

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION**

Susan J., et al.,

Plaintiffs,

VS.

**Bob Riley, in his official capacity as
Governor of the State of Alabama, et. al.,**

Defendants.

CASE NO.

2:00-cv-918-F

THIRD AMENDED COMPLAINT

I. Introduction

1. Plaintiffs bring this class action for declaratory and injunctive relief to declare the plaintiffs' rights and to remedy Defendants' violations of the Social Security (Medicaid) Act, 42 U.S.C. §§ 1396 *et seq.*, and to redress the deprivation of plaintiffs' constitutionally protected rights to procedural due process under the Fourteenth Amendment to the U.S. Constitution, to residential services and/or placement and/or day habilitation services which are designed to improve plaintiffs' overall level of functioning, independence and integration into the community. Plaintiffs are adults with disabilities, all with mental retardation, who are entitled to services. The plaintiffs now live with caretakers who, for a variety of reasons, can not provide the intensive support and services which plaintiffs both need, and to which they are entitled. Specifically, each plaintiff is eligible to receive active treatment or habilitation via, inter alia, a community residential placement, active treatment, and/or day habilitation. Plaintiffs are persons who are unable to fully care for themselves and, therefore, require various degrees of care, treatment, and/or habilitation. Plaintiffs seek appropriate residential services, residential placement, day habilitation programs, and/or

other needed therapeutic and habilitative services before their caretakers succumb to unemployment, incapacitation or death.

2. Defendants have refused to provide plaintiffs with appropriate Medicaid Home and Community Based Services (HCBS waiver) as described in the relevant State Plan. HCBS waiver services that are or shall be available include the following, among others:

- In-home residential habilitation services, including habilitation training & intervention,
- In-home residential habilitation training and intervention,
- Habilitation supplies, equipment, and transportation,
- Day habilitation services,
- Prevocational services aimed at preparing an individual for paid or unpaid employment but which are not job-task oriented, and
- Supported employment services.

These waiver services are described in more detail at Appendix A.

3. Further, in contrast to the manner in which defendants are obligated to provide needed Medicaid waiver services to plaintiffs in a reasonably prompt and comparable manner as required by law, as described below, defendants have placed plaintiffs on a waiting list for residential services, and/or day habilitation, and/or other needed services for as long as fourteen (14) years. Plaintiffs seek to remedy the pervasive, systemic, and continuing failure of defendants to provide them with necessary services in a reasonably prompt manner in sufficient quantity to meet their needs as required by federal law. This action is brought under 42 U.S.C. § 1983 and 28 U.S.C. §2201 et. seq.

4. As will be explained, defendants have violated plaintiffs' rights under federal law by: (a) failing to provide for the development of appropriate residential placement (hereinafter "RPs") and/or day habilitation (hereinafter "DH") and/or other services, and

thereby depriving these plaintiffs of those services to which they are entitled; (b) failing to assure that plaintiffs can apply for and receive RP and/or DH and/or other services with reasonable promptness; (c) failing to assure that RP and/or DH and/or other services are made available to eligible individuals, such as plaintiffs, in the same amount, duration and scope as they are provided to other similarly situated Medicaid assistance recipients in the State of Alabama; and (d) failing to assure that plaintiffs receive RP and/or DH and/or other services which could provide vocational and/or job training skills, social interaction, counseling, enhanced peer relationships, and improved mobility services and supports, among others.

II. Jurisdiction and Venue

5. This Court has jurisdiction to decide plaintiffs' claims pursuant to 28 U.S.C. §§ 1331 and 1343 and 42 U.S.C. § 1983.

6. Plaintiffs' claims are authorized by 42 U.S.C. § 1396 et seq., 42 U.S.C. § 1983, and 28 U.S.C. §§ 2201 and 2202.

7. Venue is appropriate in this District pursuant to 28 U.S.C. § 1391(b)(2) as, inter alia, a substantial part of the events that give rise to this Complaint occurred in this District. Further, all defendants are located within this District.

III. Parties

8. Plaintiff, Susan J., is a forty-three (43) year old female who has mental retardation, Down syndrome, and a seizure disorder who resides in Jefferson County, Alabama. She needs and is qualified for Medicaid waiver services, and is eligible for services that she is not receiving. She brings this action on behalf of herself.

9. Plaintiff, Elizabeth A., is a twenty-five (25) year old female who has mental retardation who resides in Jefferson County, Alabama. Elizabeth A. needs and is qualified for Medicaid waiver services, and is eligible for services that she is not receiving. Elizabeth A. has been on a waiting list for waiver services for twelve (12) years. She brings this action through her mother and next friend, Debbie G.

10. Plaintiff, Beverly W., is a forty-six (46) year old female who has mental retardation who resides in Jefferson County, Alabama. Beverly W. needs and is qualified for Medicaid waiver services, and is eligible for services that she is not receiving. Beverly W. has been on a waiting list for waiver services for twelve (12) years. She brings this action through her mother and next friend, Clarice W.

11. Plaintiff, Tara L., is a twenty-seven (27) year old female who has mental retardation and autism who resides in Jefferson County, Alabama. She needs and is qualified to receive services through a Medicaid waiver, and is eligible for services that she is not receiving. Tara L. has been on a waiting list for needed waiver services for over nine (9) years. She brings this action through her mother and next friend, Belinda L.

12. Plaintiff, Krystal W., is a twenty-two (22) year old female who has mental retardation and cerebral palsy who resides in Jefferson County, Alabama. She needs and is qualified for a Medicaid waiver and receives some respite services. She requires additional services that she is not receiving and is currently on a waiting list for needed waiver services. She brings this action through her mother and next friend, Kathy W.

13. Plaintiff, Brichette W., is a twenty-two (22) year old female who has mental retardation who resides in Jefferson County, Alabama. She needs and is qualified to receive Medicaid waiver services she is not receiving. She has been on a waiting list for

needed waiver services for approximately two (2) years. Brichette W. needs and would benefit from day habilitation services as well as transportation services, among others.

