

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA**

**BILL M., by and through his father and  
natural guardian, William M; JOHN DOE,  
by and through his mother and natural  
guardian, Jane Doe; HEATHER V., by and  
through her mother and guardian, Marcia V;  
JANE S., by and through her mother  
and natural guardian, Patricia S.;**  
**KEVIN V., by and through his mother and legal  
guardian, Kathy V.; JENNIFER T., by and through  
her parents and legal guardians, Sharon and Greg T.;**  
**MARCUS J., by and through his parents and legal  
guardians, Julie and Miles J.; and on behalf of  
themselves and all other persons similarly situated,**

**Case No. 4:03CV3189**

**AMENDED  
COMPLAINT  
(CLASS ACTION)**

**Plaintiffs,**

**vs.**

**NEBRASKA DEPARTMENT OF HEALTH AND  
HUMAN SERVICES FINANCE AND SUPPORT,  
NEBRASKA DEPARTMENT OF HEALTH AND  
HUMAN SERVICES, STEPHEN B. CURTISS,  
in his official capacity as the Director of Nebraska  
Department of Health & Human Services Finance and  
Support; and RON ROSS, in his official capacity  
as the Director of Nebraska Department of  
Health & Human Services;**

**Defendants.**

**PRELIMINARY STATEMENT**

1. This complaint, seeking declaratory and injunctive relief, challenges the Defendants’ and their agents’ (hereinafter “Defendants”) failure to provide Plaintiffs with funds for the home and community-based developmental disability services for which they are eligible, in violation of the Medical Assistance Act (hereinafter “Medicaid”) 42 U.S.C. §1396 *et seq.*; the Americans with Disabilities Act of 1990, and its implementing regulations, (hereinafter “ADA”), 42 U.S.C. § 12101

et seq.; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (hereinafter “Section 504”), and 42 U.S.C. §1983. The Plaintiffs individually named are each eligible for, desire, have applied for or have attempted to apply for and have been denied home and community-based Medicaid-funded services, specifically services available pursuant to the Home and Community Based Waiver Program (hereinafter “the Waiver Program”), 42 U.S.C. § 1396n, and Neb. Rev. Stat. 68-1018 et seq., and its implementing regulations. Plaintiffs have been unable to gain access to these critical services because Defendants have unlawfully restricted funding to the Waiver program, resulting in 1) unlawfully long waits to receive any community-based services, and 2) the failure to provide services to Plaintiffs which are adequate to meet their needs. Because of Defendants’ actions, the individually named Plaintiffs, and all those who are similarly situated, are at imminent risk of unnecessary institutionalization in Intermediate Care Facilities for the Mentally Retarded (hereinafter “ICF/MR”).

### **JURISDICTION AND VENUE**

2. This action is authorized by Title II of the ADA, 42 U.S.C. §12133, as an action seeking relief from discrimination on the basis of disability in violation of Section 42 U.S.C. §12132. In addition, this action is authorized under 42 U.S.C. §1983 and by the Supremacy Clause of the United States Constitution, Article 6, as an action seeking relief from discrimination on the basis of disability in violation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. This action is further authorized under 42 U.S.C. §1983 and by the Supremacy Clause of the United States Constitution, Article VI, as an action seeking relief for a deprivation of certain rights, privileges, or immunities granted to Plaintiffs under the Medical Assistance Act (“Medicaid”), 42 U.S.C. §1396 et seq. by the Defendants.

3. This action arises under federal law and involves deprivations under color of state law of rights secured under the United States Constitution and acts of Congress, and therefore, this Court has jurisdiction to determine the Plaintiffs' claims pursuant to 28 U.S.C. §§1331 and 1343 (a)(3). This Court also has jurisdiction over Plaintiffs' action for declaratory relief pursuant to 28 U.S.C. § 2201 and Rule 57 of the Federal Rules of Civil Procedure. Injunctive relief is authorized by 28 U.S.C. § 2202, 42 U.S.C. § 1983 and Rule 65 of the Federal Rules of Civil Procedure. The Court has supplemental jurisdiction over Plaintiffs' state law claims pursuant to 28 U.S.C. § 1367.

4. Pursuant to 28 U.S.C. §1391(b), venue is proper in this Court in that Defendants reside or are located in this judicial district, and a substantial part of the events or omissions giving rise to the claim occurred in this district.

#### **PLAINTIFFS**

5. Bill M. is a 22-year-old resident of McCook, Nebraska, who has been diagnosed with a developmental disability caused by an abnormality of the 18<sup>th</sup> chromosome, a condition known as 18Q syndrome. Bill M.'s disability falls within the meaning of 42 U.S.C. §12102(2)(A) and is a disability within the scope of Section 504. Due to his disability, Bill M. brings this suit through William M., Bill M.'s father and natural guardian.

6. John Doe is a 22-year-old resident of Valley County, Nebraska, who has been diagnosed with a developmental disability caused by Down's Syndrome. John Doe's disability falls within the meaning of 42 U.S.C. §12102(2)(A) and is a disability within the scope of Section 504. Due to his disability, John Doe brings this suit through Jane Doe, John Doe's mother and natural guardian.

7. Heather V. is a 23-year-old resident of Hastings, Nebraska, and is diagnosed as developmentally and physically disabled, and is disabled within the meaning of 42 U.S.C. §12102(2)(A) and Section 504. Heather V. brings this suit through Marcia V., Heather V.'s mother and natural guardian.

8. Jane S. is a 32-year-old resident of Omaha, Douglas County, Nebraska, and has a developmental disability, autism and obsessive-compulsive disorder. Jane S.'s disability falls within the meaning of 42 U.S.C. §12102(2)(A) and is a disability within the scope of Section 504. Due to her disability, Jane S. brings this suit through her mother and natural guardian, Patricia S.

9. Kevin V. is a 23-year-old resident of Lincoln, Nebraska, who has been diagnosed with Severe Mental Retardation, Autism, Epilepsy and a mental illness of Disruptive Behavior Disorder. Kevin V.'s disability falls within the meaning of 42 U.S.C. §12102 (2)(A) and is a disability within the scope of Section 504. Due to his disability, Kevin V. brings this suit through Kathy V., Kevin V.'s mother and legal Guardian.

10. Jennifer T. is a 23-year-old resident of Lincoln, Nebraska, who has been diagnosed with Severe Mental Retardation and Epilepsy. Jennifer T.'s disability falls within the meaning of 42 U.S.C. §12102 (2)(A), and is a disability within the scope of Section 504. Due to her disability, Jennifer T. brings this suit through Greg and Sharon T., Jennifer T.'s parents and legal guardians.

11. Marcus J. is a 21-year-old Nebraska resident who has been diagnosed with Cerebral Palsy, Profound Mental Retardation, Agitation/Anxiety, Aspartic-Athetoid Mixed Quadriplegia, Status Post Rhizotomy, Insomnia, Right Temporal Arachnoid Cyst Shunt, Right Estropia, Noonan Syndrome and Congenital Left Radial Dislocation. Marcus J.'s disability falls within the meaning

of 42 U.S.C. §12102 (2)(A), and is a disability within the scope of Section 504. Due to his disability, Marcus J. brings this suit through Miles and Julie J., Marcus J.'s parents and legal guardians.

