RA because, with or without reasonable modifications, they met the essential eligibility requirements for services under the Consolidated Waiver before they were unlawfully terminated. *See* 29 C.F.R. § 794(a); 45 C.F.R. § 84.3(k)(4).

111. Defendant DPW, operated by Defendant Richman, is a program that receives federal financial assistance, which makes it subject to Section 504 of the RA. 29 C.F.R. § 794(b)(1)(A).

112. Section 504 of the RA requires a public entity, such as DPW, to make reasonable modifications in its policies, practices, and procedures when necessary to avoid discrimination on the basis of disability unless doing so would constitute a fundamental alteration. *See* 29 U.S.C. § 794. This requires, *inter alia*, that when a public entity provides notice concerning benefits or services, it must take such steps as are necessary to ensure that qualified individuals with disabilities are not denied effective notice due to their disabilities. *See* 45 C.F.R. § 84.52(b).

113. Due to the nature of their disabilities (of which DPW was well aware), Plaintiffs and putative class members could not understand the written notices sent by DPW concerning their termination from the Consolidated Waiver nor could they understand that they might have been able to remain in the Consolidated Waiver if they relocated to other housing options.

114. Defendants violated Section 504 of the RA, 29 U.S.C. § 794, by failing to make reasonable modifications in DPW's policies, practices, and procedures to provide notice to Plaintiffs and putative class members in a manner designed in light of their disabilities to assure that they would understand that they would lose their entitlement under the Consolidated Waiver and the consequences of that loss if they remained in their personal care homes and to assist them to take steps to retain their entitlement by identifying and relocating to other housing options.

115. Defendant Richman's acts and omissions under color of state law violate 29 U.S.C. § 794 and 42 U.S.C. § 1983.

VII. Relief Requested

116. Plaintiffs respectfully request that the Court:

- a. retain jurisdiction over this action;

b. declare that Defendants' actions and inactions violate the Due Process Clause of the Fourteenth Amendment of the Constitution, Title XIX of the Social Security Act, the Americans with Disabilities Act, and the Rehabilitation Act;

c. issue appropriate classwide injunctive relief to enjoin Defendants from continuing to violate the Due Process Clause of the Fourteenth Amendment of the Constitution, Title XIX of the Social Security Act, the Americans with Disabilities Act, and the Rehabilitation Act, and to take appropriate steps to remedy their violations;

d. issue such other relief as may be just, equitable, and appropriate, including an award of reasonable attorneys' fees, litigation expenses, and costs pursuant to 42 U.S.C. §§ 1988, 12205 and 29 C.F.R. § 794a(b).

Respectfully submitted,

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