14. Plaintiff, Charles P., is a twenty-three (23) year old male who has mental retardation and autism, and is non-verbal, who resides in Jefferson County, Alabama. He needs and is qualified to receive Medicaid waiver services, but does not receive such services. He has been on a waiting list for needed waiver services for approximately seven (7) years. He needs and would benefit from residential services as well as vocational services.

15. Plaintiff, Paul B., is a twenty-one (21) year old male who has mental retardation, Down syndrome and cerebral palsy who resides in Houston County, Alabama. He needs and is qualified to receive Medicaid waiver services that he is not receiving. Paul receives some services, such as respite care and meal assistance. He has been on a waiting list for needed waiver services for approximately eight (8) years. He needs and would benefit from residential services as well as vocational services.

16. Plaintiff, Rico C., is a thirty-two (32) year old male who has mental retardation who resides in Jefferson County, Alabama. He needs and is qualified to receive Medicaid waiver services, but does not receive such services. He has been on a waiting list for needed waiver services for approximately three (3) years. He needs and would benefit from day habilitation services as well as vocational services.

17. Plaintiff, Tamara C., is a thirty-five (35) year old female who has mental retardation who resides in Autauga County, Alabama. She needs and is qualified to receive Medicaid waiver services that she is not receiving. Tamara does receive some services.

She has been on a waiting list for needed waiver services for approximately four (4) years. She needs and would benefit from day habilitation services as well as vocational services.

18. Plaintiff, Dusti M., is a twenty-four (24) year old female who has mental retardation who resides in Calhoun County, Alabama. She needs and is qualified to receive Medicaid waiver services, but does not receive such services. She has been on a waiting list for needed waiver services for approximately three (3) years. She needs and would benefit from day habilitation services.

19. Plaintiff, Nicholas A., is a twenty-six (26) year old male who has mental retardation and autism and resides in Lauderdale County, Alabama. He needs and is qualified to receive Medicaid waiver services that he has not been receiving. Nicholas currently receives day habilitation services. He has been on a waiting list for needed waiver services for approximately four (4) years. He needs and would benefit from residential and other services. This action is brought through his mother and next friend, Melissa T.

20. Plaintiff, Angie D., is a thirty-one (31) year old female who has mental retardation, cerebral palsy, and a hearing impairment who resides in Morgan County, Alabama. She needs and is qualified to receive Medicaid waiver services that she is not receiving. Angie receives day habilitation services. Angie needs and would benefit from additional services such as residential, respite and personal care. She brings this action through her legal guardians, Michelle D. and Herbert D.

21. Plaintiff, Shavon H., is a thirty-nine (39) year old female who has mental retardation, cerebral palsy, visual and hearing impairments, and digestive difficulties. She uses a wheelchair for mobility. She needs and is qualified to receive Medicaid waiver

services, but does not receive such services. She resides in Jefferson County, Alabama, and she brings this action through her mother as next friend, Marion L.

22. Defendant, Bob Riley, is the Governor of the State of Alabama and as such is vested with executive power of the government of the State of Alabama. In accordance with his executive powers, Defendant Riley is charged with faithfully executing the law, including upholding the United States Constitution and is responsible for assuring that the Medicaid programs in the State of Alabama are operated in compliance with federal law. Defendant Riley is sued in his official capacity only for actions and omissions taken under color of state law. The Governor's Office is the single state agency designated to administer or supervise the administration of the Medicaid program under Title XIX of the Social Security Act. As such, Defendant Riley has knowingly and deliberately failed and/or refused to take actions necessary to ensure that persons with mental retardation and developmental disabilities who are eligible for Medicaid services actually receive those services. In doing so, he has acted in deliberate disregard of those persons' federal, statutory, and constitutional rights.

23. Defendant, John Houston, is the Commissioner of the Department of Mental Health/Mental Retardation for the State of Alabama. The Department of Mental Health/Mental Retardation has sole responsibility for administering Alabama's federally supported Intermediate Care Facility/Mental Retardation (hereinafter "ICF/MR") and waiver programs. See 42 U.S.C. § 1396a(a)(5); Ala. Code § 22-50-11. Defendant Houston is responsible for assuring that these Medicaid assistance programs are operated in compliance with federal law. Defendant Houston is sued in his official capacity for actions and omissions taken under color of state law.

24. Defendant, Alabama Department of Mental Health/Mental Retardation, is a recipient of Medicaid funding, and thus, is required by law to continually ensure that adequate and appropriate services to people with mental retardation are available to all citizens throughout the state. The Department of MH/MR is responsible for the administration of these funds and ensuring services including, inter alia, admission, evaluation and the provision of residential placement and day habilitation services.

IV. Class Action Allegations

25. Plaintiffs incorporate by reference Paragraphs 1 through 24 of this Complaint.

26. Plaintiffs bring this action on behalf of themselves and all persons similarly situated pursuant to Federal Rule of Civil Procedure 23(a) and (b)(2). The class is defined as follows:

All Alabama residents with mental retardation who are eligible for Medicaid services under the ICF/MR program pursuant to 42 U.S.C. §1396a or a Home and Community Based Services waiver for the Mentally Retarded and Developmentally Disabled pursuant to 42 U.S.C. §1396n, who request services under these programs but (1) are denied the opportunity to apply for such services; (2) whose application for services under these programs is denied; or (3) are placed on a DMHMR waiting list for services under these programs.

27. The Plaintiff class is so numerous and geographically diverse that joinder of all members is impracticable.

28. As recently as March 2007, the Defendants acknowledged to the State Legislature that approximately 1571 people were waiting for needed services for which they were and are eligible.

29. There are at least 1,500 class members who need and are eligible to receive Medicaid waiver services and who are not receiving needed services.

30. As of March 2007, approximately 1172 persons who need and are eligible to receive Medicaid waiver services were receiving no services.

31. There are questions of law and fact common to the class, such as, and without limitation to, whether the general policies, practices and procedures of the Defendants and the State of Alabama are such that they result in a widespread failure to arrange for or provide to class members services and/or benefits in a “reasonably prompt” manner, as and to the extent required by federal law. These failures affect and/or threaten all members of the class.