### **DEFENDANTS**

12. Defendant Nebraska Department of Health and Human Services Finance and Support (hereinafter "Finance & Support") is a department of the State of Nebraska established pursuant to the Nebraska Partnership for Health and Human Services Act, Neb. Rev. Stat. § 81-3001 et seq. The functions of Finance & Support and its powers are set forth at Neb. Rev. Stat. § 81-3007, § 81-3007.01, §§81-3301 to 3307. Of particular relevance to the present action, Finance & Support is authorized to contract with, and act as an agent of, the federal government in matters of mutual concern, and pursuant to Neb. Rev. Stat. § 68-1019 et seq. is charged with administering and regulating the Nebraska Medical Assistance Program (i.e., Nebraska's Medicaid plan).

13. Defendant Nebraska Department of Health and Human Services (hereinafter "NDHHS") is a department of the State of Nebraska established pursuant to the Nebraska Partnership for Health and Human Services Act, Neb. Rev. Stat. §§ 81-3001 et seq. The functions of NDHHS and its powers are set forth at Neb. Rev. Stat. § 81-3007, § 81-3007.01, §81-3101 to 3108. Of particular relevance to the present action, NDHHS is authorized by Neb. Rev. Stat. § 83-1214 to carry out the authority granted to it by Finance & Support, pursuant to Neb. Rev. Stat. §68-1035.01, and NDHHS is obligated to comply with all applicable provisions of the federal and state laws governing the Nebraska Medical Assistance Plan.

14. Defendant Stephen B. Curtiss (hereinafter "Curtiss") is sued in his official capacity. As the Director of Finance and Support, Curtiss is bound by the duties and responsibilities stated

in Neb. Rev. Stat. §§ 81-3007, 81-3007.01, 81-3101 et seq., and 83-101.06, et seq., and their implementing regulations (Reissue 1999) and applicable federal and state laws and regulations. Curtiss exercises overall responsibility and supervision over the formulation of policies, practices, and procedures of Finance & Support, and more specifically, the promulgation, administration, supervision, and control of the rules and regulations related to community-based services for Nebraska residents with developmental disabilities, including the Medicaid funding for the Waiver Program.

15. Defendant Ron D. Ross (hereinafter “Ross”) is sued in his official capacity. As the Director of NDHHS, Ross is bound by the duties and responsibilities stated in Neb. Rev. Stat. §§ 81-3007, 81-3007.01, 81-3101 et seq., and 83-101.06, et seq., (Reissue 1999), and their implementing regulations, as well as by all applicable federal laws and regulations. Ross exercises overall responsibility and supervision over the formulation of policies, practices, and procedures of NDHHS, and more specifically, the promulgation, administration, supervision, and control of the rules and regulations related to community-based services for Nebraska residents with developmental disabilities.

### **CLASS ACTION ALLEGATIONS**

16. The named Plaintiffs bring this class action on their own behalf and, pursuant to Rules 23 (a)(1)-(4), (b)(1)(A), (b)(2), and (b)(3) of the Federal Rules of Civil Procedure, on behalf of a class defined as follows:

All present and future individuals with developmental disabilities in Nebraska who are eligible for Medical Assistance Home and Community-Based Services but either are not receiving funding for such services, or are not receiving sufficient funding for such services to reasonably achieve the purpose of the service, assure the class member’s health and safety, or ensure progress toward independence, interdependence, productivity and community integration.

Due to the failure of NDHHS and Finance & Support, all class members have been, or are at risk of being, unnecessarily placed at ICF/MR facilities, nursing homes or other institutional settings, contrary to applicable law.

17. The class is so numerous that joinder of all members is impracticable. Over eight hundred people are on the wait list for services. In addition, over two thousand individuals are receiving Home and Community-Based Services, and due to the use of a flawed mechanism for determining the appropriate level of service for each individual receiving services, a large percentage of those receiving services are receiving an inadequate level of service.

18. There are questions of law and fact common to the class. Common questions of law include, without limitation, (a) whether it is permissible under federal law for Nebraska to fail to provide an individual eligible for services under the community-based services waiver with funding for such services; (b) whether it is permissible under federal law for Nebraska to fail to provide an individual eligible for services under the community-based services waiver with a choice between an institutional setting and Home and Community-Based Services; (c) whether it is permissible under federal law for Nebraska to fail to provide an individual eligible for services under the community-based services waiver with funding for such services in a timely manner; (d) whether it is permissible under the Due Process Clause of the Fourteenth Amendment to deny funding for Home and Community Based waiver services to eligible individuals without notice and an opportunity to be heard; (e) whether it is permissible under the ADA to fail to provide individuals who are eligible for funding for services under the Home and Community Based Services waiver with funds for residential services and day habilitation services in the most integrated setting appropriate to the needs of the individual with disabilities; and (f) whether it is permissible under federal law, as well

as applicable state law, for NDHHS and Finance & Support to provide a level of funding to individuals approved for Home and Community-Based Services which is insufficient to accomplish the purpose of the services, to assure the individuals' health and safety, or to ensure the individuals' progress toward independence, interdependence, productivity and community integration. Common questions of fact include, without limitation, (a) whether the Defendants have failed to provide the putative class with funds for Home and Community-Based Waiver Services; (b) whether the Defendants have failed to provide putative class members with a choice between an institutional setting and Home and Community-Based Services; (c) whether the Defendants have failed to provide putative class members with funds for waiver services in a timely manner; (d) whether the Defendants have denied putative class members with notice and an opportunity to be heard; (e) whether the Defendants have failed to provide putative class members with funds for residential and day habilitation services in the most integrated setting appropriate to the needs of the individual with disabilities; and (f) whether Defendants have failed to provide a level of funding to individuals approved for Home and Community Based services sufficient to accomplish the purpose of the services, to assure the individuals' health and safety, or to ensure the individuals' progress toward independence, interdependence, productivity and community integration.

19. The claims of the representative Plaintiffs are typical of the claims of the class in that the representative Plaintiffs have each either been denied funding for requested services, or they are receiving funding inadequate to reasonably achieve the purpose of the service, assure the class member's health and safety, or ensure progress toward independence, interdependence, productivity and community integration

20. The representative Plaintiffs will fairly and adequately protect the interests of the



class. The representative Plaintiffs have no interests in conflict with the class, and Plaintiffs have selected qualified, experienced, competent counsel.

21. The prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications establishing incompatible rules of law for the provision of services to residents of and applicants to BSDC and other ICF/MR institutional settings.

22. Defendants, their agents, employees, predecessors, and successors in office have acted or will act on grounds generally applicable to the class, thereby making appropriate injunctive or declaratory relief with respect to the class as a whole.

### **STATUTORY AND REGULATORY FRAMEWORK**

#### **American with Disabilities Act and Section 504**

23. On July 26, 1990, President Bush signed into law the ADA, 42 U.S.C. § 12101 et seq., establishing the most important civil rights laws for persons with disabilities in our nation's history.

24. In enacting the ADA, Congress was particularly concerned about the unnecessary segregation and institutionalization of people with disabilities and the resulting lack of full participation in and access to community services and activities. 42 U.S.C. § 12101(a)(2), (a)(5), (a)(8).

25. Title II of the ADA prohibits public entities, such as the Defendants, from discriminating against the individuals with disabilities they serve. 42 U.S.C. §§ 12131-32. Discrimination under the ADA includes the segregation of persons with disabilities from society as a result of unnecessary institutionalization. Olmstead v. L.C., 527 U.S. 581, 119 S. Ct. 2176, 144 L.Ed. 2d 540 (1999).

