DISABILITY RIGHTS NEW JERSEY, INC.
By: William Emmett Dwyer, Esquire
201 South Broad Street, Third Floor
Trenton, New Jersey 08608
(609) 292-9742

PEPPER HAMILTON, LLP
A Pennsylvania Limited Liability Partnership
By: Angelo A. Stio, III, Esquire
Jeffrey A. Carr, Esquire
Travis P. Nelson, Esquire
3000 Two Logan Square
Eighteenth and Arch Streets
Philadelphia, PA 19103-2799

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

DISABILITY RIGHTS NEW JERSEY, INC., a New Jersey nonprofit corporation, ALLISON HARMON, by and through her guardians, Valerie Harmon and Linda Lemore, and FREDRENA THOMPSON,	Civil Action No: 05-CV-4723 (AET/TJB)
Plaintiffs,	
v.	
JENNIFER VELEZ, in her official capacity as Commissioner of the Department of Human Services for the State of New Jersey, and the STATE OF NEW JERSEY,	**NOTICE OF PLAINTIFFS' MOTION FOR RECONSIDERATION OF THE COURT'S SEPTEMBER 24, 2010 OPINION & ORDER**
Defendants.	

TO:

Gerard Hughes, DAG
Office of the Attorney General
Dept. of Law and Public Safety
Division of Law
P.O. Box 112
Trenton, NJ 08625
Attorney for Defendants

John Andrew Ruymann
Office of the U.S. Attorney
402 East State Street
Suite 430
Trenton, NJ 08608

Attorney for Intervenor

PLEASE TAKE NOTICE, that on November 1, 2010, at 9:00 a.m. in the morning, or as soon thereafter as counsel may be heard, Plaintiffs, Disability Rights New Jersey, Inc., Allison Harmon, by and through her guardians, Valerie Harmon and Linda Lemore, and Fredrena Thompson, through their undersigned counsel, shall move before the United States District Court for the District of New Jersey, Clarkson S. Fisher Building & U.S. Courthouse, 402 East State Street, Room 2020, Trenton, NJ 08608, for an order granting Reconsideration of the Court's September 24, 2010 Opinion & Order Granting Defendants' Motion for Summary Judgment as to Count III (Medicaid Act) of Plaintiffs' Complaint.

PLEASE TAKE FURTHER NOTICE, that in support of said motion, Plaintiffs shall rely on the attached Brief in Support of Plaintiffs' Motion for Reconsideration.

PLEASE TAKE FURTHER NOTICE that a proposed form of Order accompanies this Motion.

Plaintiffs request oral argument.

Dated: October 6, 2010

By: /s/ Travis Nelson

Angelo A. Stio, III, Esquire
Jeffrey A. Carr, Esquire
Travis P. Nelson, Esquire
PEPPER HAMILTON LLP
3000 Two Logan Square
Philadelphia, PA 19102
(215) 981-5000

Williams Emmett Dwyer, Esquire
DISABILITY RIGHTS NEW JERSEY, INC.
210 South Broad Street, Third Floor
Trenton, NJ 08608
(609) 292-9742

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I, Travis Nelson, hereby certify that a true and correct copy of Plaintiffs' Notice of Motion for Reconsideration, and brief in support of same, were filed with this Court via electronic filing on October 6, 2010, and were served on this same date via the same method on:

Gerard Hughes, DAG
Office of the Attorney General
Dept. of Law and Public Safety
Division of Law
P.O. Box 112
Trenton, NJ 08625

John Andrew Ruymann
Office of the U.S. Attorney
402 East State Street
Suite 430
Trenton, NJ 08608

Dated: October 6, 2010

/s/ Travis Nelson
Travis Nelson, Esquire

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

DISABILITY RIGHTS NEW JERSEY, INC., a New Jersey nonprofit corporation, ALLISON HARMON, by and through her guardians, Valerie Harmon and Linda Lemore, and FREDRENA THOMPSON, Plaintiffs, v. JENNIFER VELEZ, in her official capacity as Commissioner of the Department of Human Services for the State of New Jersey, and the STATE OF NEW JERSEY, Defendants.	Civil Action No: 05-CV-4723 (AET/TJB)