32. The named representative Plaintiffs’ claims are typical of the claims of the class. Plaintiffs and members of the proposed class have not obtained benefits and/or services in a reasonably prompt fashion as and to the extent required by federal law.

33. The named representative Plaintiffs will fairly and adequately represent the interests of the proposed class. Plaintiffs have a clearly defined and personally vital controversy with the Defendants which dictates that they will fully and vigorously prosecute this action. At stake for Plaintiffs is their ability to obtain needed Medicaid waiver benefits and/or services, for which they are eligible, in a “reasonably prompt” manner.

34. Plaintiffs are represented by attorneys experienced in civil rights litigation including mental health law generally, Alabama’s Medicaid program, practice and procedure in federal courts, and the prosecution and management of class action litigation. The named Plaintiffs seek relief that will inure to the benefit of the class as a whole.

35. Plaintiffs seek certification of the class under Federal Rule of Civil Procedure 23(b)(2). Defendants’ policies, practices and procedures utilized to administer Alabama’s Medicaid program violate the requirements of the federal Medicaid Act. Defendants’

policies, practices and procedures have generally affected the entire class, thereby making final injunctive and declaratory relief appropriate with respect to the class as a whole. Because Plaintiffs: 1) challenge the administration and implementation of Alabama's Medicaid program as it affects them, their interests, and the interests of numerous similarly situated persons, and 2) seek declaratory and injunctive relief, class certification is appropriate under Federal Rule of Civil Procedure 23(b)(2).

V. Facts

A. Plaintiffs' Service Needs

PLAINTIFF SUSAN J.

36. Susan J. is eligible for and receives Medicaid/medical assistance benefits, Respite Services, Targeted Case Management and Supported Employment services as well as Supplemental Security Income (hereinafter "SSI"). Susan J. needs and would benefit from transportation services, among others, in order to further her socialization and vocational skills and gain additional independence.

37. Susan J. has lived with her parents, both now in their eighties, Christine and Dewey J., for her entire life. Her father has been diagnosed with cancer and has been hospitalized recently. Susan J. has two older brothers who do not live at home. Because Mr. and Mrs. J. are advancing in age, they will not be able to care for Susan J. much longer.

38. As a result of her disabilities, Susan J. has functional limitations resulting in a need for certain supports and services so that she may attain the self-help, domestic, and job readiness skills she needs to become a more fully functioning member of society. For

example, Susan J. communicates only in a limited fashion. Susan J. is able to wake herself, groom, feed, and dress herself, cook simple meals, and handle daily tasks. Susan J. is also able to help her mother around the home by sweeping, doing dishes, setting the table, making her bed, etc. She is independent in many functions of life, but desires more independence to continue her development.

39. Susan J. has been on a waiting list for residential services since 1992, but has not received them. She has been on a waiting list for respite services since 2005, and began receiving some respite services in May 2006.

40. Susan also needs and would benefit from transportation services to relieve her parents from the task of transporting her to her supported employment day program. Susan's mother is of the belief that Susan is on a waiting list for transportation services, but does not know Susan's status on the waiting list for said transportation services.

PLAINTIFF ELIZABETH A.

41. Elizabeth A. is 25 years old, has mental retardation and is eligible for and receives Medicaid/medical assistance benefits and respite services as well as SSI. Elizabeth A. needs and would benefit from day habilitation and transportation services, among others, in order to further her socialization and vocational skills and gain additional independence.

42. Elizabeth A. has lived with her parents for her entire life. Elizabeth A. spends her days at home watching television. Because Debbie G., Elizabeth A.'s mother, works full time, Debbie G. is dependent on family members to provide day-to-day care for Elizabeth, including Elizabeth A.'s grandmother, who is eighty (80) years old.

43. As a result of her disabilities, Elizabeth A. has functional limitations resulting

in a need for certain supports and services so that she may attain the self-help and domestic skills she needs to become a more fully functioning member of society. Elizabeth A. is unable to independently perform any daily self-care activities. She desires assistance in her development and independence in the performance of daily activities.

44. Elizabeth A. needs day habilitation services and transportation services to and from a day habilitation program to acquire independence skills. A request was submitted to DMH/MR in approximately 1992, requesting day habilitation services. In approximately December 2006, Elizabeth A. was initially offered day habilitation services but this offer was revoked once the provider learned that Elizabeth A. has seizures. The stated reason for revocation was that the seizures presented a liability issue. Elizabeth A. receives no day habilitation services.

PLAINTIFF BEVERLY W.

45. Beverly W. is 48 years old, has mental retardation, and is qualified to receive Medicaid waiver services. Beverly W. has been on a waiting list for services for eleven (11) years.

46. Beverly W. needs and would benefit from housing services, among others, in order to further her socialization skills and gain additional independence.

47. Beverly W. has lived with her parents for her entire life. Beverly W. does work part-time, but requires assistance with some daily self-care activities.

48. As a result of her disabilities, Beverly W. has functional limitations resulting in a need for certain supports and services so that she may attain the self-help and domestic skills she needs to become a more fully functioning member of society. She desires assistance in her development and independence in the performance of daily activities.

49. Beverly W. needs housing services to acquire independence skills. A request was submitted to DMH/MR in approximately 1996, requesting housing services. At the time the request was submitted, Beverly W. was initially told she did not qualify for services but additional information could be submitted. Beverly W.'s mother submitted the requested information but did not receive a response. Beverly W.'s mother does not know whether Beverly W. was ever placed on a waiting list or, in the alternative, is still on the waiting list. Beverly W. is not receiving the requested housing services.

PLAINTIFF TARA L.

50. Tara L. is twenty-seven (27) years old, needs and is qualified for Medicaid waiver services, and has been on a waiting list for needed services for over nine (9) years.

51. Tara L. is eligible for and receives Medicaid/medical assistance benefits and Targeted Case Management as well as SSI. Tara L. needs and would benefit from day habilitation and transportation services, among others, in order to further her socialization and vocational skills and gain additional independence.