26. The regulations promulgated under Title II specifically provide that “a public entity

shall administer services, programs and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.” 28 C.F.R. §35.130(d). The regulations also specify a variety of requirements to ensure nondiscrimination, including the provision of access, modification of practices and policies, and the provision of auxiliary aides and services. The regulations prohibit the Defendants from administering programs in a discriminatory manner. 28 C.F.R. Part 35.

27. Pursuant to Olmstead v. L.C., 527 U.S. 581, 119 S. Ct. 2176, 144 L.Ed. 2d 540 (1999), in order to comply with the requirements of the ADA, the states are obligated to adopt a comprehensive, effective working plan for placing qualified persons with mental disabilities in less restrictive settings, and to move persons waiting for services into such services at a reasonable pace.

28. Section 504, on which the ADA is modeled, sets forth similar protections against discrimination by recipients of federal funds, such as Defendants herein, including prohibiting unnecessary segregation. 29 U.S.C. § 794 et seq. State recipients of federal funds are required to administer all programs and activities receiving such funds in the most integrated setting appropriate to the needs of qualified disabled persons. 28 C.F.R. § 41.51(d).

### **The Medicaid Act**

29. Medicaid is a joint state and federally funded program whose purpose is to provide medical services to low-income persons pursuant to Title XIX of the Social Security Act, and to provide rehabilitation and other services to help them attain or retain capability for independence or self care. 42 U.S.C. §§ 1396 et seq.

30. States are not required to participate in Medicaid. However, states choosing to participate in the Medicaid program, receive federal matching funds for their medical assistance program. Once a state elects to participate, it must do so in accordance with the mandatory

requirements of the federal Medicaid statutes and regulations. 42 U.S.C. § 1396 et seq., 42 C.F.R. § 430 et seq.

31. As a condition of participating in the federal Medicaid program, states must submit to the United States Department of Health and Human Services, a state Medicaid plan that fulfills the requirements of the Medicaid Act and includes certain mandatory, as well as optional, Medicaid services. 42 U.S.C. §§ 1396 a(a) and d(a).

32. Federal Medicaid law requires every state to offer nursing facility services. 42 U.S.C. §§ 1396 a(a)(10)(A); 1396 d(a)(4)(A). The state plan must also provide for home health services for any individual who is entitled to nursing facility services. 42 U.S.C. § 1396 a(a)(10)(D).

33. Although not required to do so, states may offer ICF/MR services, as well as home health care services, private duty nursing services, community supported living arrangements, home and community care for functionally disabled elderly individuals, personal care services, and any medical and remedial care recognized under state law. 42 U.S.C. § 1396 d(a). Once a state elects to include such optional services in its plan, however, such services become subject to all the requirements of federal Medicaid law. 42 U.S.C. § 1396 a(a)(1).

34. In general, states must provide institutional services to all individuals who qualify for them, and Medicaid services must be furnished with reasonable promptness to eligible individuals. 42 U.S.C. § 1396 a(a)(8); 42 C.F.R. § 435.93(a).

35. Covered services are to be rendered by qualified providers to Medicaid-eligible persons, and beneficiaries are to have a free choice of qualified providers. 42 U.S.C. § 1396a (a)(23), 42 C.F.R. § 431.51.

36. The state makes payments directly to providers, and the provider cannot bill the beneficiary for services. Medicaid payments must be accepted as payment in full. 42 C.F.R. §447.15.

37. Federal law allows states to waive certain, limited Medicaid requirements in order to enable people with disabilities to avoid institutionalization and receive Medicaid services in the community. 42 U.S.C. § 1396 n(c). These waivable requirements are the requirements relating to comparability, statewideness, and eligibility standards for the medically needy. Nebraska currently operates several programs, with the one of particular relevance to the present suit, being the Home and Community-Based Services Waiver for Adults with Developmental Disabilities.

38. Home and Community-Based Services are less expensive than services in an institutional setting, and thus in addition to the requirements of the ADA and Medicaid (see Olmstead), it is in the state's interest to provide such services as an alternative to institutionalization.

39. A great number of individuals with disabilities can live in the community so long as they have adequate supports and services. In addition, due to their ties to family and friends, there are many benefits to developmentally disabled individuals in receiving adequate supports which will enable them to live in the community rather than an institutional setting. Thus, it is in the interest of many individuals with developmental disabilities to receive such community-based services as an alternative to institutionalization.

40. 42 C.F.R. §440.230(b), promulgated pursuant to the Medicaid Act, provides that each service must be sufficient in amount, duration and scope to reasonably achieve its purpose. Related to this requirement, HCFA issued the following guidance to State Medicaid Directors in Olmstead letter number 4, dated January 10, 2001:

In exercising discretion to approve new waiver requests, we will apply the same sufficiency concept to the entire waiver itself, i.e., whether the amount, duration, and scope of all the services offered through the waiver (together with the State’s Medicaid plan and other services available to waiver enrollees) is sufficient to achieve the purpose of the waiver to serve as a community alternative to institutionalization and assure the health and welfare of the individuals who enroll.

... an exceptionally limited service design may prevent an existing waiver from being able to assure the health or welfare of the individuals enrolled. Where, subsequent to a HCFA review of quality in an existing waiver, it is very clear that the waiver design renders it manifestly incapable of responding effectively to serious threats to the health or welfare of waiver enrollees, we would expect the State to fulfill its assurance to protect health and welfare. At page 7.

41. As indicated in the foregoing passage, a participating state is obligated to protect the health and welfare of individuals who are provided services under the waiver. Specifically, 42 U.S.C §. 1396n(c)(2)(A) provides:

A waiver shall not be granted under this subsection unless the State provides assurances satisfactory to the Secretary that – (A) necessary safeguards (including adequate standards for provider participation) have been taken to protect the health and welfare of individuals provided services.

**Due Process Clause of the Fourteenth Amendment & Due Process Requirements under Federal Medicaid Law**

42. The due process clause of the Fourteenth Amendment prohibits a state from depriving a person of life, liberty or property without due process of law. Welfare benefits “are a matter of statutory entitlement for persons qualified to receive them” and thus are constitutionally protected. Goldberg v. Kelly, 397 U.S. 245, 90 S.Ct. 1011, 25 L.Ed. 2d 287 (1970). Due process requires, at a minimum, that persons eligible for Home and Community-Based Services be given notice and an opportunity for a hearing upon a denial or delay in providing those services.

43. Federal Medicaid Law specifically requires a participating state's medical assistance plan to "provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for medical assistance under the plan is not acted upon with reasonable promptness." 42 U.S.C. §1396a(a)(3). See also, 42 C.F.R. §§ 431.200 - 431.250.

#### **Relevant Nebraska Law**

44. Pursuant to Neb. Rev. Stat. § 83-1214, NDHHS is obligated to comply with all applicable provisions of Title XIX of the Social Security Act. Title XIX includes 42 U.S.C. §1396a, which provides for state plans for medical assistance (*i.e.*, Medicaid).

45. As described above, the amount, duration, and scope of all the services offered through the waiver (together with the state's Medicaid plan and other services available to waiver enrollees), must be sufficient to achieve the purpose of the waiver to serve as a community alternative to institutionalization and must assure the health and welfare of the individuals who enroll. To some extent, the purpose of particular services to individuals with developmental disabilities are suggested by the Nebraska Administrative Code. For example, with respect to day services, 205 NAC 4-017 states:

Day services provide persons with supports, services and interventions desired and needed to increase or maintain their capacity for independent functioning, self-determination, interdependence, productivity and community integration in the Day Service environment.