52. Tara L. has lived with her mother, Belinda L., who is fifty-seven (57) years old, for her entire life. Tara L. spends her days at home watching television and playing with toys.

53. As a result of her disabilities, Tara L. has functional limitations resulting in a need for certain supports and services so that she may attain the self-help, domestic, and job readiness skills she needs to become a more fully functioning member of society. Tara L. is able to feed and dress herself. She is independent in some functions of life, but desires more independence to continue her development.

54. Tara L. needs day habilitation services and transportation services to and

from a day habilitation program to acquire independence and job readiness skills. A request was submitted to Defendants in 1997 for day habilitation services and transportation services to and from a day habilitation program, but Tara L. receives no such services.

PLAINTIFF KRYSTAL W.

55. Krystal W. is twenty-four (24) years old and has mental retardation and cerebral palsy.

56. Krystal W. is eligible for and receives Medicaid/medical assistance benefits and respite services as well as SSI. Krystal W. needs and would benefit from day habilitation and group home services, among others, in order to further her socialization and vocational skills and gain additional independence.

57. Krystal W. has lived with her parents for her entire life. Krystal W. spends her days at home listening to music. Because Krystal W.'s parents work full-time, Krystal W. is dependent on family members to provide day-to-day care for her, including Krystal W.'s grandmother, who is seventy-eight (78) years old.

58. As a result of her disabilities, Krystal W. has functional limitations resulting in a need for certain supports and services so that she may attain the self-help and domestic skills she needs to become a more fully functioning member of society. Krystal W. is unable to independently perform any daily self care activities. She desires assistance in her development and independence in the performance of daily activities.

59. Krystal W. needs day habilitation services and group home services to acquire independence skills. A request was submitted to DMH/MR in approximately 2000, requesting day habilitation and group home services. Approximately one year ago, Kathy

W., Krystal W.'s mother, called the various agencies which supposedly had Krystal W. on their respective waiting list to determine Krystal W.'s status on the waiting list. The agencies informed Kathy W. that they had no information on Krystal W. and she would have to resubmit the information to be placed back on the waiting list. Krystal W. receives no day habilitation or group home services.

PLAINTIFF BRICHETTE W.

60. Brichette W. is eligible for and receives Medicaid/medical assistance benefits as well as Supplemental Security Income SSI. Brichette W. needs and would benefit from day habilitation and transportation services, among others, in order to further her socialization and vocational skills and gain additional independence.

61. Brichette W. has lived with her parents for her entire life. Brichette W. spends her days at home watching television and videos and occasionally goes shopping with family members.

62. As a result of her disabilities, Brichette W. has functional limitations resulting in a need for certain supports and services so that she may attain the self-help, domestic, and job readiness skills she needs to become a more fully functioning member of society. Brichette W. is able to feed and dress herself and cook simple meals in a microwave. Brichette W. needs assistance with handling her finances and transportation. She is independent in some functions of life, but desires even more independence to continue her development.

63. Brichette W. needs day habilitation services and transportation services to and from a day habilitation program to acquire independence and job readiness skills. A request was submitted to DMH/MR in 2005, requesting day habilitation services and

transportation services to and from a day habilitation program, but Brichette W. receives no such services.

PLAINTIFF CHARLES P.

64. Charles P. is eligible for and receives Medicaid/medical assistance benefits as well as SSI. Charles P. needs and would benefit from day habilitation and supported employment services, among others, in order to further his socialization and vocational skills and gain additional independence.

65. Charles P. has lived with his parents for his entire life. His mother is fifty-seven (57) years old and his father is sixty (60) years old. Charles P. spends some of his days informally attending the day habilitation program at which his father is employed. Charles P. does not receive consistent services from this program. On the days Charles P. does not accompany his father to work, Charles P. stays at home with his mother.

66. As a result of his disabilities, Charles P. has functional limitations resulting in a need for certain supports and services so that he may attain the self-help, domestic, and job readiness skills he needs to become a more fully functioning member of society. Charles P. is able to feed and dress himself, except for tying his shoes and he takes care of most of his own personal hygiene needs. He is independent in some functions of life, but desires even more independence to continue his development.

67. Charles P. needs day habilitation services and supported employment services to acquire independence and job readiness skills. A request was submitted to DMH/MR approximately seven (7) years ago, requesting day habilitation services and supported employment services, but Charles P. technically receives no such services.

PLAINTIFF PAUL B.

68. Paul B. is eligible for and receives Medicaid/medical assistance benefits as well as SSI. Paul B. needs and would benefit from day habilitation and supported employment services, among others, in order to further his socialization and vocational skills and gain additional independence.

69. Paul B. has lived with his parents for his entire life.

70. As a result of his disabilities, Paul B. has functional limitations resulting in a need for certain supports and services so that he may attain the self-help, domestic, and job readiness skills he needs to become a more fully functioning member of society. Paul B. requires assistance with all daily activities. He is independent in some functions of life, but desires even more independence to continue his development.

71. Paul B. needs day habilitation services to acquire independence skills. A request was submitted to DMH/MR approximately eight (8) years ago, requesting day habilitation services. Approximately two (2) years ago, Paul B. was on the top of the waiting list, but the offer of services was revoked due to Paul B.'s disabilities, specifically, Paul B. has a trachea tube. Paul B. was moved down to the bottom of the waiting list. As of this date, Paul B. receives no day habilitation services.

PLAINTIFF RICO C.

72. Rico C. is eligible for and receives Medicaid/medical assistance benefits as well as SSI. Rico C. needs and would benefit from day habilitation and supported employment services, among others, in order to further his socialization and vocational skills and gain additional independence.

73. Rico C. has lived with his parents for his entire life. Rico C. spends his days watching television, assisting with household chores, and doing yard work.

74. As a result of his disabilities, Rico C. has functional limitations resulting in a need for certain supports and services so that he may attain the self-help, domestic, and job readiness skills he needs to become a more fully functioning member of society. Rico C. can perform most self-care activities. He is independent in some functions of life, but desires even more independence to continue his development.

75. Rico C. receives no day habilitation or vocational services.

PLAINTIFF TAMARA C.

76. Tamara C. is eligible for and receives Medicaid/medical assistance benefits as well as SSI. Tamara C. needs and would benefit from day habilitation and supported employment services, among others, in order to further her socialization and vocational skills and gain additional independence.

77. Tamara C. has lived with her mother for her entire life. Tamara C. spends her days at home assisting with household chores and caring for her sister.

78. As a result of her disabilities, Tamara C. has functional limitations resulting in a need for certain supports and services so that she may attain the self-help, domestic, and job readiness skills she needs to become a more fully functioning member of society. Tamara C. can perform most self-care activities. She is independent in some functions of life, but desires even more independence to continue her development.

79. When Tamara C.'s mother applied for waiting list services approximately three or four years ago, she was told that Tamara C. was at the top of the waiting list. Tamara C.'s mother was recently informed that Tamara C. has not even been approved for a Medicaid waiver. Although Tamara C. receives some services, Tamara C. would benefit from transportation, prevocational services or supported employment, targeted case

management or case management, and vocational rehabilitation services.

PLAINTIFF DUSTI M.

80. Dusti M. is eligible for and receives Medicaid/medical assistance benefits as well as SSI. Dusti M. needs and would benefit from day habilitation services, among others, in order to further her socialization and vocational skills and gain additional independence.

81. Dusti M. has lived with her parents for her entire life. Dusti M. spends her days at home watching neighbors out the window.

82. As a result of her disabilities, Dusti M. has functional limitations resulting in a need for certain supports and services so that she may attain the self-help, domestic, and job readiness skills she needs to become a more fully functioning member of society. Dusti M. can perform some self-care activities, but needs assistance with toileting and daily household chores. She is independent in some functions of life, but desires even more independence to continue her development.

83. When Dusti M.'s mother applied for waiting list services approximately three years ago, she never heard from a caseworker after the initial interview. In February 2007, Dusti M. had to reapply for the waiting list because the original caseworker apparently had not properly processed Dusti M.'s waiting list application. Dusti M. receives no day habilitation services.

PLAINTIFF NICHOLAS A.

84. Nicholas A. is 24 years old and has mental retardation. He needs, would benefit from, and is qualified for Medicaid waiver services.

85. Nicholas A. has been on a waiting list for services for four (4) years. Nicholas A. is currently receiving day habilitation services.

86. Nicholas A. lives with his mother, Melissa T. Nicholas A. needs and would benefit from residential services, medical services and vocational services.

PLAINTIFF ANGIE D.

87. Angie D. is 31 years old and has mental retardation, cerebral palsy and a hearing impairment. She needs, would benefit from, and is qualified for Medicaid waiver services.

88. Angie D. lives with her brother and sister-in-law, Hubert and Michelle D., who provide all care for Angie.

89. Angie D. needs residential, respite and personal care services, but receives no such services. Angie's personal representative, Michelle Dotson, is unsure whether Angie is on a waiting list for said services, but has requested said services on Angie's behalf. She can perform limited self care and some household chores but cannot bathe herself.

PLAINTIFF SHAVON H.

90. Shavon H. is eligible for Medicare and receives SSI benefits. Shavon H. needs and would benefit from respite, day habilitation and Targeted Case Management services.

91. Because of her severe disabilities, Shavon H. must receive assistance regarding every aspect of living. She has no functional control over the movement of her limbs or bowels, and has severe problems with verbalization. She uses a wheelchair for

mobility, but is unable to assist with the movement of the chair. She is unable to feed herself.

92. Shavon H. resides with her mother, Marion L., and father, Rodgers L., in their family home in Jefferson County, where she has lived all her life. Shavon H. relies totally on her mother, Marion L., for her care. Marion L. must not only accomplish typical chores to manage the household such as shopping, cooking, cleaning, laundry, etc., but she must also provide the total care required by Shavon H. This includes all lifting and transfers, dressing, feeding, assistance with toileting, bathing, transferring Shavon H. from her bed to the tub, tooth brushing, grooming, etc.

93. Shavon H's mother applied for day habilitation services years ago, but was told that Shavon would be placed on a waiting list for those services and it would take years to obtain them.

94. Due to her disabilities, Shavon H. cannot be left alone. Shavon H. received day habilitation services for a brief period in 2002. Her primary caregiver, her mother, Marion L., was forced to give up such services because she had difficulty in helping Shavon H. attend the day habilitation program due to Shavon H's retardation and her inability to ambulate. Shavon H. received Targeted Case Management services for a period of time through 2003.

95. Despite her need for services, and the fact that she would benefit from Medicaid waiver services, Shavon H. is not receiving needed Medicaid waiver services.

B. The Medicaid Waiver Program and Community Residential Placements and Day Habilitation for Persons with Mental Retardation.

96. The Medicaid Waiver Program, which is authorized by Title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq., is a joint federal-state program. The Medicaid Waiver is a cost-sharing arrangement under which the federal government reimburses a portion of the expenditures incurred by states that elect to furnish Medicare medical assistance to individuals with mental retardation who meet eligibility requirements.

97. Pursuant to the Act, the designated “single state agency” must submit a State Plan to the U.S. Department of Health and Human Services (hereinafter “HHS”) which details the programs and funding requirements for which Medicaid funds are to be used.

98. Upon approval of the State Plan by HHS, the State becomes entitled to grants of federal funds as reimbursement for a portion of the expenditures made in providing specific types of medical assistance to eligible individuals.

99. States are not required to participate in the Medicare Medical Assistance program but, if they choose to do so, they must adopt a State Plan that delineates the standards for determining eligibility and the extent of Medicare Medical Assistance benefits in compliance with the Medicare Medical Assistance statute and implementing regulations. Alabama has chosen to participate in the Medicare Medical Assistance program and has adopted a State Plan.