In addition, the intent and services of the Waiver Program, 480 NAC 2-002, states:

Nebraska's waiver allows for the provision of Habilitation Services and Family Support Services to promote client independence and integration and to support the family. 2-002.01 Habilitation Services: An aggregate set of essential interventions, designated in an IPP, which assist the client to develop and retain the capacity for independence, self-care, and social and /or economic functioning.

46. Neb. Rev. Stat. § 83-1202(1) states the intent of the Legislature that all persons with developmental disabilities shall receive services and assistance which present opportunities to increase their independence, productivity, and integration into the community.

47. The determination of the type and amount of specialized supports and services to be funded through the Department for individual, eligible persons is to be made by service coordination personnel in the Local Field Office. 205 NAC 2-011.08.

### **THE NAMED PLAINTIFFS**

48. Bill M. lives with his father, who was divorced from Bill M.'s mother in 1996. At the time of his parents' divorce, Bill M. was receiving habilitating services from the public school system. Due to the demands of his employment, Bill M.'s father was unable to provide either supervision or care for Bill M. each day immediately after school and during school vacations. Consequently, daycare and respite care services were requested and approved under the Medicaid waiver for community-based developmental disability services for children.

49. Bill M. continued to be enrolled in the public schools until May, 2001. At that time, Bill M., who had turned twenty-one (21) and had completed his public school program, was approved for adult day services. He has received adult day services under the Nebraska Developmental Disability Services Act, since May, 2001.

50. Related to his developmental disability, Bill M. engages in certain behaviors which cause conflict between Bill M., his father, and other family members. Such conflict has on occasions led to fights involving pinching, hitting and kicking. Bill M.'s father does not have specialized training sufficient to enable him to effectively cope with these behavioral issues.

51. Bill M.'s interests can only be adequately addressed in a residential setting with staff specially trained to work with individuals with developmental disabilities, and consequently since

1996, Bill M. has been requesting residential services in a community setting. Defendants have informed Bill M. that funding for residential services is inadequate to provide services to all eligible persons, and the Defendants have therefore refused to provide such services to Bill M. Instead, Bill M. has been placed on the registry of persons with unmet needs, and has been on that registry since 1996.

52. Defendants' continuing refusal to provide services to Bill M. in the community places Bill M. at risk of being placed in a more restrictive institutional setting, such as an ICF/MR, because Bill M.'s individualized needs can only be adequately served by those specially trained to deal with the needs of individuals with disabilities. While Bill M. and his family would prefer that Bill M. receive these residential services in a community setting, it is more important that Bill M. receive appropriate services, even in an institutional setting, than not receive those services at all.

53. John Doe lives with his mother and father. Doe was a student in the public schools and received habilitating services through the public schools until May, 2001. At that time, Doe, who had turned twenty-one (21) and had completed his public school program, was approved for adult day services. He has received adult day services under the Nebraska Developmental Disability Services Act since approximately May, 2001.

54. Related to his developmental disability Doe engages in certain behaviors which place him at risk. Specifically, Doe is hyperactive and he does not sleep through the night. Virtually every night, Doe is awake in the middle of the night. He regularly calls other people he knows in his community. As a result of calling others in the middle of the night, he has been reported to the police at least twice. He also has left the house in the middle of the night. On occasion, he has gone into other houses when their residents were gone. Compounding the situation, Doe lacks an appreciation



concerning the line between appropriate and inappropriate physical conduct, and there is a risk that he will act inappropriately when not supervised. Although his parents have blocked the phone, locked the doors, and have discussed correct behavior with Doe, he has found ways to use the phone and to get out, and his limited cognitive ability prevents him from either appreciating the dangers in his behavior or having the ability to conform his behavior to expectations. Doe's parents are unable to supervise him at all times when he needs supervision and they do not have the specialized training sufficient to enable them to effectively cope with these behavioral issues.

55. Doe's interests can only be adequately addressed in a residential setting, adequately staffed by individuals specially trained to work with individuals with developmental disabilities. Consequently, since approximately 1995, Doe's parents have been requesting residential services in a community setting.

56. Defendants have informed Doe that funding for residential services is inadequate to provide services to all eligible persons, and the Defendants have therefore refused to provide such services to Doe. Instead, Doe has been placed on the registry of persons with unmet needs, and has been on that registry since at least 1997.

57. The Defendants' continuing refusal to provide services to Doe in the community places Doe at risk of being placed in a more restrictive institutional setting, such as an ICF/MR, because Doe's individualized needs can only be adequately served by those specially trained to deal with the needs of individuals with developmental disabilities and by an adequate level of supervision to ensure his safety.

58. Indeed, at his parents' request, Doe was recently evaluated for placement into an ICF/MR setting. The ICF/MR facility determined that Doe is eligible for placement in their facility,

but denied admission because in the view of the facility's admission committee, Doe would benefit far more from services in the community than placement at the ICF/MR. The ICF/MR further stated in its denial of admission, "Should such a [community] placement not be available," then the ICF/MR facility would "gladly accept another request for services at our facility."

59. While Doe and his family seek residential services in a community setting, the Defendants continue to refuse to approve Doe's receipt of residential services "because funding is not available." Consequently, Doe is at risk of placement in a more restrictive setting, because it is more important that Doe receive appropriate services, even in an institutional setting, than not to receive those services at all.

60. Heather V. is unable to walk due to muscular spasticity. Although Heather V. can see light, she is legally blind and can only make out the shapes of large objects. Heather V. also has periodic grand mal seizures. Although Heather V. lived at home with her parents until a few years ago, she now lives at a group home.

61. In addition to the foregoing cognitive and physical difficulties, Heather V. has a bi-polar disorder, which is manifested in a disruption in activity levels and sleep/awake cycles. This bi-polar disorder appeared after a bout with encephalitis in September, 1998. Heather V. is often awake and highly active for several days without sleep, and then she may sleep and be unresponsive in efforts to wake her for several days. Since September, 1998, Heather V. has also had apparent hallucinations and delusions, in that she often appears to be talking to people not present and reacts as if she is responding to a startling stimulus, which is not in fact present. Her doctors have been working to bring her bi-polar disorder and her hallucinatory symptoms under control.

62. Heather V. is given numerous medications for her mood disorder, seizures, muscle spasms, digestive and bowel problems. She receives physical therapy and her caregivers help her with stretching exercises daily. Because Heather V. is non-ambulatory, her caregivers assist her whenever she moves from one location to another. Heather V. cannot feed herself, is unable to use toilet facilities on her own, and wears Depends for incontinence.

63. Heather V. attended a special education program in the public schools until her graduation in May 2001.

64. Prior to the close of that school year, Heather V. and her family requested day services from Defendants to replace the day habilitation services she was receiving through the schools.

65. In May, 2001, Defendants determined that Heather V. would receive day services. However, Defendants determined that Heather V. should only receive 82 hours per month, as opposed to the approximately 173 hours of day services Heather V.'s care providers and parents believed she required.

66. Upon learning of the decision, Heather V.'s mother and guardian, Marcia V., requested informal dispute resolution.

67. In response to that request, Defendants updated Heather V.'s assessment, and revised the number of hours of day service for which it would approve Heather V. to 105 hours per month.

68. This number of hours was still well below the number of hours Heather V.'s family, her Individual Program Plan team (hereinafter "IPP"), and care providers believed necessary to achieve the purpose of the day service and to ensure Heather V.'s health and safety.