100. Title XIX mandates that a State Plan must provide certain specified health care services. See 42 U.S.C. § 1396a(a)(10)(A)(i) (incorporating 42 U.S.C. §1396d(a)(1)-(5), (17), (21)). These mandatory services include, inter alia, inpatient hospital services, outpatient services, nursing facility services, and physician’s services.

101. In addition to these mandatory services, Title XIX also permits (but does not

require) a State Plan to provide other specified Medicare Medical Assistance “optional” services identified in 42 U.S.C. § 1396d(a); 42 U.S.C. §1396a(a)(10)(A). However, if a state chooses to provide such optional services, it must provide those services to all eligible persons throughout the state who need them.

102. Residential placements for persons with mental retardation are “optional” under Title XIX and the Medicaid Waiver. Alabama has chosen to provide residential placements in ICF/MR facilities, its main residential program in its State Plan. As such, individuals who are eligible for residential placements and/or day habilitation services, including plaintiffs, are entitled to receive them.

103. In Alabama, residential placements are provided through a number of different means, including large, segregated, state-operated facilities and small, community-based, home-like settings operated by nonprofit and for profit private providers.

104. As a result of providing residential placements and day habilitation, Alabama’s state budget benefits from a huge influx of federal monies, including the funding of over 69.57% of the costs of Alabama’s state-operated institutions and community programs for persons with mental retardation.

105. The primary purpose of residential placements and day habilitation is to provide daily living, health and rehabilitative services for individuals with mental retardation or other developmental disabilities. 42 U.S.C. § 1396(d). In fact, Alabama’s Department of Mental Health/Mental Retardation acknowledges:

“The chances for success of persons with . . . mental retardation are greatest in community settings where they can engage in normal life experiences and be challenged to achieve their personal best.”

Department of Mental Health/Mental Retardation Three-Year Plan, FY00-FY02, p.3.

106. A person eligible for Medicare Medical Assistance must meet three criteria to be eligible for residential placement in Alabama. First, the person must have a diagnosis of mental retardation. Second, the person must need active treatment. Third, a professional must recommend that the person needs the level of care provided in a given residential placement or day treatment program.

107. An essential component of the residential placement or day habilitation service is "active treatment." Federal regulations governing progress of services state persons receiving such services:

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

42 C.F.R. § 483.440 (a)(1).

108. The need for active treatment is met if the person will benefit from a professionally developed and supervised program of activities, experiences, or therapies which are necessary for assisting the individual to function at his/her greatest physical, intellectual, social, or vocational level. See Alabama Department of Mental Heath/Mental Retardation, Three-Year Plan, FY00-FY02; See also Standards for Community Services for Persons with Mental Retardation.

109. As part of the services required to be provided, an individual program plan

must be developed for each person. The individual program plan must identify the interventions to support the person in independence and must include, for those clients who need them, inter alia, training in the basic personal skills needed for independence and privacy, such as personal and dental hygiene, self-feeding, dressing, grooming, and communication skills.

110. Before admitting an individual to residential placement or day habilitation an evaluation must be conducted to determine if the facility can meet the client's needs and if the client is likely to benefit from the placement in the facility. See Alabama Department of Mental Health/Mental Retardation, Three-Year Plan, FY00-FY02; See also Standards for Community Services for Persons with Mental Retardation.

111. DMH/MR has significant control over the development and provision of residential placement and day habilitation services.

112. DMH/MR is, has been, or should have been, aware of a substantial waiting list for community residential services for persons with mental retardation who are eligible for residential placement and day habilitation services. DMH/MR has acknowledged that approximately 1,571 persons are on its waiting list for such services, that additional qualified persons are routinely added to the waiting list, and that the number of such qualified persons on the waiting list is increasing.

113. Individual plaintiffs are Medicare and SSI eligible recipients who meet the criteria for residential placement and day habilitation services. Individual plaintiffs' needs can be met in small, community-based residential placements, and/or day habilitation services and they would benefit from placement in such programs. Nevertheless, defendants have failed to provide individual plaintiffs with services in residential placements

or day habilitation programs. As a result, individual plaintiffs have remained, in many cases for years, on waiting lists for these services.

114. Title XIX requires that categorically needy recipients such as plaintiffs must receive services in an amount, duration or scope that is available to other categorically needy recipients. 42 U.S.C. § 1396a(a)(10)(B)(i) and (ii); 42 C.F.R. § 440.240.

C. Alabama's System For Assuring Services to Persons with Mental Retardation.

115. In Alabama, provision of services to persons with mental retardation is governed by the Department of Mental Health/Mental Retardation Act of 1984 (MH/MR Act), Act No. 84-242, § 22-50-1, et seq., of the Code of Alabama.

116. Under the MH/MR Act, the Department of Mental Health/Mental Retardation must assure that the residents of Alabama with mental retardation receive adequate services. Ala. Code § 22-50-9, et seq.

117. Department of Mental Health/Mental Retardation's mental retardation policy is based on:

“the principal of establishing and promulgating reasonable minimum standards for the construction and operation of facilities including reasonable minimum standards for the admission, diagnosis, care, treatment, transfer of patients or clients and their records, and also including reasonable minimum standards for providing day care, outpatient care, emergency care, inpatient care and follow up care when such care is provided for persons, with mental or emotional illness or day care or residential care for persons who are mentally retarded.”

Ala. Code § 22-50-11(11) (emphasis added).

118. Persons seeking residential placement or day habilitation programs must do

so through their locally designated Mental Retardation and Developmental Disabilities Health Care Authority (MRDDHCA). Under the MH/MR Act, for example, the MRDDHCA of Jefferson County, Alabama, through its designees, serves as the point of entry into Alabama's mental retardation system for persons in Jefferson County who want to apply for services. See Ala. Code § 22-51-1(8).

119. All referrals of persons with mental retardation living in Alabama for needed residential services, and/or day habilitation programs, and/or other related supports and services must be approved by the Department of Mental Health/Mental Retardation.