69. Heather V.'s care providers indicate she requires approximately 173 hours per month of day services, and failure to provide services at this level would jeopardize Heather V.'s health and

safety. In addition, with only the approved number of hours (105 per month), as opposed to 173 hours per month, it would not be possible to accomplish meaningful habilitation in Heather V.'s service, and thus the purpose of the day service would not be met.

70. Despite not being paid to provide 173 hours of day service each month, Heather's care provider has been providing 173 hours because its staff believes this level of services is necessary to adequately protect Heather V.'s health and safety.

71. The decision regarding Heather V.'s day service hours was not made by service coordination personnel in the local field office, as required by the agency's own regulation, 205 NAC 2-011.08.

72. Indeed, Defendants' decision on hours was not made by any person or group of persons. Instead, the decision was made by supplying numbers obtained from a pencil and paper inventory of Heather V.'s adaptive and maladaptive behaviors (known as the "ICAP") into a funding equation developed by the Defendants' administration. A computer at the Beatrice State Developmental Center calculated the equation's result, and this result was regarded as final and subject to no human judgment or discretion.

73. Under Defendants' tandem application of the ICAP and the funding formula, it is mathematically impossible for anyone to receive a result indicating an amount over 149 hours of day service.

74. As a practical matter, the test and the funding formula, as used in combination, would yield a ceiling considerably below 149 hours.

75. Defendants have no policy limiting day services to fewer than 173 hours, and there are individuals with developmental disabilities within the system receiving 173 hours of day service.

76. The administration of the ICAP was flawed in that it was administered by an NDHHS's employee with inadequate training in its administration.

77. The actions taken by NDHHS violate applicable laws and regulations in that: a) the tandem application of the ICAP and NDHHS's funding formula was not decided in the local field office, as required by NDHHS's own regulations, but rather was determined by a blind application of a mechanical process without regard to the actual and real needs of Heather V., b) the tandem application of the ICAP and funding formula violates federal and state law in that it is absolutely incapable of yielding a service result sufficient in amount, duration and scope to achieve its purpose for those individuals needing more than 149 hours of day services, c) the number of service hours approved for Heather V. are insufficient to ensure her health and welfare and therefore violates applicable federal and state law, and d) in violation of federal and state law, the tandem application of the ICAP and NDHHS's funding formula does not accurately determine the type and amount of support and service intervention needed to ensure independence, interdependence, productivity and integration, and it does not ensure that eligible persons will receive no more and no less of the supports and services they need.

78. Jane S. lives in an apartment in the lower level of her mother's home. She is able to work in a supported job setting. Several years ago, before moving to Nebraska with her mother, Jane S. worked 40 hours per week at a thrift shop. Her work responsibilities included picking up clothes, moving them to the part of the store where they belonged, and re-hanging them. She earned \$5.15 per hour for her work.

79. While Jane S. was able to work, she required monitoring while at her job. Her developmental disability, autism and obsessive-compulsive disorder can lead to behaviors that may

be counter-productive or disruptive in a work environment. However, these behaviors can be managed and minimized with an appropriate level of supervision.

80. Upon moving to Nebraska in September 2000, Jane S. requested services under the Waiver Program. Jane S. was approved for Developmental Disability services, provided a service co-ordinator, and allowed 30 days per year of respite care. However, she was denied any Home and Community Based Services due to a stated lack of funding.

81. Despite Jane S.'s lack of funding, a service provider arranged for Jane S. to work part-time in an enclave setting (a work site employing up to 10 individuals with Developmental Disabilities and one or more supervisor(s) washing dishes. After working in this setting for approximately nine months, Jane S. was approved by Defendants for the Waiver Program, including 26 hours per month of vocational-related day service and 64 hours per month of residential services.

82. While such hours enable her to work in an enclave setting, Jane S. is capable of working full time and doing work of a more challenging nature than what she is currently doing in the enclave setting. To pursue work more appropriate to her habilitation needs, Jane S. needs additional day service hours.

83. Jane S. has requested additional hours of service, but has been denied additional hours. As a result of Defendants' denial of additional service hours, Jane S. is unable to move to a work setting more suited to her needs. Defendants' denial of additional hours relegates Jane S. to a setting that is not sufficient in amount, duration or scope, to fulfill the habilitating purpose of the Home and Community-Based Services.

84. Kevin V. is an individual with disabilities, specifically he is diagnosed with Autism, Epilepsy and severe to profound Mental Retardation. Kevin V. also is an individual with a mental illness, specifically diagnosed with disruptive behavior disorder.

85. Kevin V. is eligible for and receives services under the Waiver Program.

86. Due to the severity of Kevin V.'s disabilities, he requires a high level of care to meet his individual needs.

87. Kevin V.'s IPP team recommends one-to-one supervision due to his extensive history of aggressive behaviors; including hitting, kicking, spitting and biting other residents and staff care providers.

88. On or about April 19, 2001, Defendants informed Kevin V.'s guardian that one-to-one level of funding was unavailable.

89. Kevin V.'s allocation of 114 day service hours is determined by Defendants' use of the ICAP assessment tool.

90. Kevin V.'s provider was unable to offer services to Kevin V. without the one-to-one funding and thus services were terminated and Kevin V. transferred to a different provider.

91. Despite not being paid to provide 173 hours of day service each month, Kevin V.'s new service provider has nevertheless provided one-to-one level of services (173 hours) in order to adequately protect his health and safety.

92. Jennifer T., is an individual with disabilities, specifically she is diagnosed with Mental Retardation in the severe to profound range and Epilepsy. Jennifer T. has a functional age equivalent below the age of three in most areas, with the exception of motor skills. Due to the severity of these disabilities, Jennifer T. requires numerous supports and services in her daily life.

93. In February of 2001, Jennifer T. reached the age of twenty-one and became eligible to apply for services under the Adult Home and Community-Based Wavier Program pursuant to 480 NAC 2-006.

94. In preparation for Jennifer T.'s transition from High School to community based services, her IPP team selected the Socialization Opportunities, Activities, and Recreation program (hereinafter "SOAR") for day services. Jennifer T.'s team based this decision on over 13 years of experience working with her strengths, abilities, and limitations.

95. The reality for Jennifer T. is that her limitations prevent her from an array of community day service choices. Her IPP team felt that a highly structured day program, as opposed to a vocational workshop, was the most appropriate placement.

96. In order to safely and adequately provide services to Jennifer T., one-to-one staff supervision would be required. Jennifer T.'s IPP team requested 173 units of day service hours, which would provide the necessary one-to-one staffing. This request was denied. Service Coordination approved 97 units of day service hours. The 97 units of day service hours were calculated by the administration of the ICAP assessment tool.

97. Jennifer T.'s IPP team unanimously agreed that Jennifer T. needs one-to-one staffing in order for her day program to accomplish its purpose.

98. Despite not being paid to provide 173 hours of day service each month, Jennifer T.'s service provider nevertheless provides 173 hours because it believes this is necessary to adequately protect Jennifer T.'s health and safety.

99. The actions taken by the Defendants violate applicable laws and regulations in that:



a) Jennifer T's service hours were determined by a blind application of a mechanical process without regard to the actual and real needs of Jennifer T., b) the tandem application of the ICAP and funding formula violates federal and state law in that it is absolutely incapable of yielding a service result sufficient in amount, duration and scope to achieve its purpose for those individuals needing more than 149 hours of day services, c) the number of service hours approved for Jennifer T. are insufficient to ensure her health and welfare and therefore violates applicable federal and state law, and d) in violation of federal and state law, the tandem application of the ICAP and Defendants' funding formula does not accurately determine the type and amount of support and service intervention needed to ensure independence, interdependence, productivity and integration, and it does not ensure that eligible persons will receive no more and no less of the supports and services they need.