120. For many years, The Alabama Department of Mental Health/Mental Retardation has failed or refused to provide community based services to all persons with mental retardation who apply and are eligible for such services, regardless of the need for such services. Thus, for example, the MRDDHCA of Jefferson County has developed a waiting list, as required in its contractual agreement with the Alabama Department of Mental Health/Mental Retardation, for persons with mental retardation who need residential, day habilitation, and other community based services, which lists hundreds of persons who are waiting for needed services.

121. The Department of Mental Health/Mental Retardation is aware of the lack of community residential placements, day habilitation, and other community based services available to eligible applicants and is aware that there are growing numbers of unserved and underserved persons on their waiting lists for such services, but is not providing needed services to qualified individuals as required by federal law.

122. Individuals with mental retardation who need community services, but who are placed on waiting lists are often forced to remain at home with aging or ailing relatives

who cannot provide them with appropriate care or opportunities, while others are admitted and cared for entirely by the State in large, inappropriate institutions.

123. All individual plaintiffs will suffer imminent, irreparable injury absent an award of injunctive relief. Plaintiffs need small, community-based residential placement and/or day habilitation services. Plaintiffs can no longer live in their homes with caretakers who are unable to meet their needs, and they cannot live independently.

124. At all material times the defendants acted under color of state law.

125. All of the individual defendants are named and sued solely in their official capacities.

VI. Claims

A. Count I - Violation of 42 U.S.C. § 1983; Failure to Provide ICF/MR and/or Waiver Services with Reasonable Promptness.

126. Plaintiffs incorporate by reference Paragraphs 1 through 125 of this Complaint. For purposes of Count I, “defendants” refers to defendants Riley, Houston, and the Department of MH/MR.

127. Title XIX requires that states that participate in the Medical Assistance program must make Medical Assistance benefits available. 42 U.S.C. § 1396a(a)(10)(A). Medical Assistance benefits include, at the option of the state, ICF/MR services and/or waiver services. 42 U.S.C. § 1396a(a)(15).

128. Alabama has chosen to cover ICF/MR and/or waiver services for some eligible persons as a Medical Assistance benefit. As a condition of its participation in the program, defendants must ensure that services which are necessary for eligible persons with mental retardation and other developmental disabilities are provided to them in a

reasonably prompt manner.

129. Plaintiffs are eligible for Medical Assistance benefits generally and ICF/MR and/or waiver services in particular. Title XIX requires that the State Plan provide that “all individuals wishing to make application for medical assistance under the plan shall have opportunity to do so, and that such assistance shall be furnished with reasonable promptness to all eligible individuals.” 42 U.S.C. § 1396a(a)(8). This means that defendants must not only allow individual plaintiffs to apply for residential placement, day habilitation services, and other related supports and services, but must furnish these services promptly and without any delay caused by the agency’s administrative procedures. 42 C.F.R. § 435.930(a).

130. Defendant has failed or refused to provide plaintiffs with residential placement, day habilitation, and other supports and services in small, community-based settings in violation of Title XIX. This failure violates plaintiff’s rights under the Social Security Act and its implementing regulations, and the Fourteenth Amendment to the United States Constitution, and thus constitutes a violation of 42 U.S.C. § 1983.

B. Count II – Violation of 42 U.S.C. § 1983; Failure to Comply with Comparability Requirements.

131. Plaintiffs incorporate by reference Paragraphs 1 through 130 of this Complaint. For purposes of Count II, “defendants” refers to defendants Riley, Houston, and Department of MH/MR.

132. Title XIX requires that eligible recipients must not receive mandatory services and any designated optional services, such as residential placement or day habilitation, in an amount, duration or scope that is no less than those services that are available to other

eligible recipients already enrolled, or than are available to other categorically needy recipients. 42 U.S.C. § 1396a; 42 C.F.R. § 440.240. Title XIX further requires that eligible recipients must receive services that are equal in amount, duration, and scope to other eligible recipients within their covered group.

133. Alabama, in its Medicaid program, provides residential placements, day habilitation, and other services to some eligible recipients, while continuing to deny those services to the plaintiffs.

134. Alabama's failure to provide residential placement, day habilitation, and other services to plaintiffs, who are eligible for and need residential placement, day habilitation and other services, while it provides ICF/MR and/or waiver services to certain other eligible recipients, violates 42 U.S.C. § 1396a(a)(10)(B). This failure violates plaintiffs' rights under the Social Security Act and its implementing regulations, and the Fourteenth Amendment to the United States Constitution, and, thus, constitutes a violation of 42 U.S.C. § 1983.

C. Count III – Violation of 42 U.S.C. § 1983; Failure to Provide Right to Apply

135. Plaintiffs incorporate by reference Paragraphs 1 through 134 of this Complaint. For purposes of Count III, “defendants” refers to defendants Riley, Houston, and Department of MH/MR.

136. Title XIX provides eligible recipients the right to apply for services and have a decision rendered regarding their applications for services. 42 U.S.C. § 1396a.

137. Alabama, in its Medicaid program, as administered by defendants, has afforded the right to apply for services to certain eligible recipients, while continuing to deny

the right to apply to certain plaintiffs.

138. Alabama's failure to provide the right to apply for services and have a decision rendered regarding their applications for services to plaintiffs who are eligible for and need residential placement, day habilitation and other services, while it provides the right to apply to certain other eligible recipients, violates 42 U.S.C. § 1396a(a)(3). This failure violates plaintiffs' rights under the Social Security Act and its implementing regulations, and the Fourteenth Amendment to the United States Constitution, and, thus, constitutes a violation of 42 U.S.C. § 1983.

D. Count IV - Violation of Plaintiff's Due Process Rights as Guaranteed by United States Constitution.

139. Plaintiffs incorporate by reference Paragraphs 1 through 138 of this Complaint. For purposes of Count VI, "defendants" refers to defendants Riley and Houston in their official capacities.

140. 42 U.S.C. § 1983 provides that any person acting under color of state law who deprives any other person of rights guaranteed by the Constitution or laws of the United States shall be liable to the party injured in an action for legal or equitable relief.

141. The actions of defendants described in this Complaint were taken under color of state law and represent the custom and policy of these officials and the offices and programs they operate. Defendants' conduct was done with malice and with reckless disregard of the federally protected rights of the plaintiffs.