100. Marcus J. currently resides in a nursing home, and has received care from that facility since on or about May 1, 2003. Prior to the nursing home placement, Marcus J. lived at home with his parents.

101. Marcus J. was a student in the public schools and received habilitating services through the public schools until age thirteen. Marcus J. was then home schooled until the age of twenty-one and continued to receive habilitating services.

102. On or about February 18, 2003, Marcus J.'s mother became seriously ill and his parents requested emergency respite care for Marcus J. The respite care was approved and Marcus J.'s parents began to research community residential placements outside the family home.

103. On or about April 11, 2003, the ICAP assessment tool was administered, and

Defendants determined that Marcus J. was eligible for 99 hours of adult day services also known as assisted day services.

104. On or about February 17, 2003, in preparation for Marcus J.'s transition from High School to community-based services, Marcus J. was provided transitional day services through a local provider.

105. On or about May 1, 2003, Marcus J. was placed in a Nursing home for a temporary thirty-day respite care because his parents could no longer provide in home care for him due to his mother's health conditions.

106. Since June 1, 2003, Marcus J. was approved and has been receiving adult day services.

107. Although Marcus J. was approved for day services, he also requires treatment in a residential setting, adequately staffed by individuals specially trained to work with individuals with developmental disabilities. Marcus J.'s parents have been requesting residential services in a community setting since January 2003.

108. On or about May 14, 2003, Defendants informed Marcus J.'s parents that funding for residential services was denied, therefore Defendants refused to provide such services to Marcus J., who was then placed on the Registry of Needs for residential services through the NDHHS.

109. Due to Defendants' refusal to provide residential services to Marcus J., he has been forced to remain in a more restrictive institutional setting, i.e., a nursing home, in order to receive the services he needs, despite the fact that Marcus J.'s service needs could be met in a developmental disability residential placement in the community.

110. The actions taken by the Defendants violate applicable laws and regulations in that:

a) Marcus J's service hours were determined by a blind application of a mechanical process without regard to the actual and real needs of Marcus J., b) the tandem application of the ICAP and funding formula violates federal and state law in that it is absolutely incapable of yielding a service result sufficient in amount, duration and scope to achieve its purpose for those individuals needing more than 149 hours of day services, c) the number of service hours approved for Marcus J. are insufficient to ensure his health and welfare and therefore violates applicable federal and state law, and d) in violation of federal and state law, the tandem application of the ICAP and Defendants' funding formula does not accurately determine the type and amount of support and service intervention needed to ensure independence, interdependence, productivity and integration, and it does not ensure that eligible persons will receive no more and no less of the supports and services they need.

**FIRST CLAIM FOR RELIEF**

(Wait List and Insufficient Level of Service Violation of the ADA)

111. The allegations of Paragraphs 1 through 110 above are fully incorporated in Plaintiffs' first claim for relief.

112. Plaintiffs are individuals with developmental disabilities who are eligible for ICF/MR services and alternative Home and Community-Based Services.

113. Plaintiffs' treating professionals consider community-based placement to be appropriate for Plaintiffs.

114. Despite the appropriateness of community-based placement, Defendants have failed, and continue to fail, to provide funding, or sufficient funding, for Home and Community-Based Services to Plaintiffs, and other similarly situated eligible developmentally disabled individuals.

115. Defendants have not moved individuals placed on the “waiting list,” also known as the “register of persons with unmet needs,” to community-based placements at a reasonable pace or in a reasonably timely manner.

116. Defendants do not have a comprehensive, effective working plan for placing Plaintiffs and other similarly situated qualified individuals in adequate and appropriate services in less restrictive settings.

117. Defendants’ failure to provide funding, or adequate and appropriate funding, for Home and Community-Based Services to Plaintiffs, and other similarly situated eligible individuals with developmental disabilities in a reasonably timely manner, places such individuals with developmental disabilities at risk of institutionalization, even though such individuals would be better served in a less restrictive community setting.

118. Defendants’ foregoing actions and inactions constitute a violation of the ADA, 42 U.S.C. §12101 et seq., and such violation is continuing.

119. Defendants’ violation of the ADA is causing harm to Plaintiffs and all similarly situated individuals with developmental disabilities, which harm partially can be remedied by declaring Defendants’ actions unlawful and enjoining Defendants from further violation of the ADA.

**SECOND CLAIM FOR RELIEF**

(Wait List and Insufficient Level of Service Violation of the Rehabilitation Act)

120. The allegations of Paragraphs 1 through 119 above are fully incorporated in Plaintiffs’ second claim for relief.

121. Plaintiffs are “disabled individuals” under 29 U.S.C. § 794 (*i.e.*, Section 504 of the Rehabilitation Act of 1973).

122. Plaintiffs are otherwise qualified to participate in Nebraska's medical assistance plan and to have the medical assistance plan pay for any ICF/MR services they might receive.

123. Nebraska's medical assistance plan receives federal funding, and ICF/MR services provided in Nebraska to the state's population of individuals with developmental disabilities are in part, paid by federal funds through the state's medical assistance plan. In addition, Home and Community-Based Services are in part, paid by federal funds through the state's medical assistance plan.

124. Plaintiffs' treating professionals consider community-based placement to be appropriate for Plaintiffs. However, despite the appropriateness of community-based placement, Defendants have failed, and continue to fail, to provide funding, or sufficient funding, for Home and Community-Based Services to Plaintiffs, and other similarly situated eligible individuals with developmental disabilities.

125. Defendants' failure to provide funding, or adequate and appropriate funding, for the Waiver Program to Plaintiffs, and other similarly situated eligible individuals with developmental disabilities places such individuals at risk of institutionalization, even though such individuals would be better served in a less restrictive community setting.

126. Defendants' foregoing actions and inactions are discriminatory and constitute a violation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, as well as 28 C.F.R. §41.51(d), and such violation is continuing.

127. Defendants' violation of the Rehabilitation Act is causing harm to Plaintiffs and all similarly situated individuals with developmental disabilities, which harm partially can be remedied

by declaring Defendants' actions unlawful and enjoining Defendants from further violation of the Rehabilitation Act.

**THIRD CLAIM FOR RELIEF**

(Denial of an Opportunity to Apply for Medical Assistance Covering ICF/MR or Community-Based Services and Failure to Furnish Assistance with Reasonable Promptness Violates the Medicaid Act)

128. The allegations of Paragraphs 1 through 127 above are fully incorporated in Plaintiffs' third claim for relief.

129. All the Plaintiffs, and other similarly situated individuals, have requested ICF/MR or Home and Community-Based Services from their NDHHS service coordinators, and they are eligible for such services.

130. Despite their request and eligibility for such services, in many cases Plaintiffs, and other similarly situated individuals, have not been given an opportunity to apply for medical assistance which would cover such services.

131. Plaintiffs, and other similarly situated persons, have not been furnished with medical assistance for ICF/MR or Home and Community-Based Services with reasonable promptness.