142. Defendants' failure to provide plaintiffs with adequate residential placement, day habilitation and other services, and defendants' failure to provide such services to plaintiffs, has violated, and continues to violate, plaintiffs' rights to due process guaranteed

by the 14th Amendment to the U.S. Constitution and 42 U.S.C. § 1983.

143. Plaintiffs' constitutional rights to habilitation were clearly established at the time of this lawsuit.

144. Defendants knew, or should have known, about plaintiffs' needs for safe living conditions, habilitation, training and other services to ensure Plaintiffs' safety and freedom from harm, via placement of plaintiffs in residential placements and/or day habilitation programs and/or other appropriate services and programs, but customarily refused to or failed to assure that plaintiffs' needs were met. Defendants had, and have, the power and authority necessary to make the appropriate changes to provide to the plaintiffs the requested due process. As such, defendants knew about, but failed or refused, to remedy the known and continuing violation of plaintiffs' clearly established Constitutional rights to habilitation, care, and treatment equal or substantially similar to that provided to others receiving services.

145. Also, defendants created and promoted unconstitutional practices, including inter alia, the failure to exercise and implement professional judgment with respect to plaintiffs' care and treatment, including their needs for habilitation, ancillary services, community placements, and safe living conditions. Defendants' refusal to remedy the known violations of plaintiffs' clearly established Constitutional rights to, inter alia, habilitation, has amounted, and continues to amount to, gross indifference to plaintiffs' rights.

146. Defendants' failure to provide plaintiffs with the services described in this Complaint has caused, and is continuing to cause, them irreparable harm in that they are being denied services that would allow them to become more independent, to become

more integrated into the community, to assure their safety, and to prevent the loss of previously acquired skills which would prevent deterioration of their physical and mental health, including increased contractures and disability, loss of adaptive skills, muscle atrophy, and generalized failure to thrive.

VII. Request for Relief

147. WHEREFORE, the plaintiffs respectfully request that this Court grant the following relief:

As to COUNTS I, II, and III - Defendants, Riley, Houston, and Department of MH/MR:

1. Retain jurisdiction over this case;
2. Declare that defendants' actions and inactions violate Title XIX of the Social Security Act;
3. Issue a preliminary injunction and a permanent injunction to enjoin defendants from continuing to violate Title XIX of the Social Security Act and to require defendants to allow individual plaintiffs to apply for residential placement and/or day habilitation and/or other needed services, and immediately provide individual plaintiffs with services in small, community-based programs appropriate to their needs; and,
4. Issue such other relief as may be just, equitable and appropriate, including an award of reasonable attorney's fees and costs pursuant to 42 U.S.C. § 1988.

As to COUNT IV - Defendants, Riley and Houston:

1. Retain jurisdiction over this case;
2. Declare that defendants' actions and inactions violate plaintiffs' due

process rights guaranteed under Fourteenth Amendment to the United States Constitution.

3. Issue a preliminary injunction and a permanent injunction to enjoin defendants from continuing to violate plaintiffs' due process rights under the Fourteenth Amendment of the United States Constitution and require defendants to allow individual plaintiffs to apply for services appropriate to their needs, and immediately provide individual plaintiffs with such services in small, community-based programs appropriate to their needs; and,
4. Issue such other relief as may be just, equitable and appropriate, including an award of reasonable attorney's fees and costs pursuant to 42 U.S.C. § 1988.

Respectfully Submitted,

By: /s/ J. Patrick Hackney

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Dated: July 26, 2007

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this the 26th day of July, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to counsel for all parties of record.

/s/ J. Patrick Hackney
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APPENDIX A

HOME AND COMMUNITY BASED WAIVER LIST OF SERVICES

- **In-home residential habilitation services, including habilitation training & intervention the following areas:**
 - Self-care;
 - Sensory/motor development;
 - Interpersonal skills;
 - Communication;
 - Behavior shaping;
 - Community living skills;
 - Mobility;
 - Health care;
 - Socialization;
 - Community inclusion;
 - Money management;
 - Pursuit of leisure & recreational activities;
 - Household responsibilities.
- **In-home residential habilitation training and intervention consisting of:**
 - Incidental learning in addition to formal training plans;
 - Modification of the physical and/or social environment, such as changing factors that impede progress (examples range from changing other peoples' attitudes towards the person to opening a door or moving a chair); and
 - Provision of direct support.
- **Habilitation supplies, equipment and transportation, including:**
 - Transportation costs to providers of residential habilitation to transport individuals to day programs, when public transportation or transportation covered under the Medicaid state plan is not available, accessible or desirable due to the functional limitations of the client; and
 - Transportation costs to providers of residential habilitation to transport individuals to social events or community activities, when public transportation or transportation covered under the Medicaid state plan is not available, accessible, or desirable due to the functional limitations of the client.
- **Day habilitation services including:**
 - Planning, training, coordination, and support to enable and increase independent functioning, physical health and development;
 - Communication development services;
 - Cognitive training services;
 - Socialization services;
 - Community integration services;
 - Domestic & economic management services;
 - Behavior management services;
 - Responsibility services; and
 - Self-direction services;

- Assistance/ training in daily living activities;
 - Instruction in the skills necessary for independent pursuit of leisure time/ recreation activities.
 - Social and other adaptive skills building activities (such as expressive therapy and prescribed use of art, music or drama movement to modify ineffective learning patterns and/or to influence a change in behavior);
- **Prevocational services aimed at preparing an individual for paid or unpaid employment but which are not job-task oriented, including:**
 - Teaching concepts such as compliance, attendance, task completion, problem solving and safety.
 - Activities aimed at teaching underlying habilitative goals such as attention span and motor skills.
- **Supported employment services, including:**
 - where the individual participates in paid employment but will not likely be competitive at or above the minimum wage and where the individual needs intensive and ongoing support to perform in a work setting; and
 - where the individual participates in paid employment and needs supervision and training in excess of that provided to other nondisabled employees.