132. Defendants' a) denial of an opportunity to apply for medical assistance which would cover the services sought by Plaintiffs, and other similarly situated individuals, and b) failure to furnish Plaintiffs, and other similarly situated individuals, with medical assistance for either ICF/MR or Home and Community-Based Services with reasonable promptness are violations of 42 U.S.C. §1396a(a)(8), and such violations are continuing.

133. Defendants' violations of 42 U.S.C. §1396a(a)(8) are causing harm to Plaintiffs and all similarly situated individuals with developmental disabilities, which harm partially can be

remedied by declaring Defendants' actions unlawful and enjoining Defendants from further violation of 42 U.S.C. §1396a(a)(8).

**FOURTH CLAIM FOR RELIEF**

(Failure to Provide Funding for Services Sufficient in Amount, Duration, or Scope To Fulfill the Purpose of Such Service Violates federal medicaid regulations)

134. The allegations of Paragraphs 1 through 133 above are fully incorporated in Plaintiffs' fourth claim for relief.

135. Defendants have adopted a methodology for determining the level of funding for Home and Community-Based Services which will provide to each recipient of such services, and this level of funding effectively determines the amount, duration and scope of the services furnished to Plaintiffs and similarly situated individuals.

136. Defendants' methodology results in Home and Community-Based Services which are not sufficient in amount, duration, and scope, to reasonably achieve the purpose of such services.

137. Defendants' failure to provide sufficient Home and Community-Based Services under the Waiver Program sufficient in amount, duration and scope, to reasonably achieve their purpose violates 42 C.F.R. §440.230(b), promulgated pursuant to the Medicaid Act, and such violation is continuing.

138. Defendants' violation of 42 C.F.R. §440.230(b) is causing harm to Plaintiffs and all similarly situated individuals with developmental disabilities, which harm partially can be remedied by declaring Defendants' actions unlawful and enjoining Defendants from further violation of 42 C.F.R. § 440.230(b).

**FIFTH CLAIM FOR RELIEF**

(Failure to Provide Funding for Services Sufficient in Amount, Duration and Scope to Ensure Plaintiffs Health and Safety Violates Medicaid Act)

139. The allegations of Paragraphs 1 through 138 above are fully incorporated in Plaintiffs' fifth claim for relief.

140. Defendants have adopted a methodology for determining the level of funding for Home and Community-Based Services which will provide to each recipient of such services, and this level of funding effectively determines the amount, duration and scope of the services furnished to Plaintiffs and similarly situated individuals.

141. Defendants' methodology results in Home and Community-Based Services which are not sufficient in amount, duration and scope to protect the health and welfare of individuals provided such services.

142. Defendants' failure to provide Home and Community-Based Services sufficient in amount, duration and scope to protect the health and welfare of Plaintiffs receiving services, and all those individuals similarly situated, violates 42 U.S.C. § 1396n(c)(2)(A) and the guidance provided to the states by the federal government in Olmstead letter number 4, dated January 10, 2001.

143. Defendants' violation of 42 U.S.C. § 1396n(c)(2)(A) is causing harm to Plaintiffs and all similarly situated individuals with developmental disabilities, which harm partially can be remedied by declaring Defendants' actions unlawful and enjoining Defendants from further violation of 42 U.S.C. § 1396n(c)(2)(A), and such violation is continuing.



### **SIXTH CLAIM FOR RELIEF**

(Failure to Provide Funding for Services Sufficient in Amount, Duration and Scope to Present Opportunities to Increase or Maintain Independent Functioning, Self-Determination, Interdependence, Productivity and Community Integration Violates the Nebraska Developmental Disabilities Act and Related Regulations)

144. The allegations of Paragraphs 1 through 143 above are fully incorporated in Plaintiffs' sixth claim for relief.

145. Defendants have adopted a methodology for determining the level of funding for Home and Community-Based Services which will provide to each recipient of such services, and this level of funding effectively determines the amount, duration, and scope of the services furnished to Plaintiffs and similarly situated individuals.

146. Defendants' methodology results in Home and Community-Based Services which are not sufficient in amount, duration and scope to present opportunities to increase or maintain independent functioning, self-determination, interdependence, productivity and community integration.

147. Defendants' failure to provide sufficient Home and Community-Based Services sufficient in amount, duration and scope to present opportunities to increase or maintain Plaintiff's independent functioning, self-determination, interdependence, productivity, and community integration, and that of all those similarly situated, violates Neb. Rev. Stat. § 83-1202(1), 205 NAC 4-017, 480 NAC 2-002.01, and such violation is continuing.

148. Defendants' violation of Neb. Rev. Stat. § 83-1202(1), 205 NAC 4-017, 480 NAC 2-002.01 is causing harm to Plaintiffs and all similarly situated developmentally disabled individuals, which harm partially can be remedied by declaring Defendants' actions unlawful and enjoining

Defendants from further violation of Neb. Rev. Stat. § 83-1202(1), 205 NAC 4-017, 480 NAC 2-002.01.

**SEVENTH CLAIM FOR RELIEF**

(Failure to Determine Type and Amount of Specialized Supports and Services Funded by the State in the Local Field Office Violates State Regulation)

149. The allegations of Paragraphs 1 through 148 above are fully incorporated in Plaintiffs' seventh claim for relief.

150. Defendants have adopted a methodology for determining the type and amount of community-based specialized supports and services which it will provide to each recipient of such services, and this methodology does not provide for decisions to be made in the local field office.

151. Defendants' failure to make the determination of the type and amount of specialized supports and services to be funded for eligible individuals in the Local Field Office by service coordination personnel, violates 205 NAC 2-011.08, and such violation is continuing.

152. Defendants' violation of 205 NAC 2-011.08 is causing harm to Plaintiffs and all similarly situated individuals with disabilities, which harm partially can be remedied by declaring Defendants' actions unlawful and enjoining Defendants from further violation of 205 NAC 2-011.08.

**EIGHTH CLAIM FOR RELIEF**

(Failure to Provide Notice and a Hearing to Persons Placed on the Wait List Violates the Due Process Clause of the Fourteenth Amendment, the Medicaid Act, and Due Process Clause Under the Nebraska State Constitution)

153. The allegations of Paragraphs 1 through 152 above are fully incorporated in Plaintiffs' eighth claim for relief.

154. When Plaintiffs applied for Home and Community-Based Services and were determined eligible for such services, many of them, and many of those similarly situated, were

informed that funds were not available for them to receive such services and they were told that they would be placed on the register of persons with unmet needs, also known as the wait list. At the time they were notified that funds for the services were unavailable, they were not given notice of a right to appeal such decision, nor were they afforded a hearing on the matter.

155. Defendants' failure to give notice of a right to appeal the decision to deny funds for services and Defendants' failure to afford a hearing on the matter to Plaintiffs and all other similarly situated individuals, violates 42 U.S.C. §1396a(a)(3), 42 C.F.R. §§ 431.200 - 431.250, the due process clause of the United States Constitution and Section 3 of the Nebraska State Constitution.

156. Defendants' violation of 42 U.S.C. §1396a(a)(3), 42 C.F.R. §§ 431.200 - 431.250, the due process clause of the United States Constitution and Section 3 of the Nebraska State Constitution is causing harm to Plaintiffs and all similarly situated individuals with developmental disabilities, which harm partially can be remedied by declaring Defendants' actions unlawful and enjoining Defendants from further violation of 42 U.S.C. §1396a(a)(3), 42 C.F.R. §§ 431.200 - 431.250, the due process clause of the United States Constitution and Section 3 of the Nebraska State Constitution.

### **RELIEF REQUESTED**

**WHEREFORE**, Plaintiffs respectfully request that this Court grant the following relief:

A. Assume jurisdiction over this action and maintain continuing jurisdiction until Defendants are in full compliance with every Order of this Court;

B. Certify this case to proceed as a class action, pursuant to Federal Rule of Civil Procedure 23(b)(2);

C. Order that the named Plaintiffs may proceed as representatives of a class of similarly situated individuals;

D. Declare that Defendants' failure to provide funding, or adequate funding, for Home and Community-Based Services sought by Plaintiffs and other similarly situated individuals, violates the ADA, 42 U.S.C. §12101, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, and 28 C.F.R. §41.51(d), in that Defendants' actions and inactions impermissibly favor the provision of services in an institutional setting;

E. Issue appropriate injunctive relief prohibiting Defendants from further violation of the ADA, 42 U.S.C. §12101, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, and 28 C.F.R. §41.51(d), and compelling Defendants to:

i. Formulate and implement a comprehensive plan to provide all eligible persons with developmental disability services in home and community-based settings in a timely fashion and to avoid unnecessary institutionalization or continued unnecessary segregation;

ii. Provide funding for Home and Community-Based Services to those on the wait list within ninety (90) days, so long as Nebraska has available waiver slots in Adult Home and Community-Based Waiver program;

iii. Notify all individuals who are currently eligible for or who will apply for Medicaid funded long-term services, of the existence of the Home and Community Based Waiver Program;

iv. Request, and in good faith, take all necessary action to obtain increased waiver slots within six months from the federal government in an amount sufficient

to accommodate all immediate demand for community-based services and all additional demand anticipated over the next three years;

v. Request additional waiver slots from time to time to allow for, and anticipate, any increased demand for Home and Community-Based Services;

vi. Adopt a sound, valid methodology for properly determining payment levels for Home and Community-Based Services provided to each eligible individual which ensures that each individual will receive a level of service appropriate to their needs;

F. Declare that (i) Defendants' denial to Plaintiffs, and all similarly situated individuals, an opportunity to apply for medical assistance which would cover the services sought by Plaintiffs, and all similarly situated individuals, and (ii) Defendants failure to furnish Plaintiffs, and all similarly situated individuals, with medical assistance for either ICF/MR or Home and Community-Based Services with reasonable promptness (i.e., within 90 days), are violations of 42 U.S.C. §1396a(a)(8);

G. Issue appropriate injunctive relief prohibiting Defendants from further violations of 42 U.S.C. §1396a(a)(8), and compelling Defendants to, i) adopt clear, written regulations setting forth practices, policies and procedures ensuring that all eligible individuals with developmental disabilities have the opportunity to apply for medical assistance which would cover the services they require, and ii) to furnish all eligible individuals with developmental disabilities with medical assistance for either ICF/MR or Home and Community-Based Services within 90 days of request or application;

H. Declare that Defendants' methodology for determining the level of funding for Home and Community-Based Services which will provide to each recipient of such services, results in Home and Community-Based Services which are not sufficient in amount, duration and scope to

reasonably achieve the purpose of such service, and such methodology therefore violates 42 C.F.R. §440.230(b);

I. Issue appropriate injunctive relief prohibiting Defendants from further violations of 42 C.F.R. §440.230(b), and compelling Defendants to adopt a sound and valid methodology for properly determining payment levels for Home and Community-Based Services provided to each eligible individual which ensures that each individual will receive a level of service sufficient to achieve the purpose of such service;

J. Declare that Defendants' methodology for determining the level of funding for Home and Community-Based Services which will provide to each recipient of such services, results in Home and Community-Based Services which are not sufficient in amount, duration, and scope to ensure the health and safety of such recipients, and such methodology therefore violates 42 U.S.C. §1396n(c)(2)(A);

K. Issue appropriate injunctive relief prohibiting Defendants from further violations of 42 U.S.C. §1396n(c)(2)(A), and compelling Defendants to adopt a sound and valid methodology for properly determining payment levels for Home and Community-Based Services provided to each eligible individual which ensures that each individual will receive a level of service sufficient to ensure the health and safety of such individual;

L. Declare that Defendants' methodology for determining the level of funding for Home and Community-Based Services which will provide to each recipient of such services, results in Home and Community-Based Services which are not sufficient in amount, duration and scope to present opportunities to increase or maintain independent functioning, self-determination,

interdependence, productivity and community integration, and such methodology therefore violates Neb. Rev. Stat. § 83-1202(1), 205 NAC 4-017, 480 NAC 2-002.01.

M. Issue appropriate injunctive relief prohibiting Defendants from further violations of Neb. Rev. Stat. § 83-1202(1), 205 NAC 4-017, 480 NAC 2-002.01, and compelling Defendants to adopt a sound and valid methodology for properly determining payment levels for Home and Community-Based Services provided to each eligible individual which ensures that each individual will receive a level of service sufficient to present opportunities to increase or maintain independent functioning, self-determination, interdependence, productivity and community integration;

N. Declare that Defendants' failure to determine the type and amount of specialized services to be funded by the State in the local field office violates 205 NAC 2-011.08;

O. Issue appropriate injunctive relief prohibiting Defendants from further violations of 205 NAC 2-011.08, and compelling Defendants comply with 205 NAC 2-011.08;

P. Declare that Defendants' failure to provide notice and a hearing to individuals placed on the wait list violates the due process clause of the United States Constitution, 42 U.S.C. §1396a(a)(3), 42 C.F.R. §§ 431.200 - 431.250, and Section 3 of the Nebraska State Constitution;

Q. Issue appropriate injunctive relief requiring Defendants to adopt policies and procedures providing notice and a hearing to anyone denied funding for services for which they are otherwise eligible.

R. Issue such other injunctive relief as shall be necessary to enjoin Defendants from continuing to violate the individual Plaintiffs' rights to community-based services, pursuant to the Medicaid Act, the ADA, and Section 504 of the Rehabilitation Act;

S. Award Plaintiffs any additional relief that this court may deem just, proper, and equitable; and

T. Award Plaintiffs reasonable litigation expenses, costs, and attorneys' fees, pursuant to 29 U.S.C. § 794a(b), 42 U.S.C. § 1988, and 42 U.S.C. § 12205.

**PLACE OF TRIAL REQUESTED: LINCOLN, NEBRASKA**

Respectfully submitted this 28<sup>th</sup> day of August, 2003.

**BILL M., by and through his father and natural guardian, William M; JOHN DOE, by and through his mother and natural guardian, Jane Doe; HEATHER V., by and through her mother and guardian, Marcia V.; JANE S., by and through her mother and natural guardian, Patricia S.; KEVIN V., by and through his mother and legal guardian, Kathy V.; JENNIFER T., by and through her parents and legal guardians, Sharon and Greg T., MARCUS J., by and through his parents and legal guardians, Julie and Miles J.; and on behalf of themselves and all other persons similarly situated, Plaintiffs,**

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**ATTORNEYS FOR THE PLAINTIFFS**

**CERTIFICATE OF SERVICE**

I hereby certify that on August 28, 2003, I electronically filed the foregoing with the Clerk of the Court using CM/ECF system, which sent notification of such filings to Attorney General Jon Bruning by and through Assistant Attorney General Douglas D. Dexter, attorneys for Defendants.

s/Shirley A. Mora James  
Shirley A. Mora James

**One of the Attorneys for Plaintiffs.**