PLAINTIFFS' BRIEF IN SUPPORT OF THEIR MOTION FOR RECONSIDERATION

DISABILITY RIGHTS NEW JERSEY, INC.
By: William Emmett Dwyer, Esquire
210 South Broad Street, Third Floor
Trenton, New Jersey 08608
(609) 292-9742

PEPPER HAMILTON, LLP
A Pennsylvania Limited Liability Partnership
By: Angelo A. Stio III, Esquire
Jeffrey A. Carr, Esquire
Travis P. Nelson, Esquire
301 Carnegie Center, Suite 400
Princeton, New Jersey 08543
(609) 452-0808

Attorneys for Plaintiffs

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PRELIMINARY STATEMENT

Plaintiffs' Motion for Reconsideration should be granted because the Court's dismissal of Count III of the Amended Complaint (the "Medicaid Claim") was based on the application of incorrect law. Specifically, the Court relied upon the definition of "medical assistance" under 42 U.S.C.A. § 1396d(a) and several circuit court decisions[1] and found the Medicaid Claim to be invalid because "the state's obligation to provide 'medical assistance' refers to financial assistance rather than actual medical services." [Dkt. 82 at 7].

The Court decision was contrary to law because Congress expressly amended the definition of "medical assistance," and essentially overturned the circuit court decisions that the Court relied upon through the passage of Section 2304 of the Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119, to be codified as amended at scattered sections of 42 U.S.C. ("PPA"). Under Section 2304 of the PPA, which was signed into law on March 23, 2010, Congress clarified the meaning of "medical assistance" to include not only financial assistance, but also the actual provision of medical services:

> Section 1905(a) of the Social Security Act (42 U.S.C. 1396d(a)) is amended by inserting **"or the care and services themselves, or both"** before "(if provided in or after".
>
> PPA Sec 2304 (emphasis added).

By clarifying the meaning of the term "medical assistance," Congress essentially overturned the circuit court cases relied upon by this Court in reaching its decision and rendered the dismissal of the Medicaid Claim improper. Given that the applicable federal law was not applied in this case, an error of law has occurred. As a result of this error and the prejudice

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1 In its ruling the Court relied upon the following cases for the definition of "medical assistance": Mandy R. v. Owens, 464 F.3d 1139, 1143 (10th Cir. 2006); Bruggeman v. Blagojevich, 324 F.3d 906, 910 (7th Cir. 2003); and Westside Mothers v. Olszewski, 454 F.3d 532, 540 (6th Cir. 2006).

Plaintiffs respectfully request that this Court reconsider and vacate its ruling which granted summary judgment and dismissed the Medicaid Claim.

BACKGROUND

The constituents of plaintiff Disability Rights New Jersey, Inc. ("DRNJ") are developmentally disabled people who currently reside in seven large institutions operated by the State of New Jersey (the "State"). By the State's own admission, with proper community services, DRNJ's constituents can live in the community. However, the State's administration of the Medicaid program is done in a way that denies eligible individuals the opportunity to apply for and receive community-based services in violation of the Medicaid Act. Plaintiffs brought suit, and in Count III of the Amended Complaint, alleged a violation of their rights under the Medicaid Act.

On March 25, 2010, the parties filed motions for summary judgment. On September 24, 2010, The Honorable Anne E. Thompson, U.S.D.J., issued an opinion and order granting Defendants' motion for summary judgment only with respect to the Medicaid Claim. Relying on several circuit court decisions, the Court found that the term "medical assistance" under the Medicaid Act is limited to financial assistance only and dismissed the Medicaid Claim. [Dkt. 82 at 7]. The Court held as follows:

> Because Plaintiffs are not requesting the type of assistance – financial assistance – provided for by the Medicaid Act, the Court finds that Plaintiffs do not have a valid claim and will grant summary judgment in favor of Defendants.
>
> [Dkt. 82 at 7-8].

Because the Medicaid Act applies to more than just financial assistance, but also providing actual medical services, the rationale for the Court's decision is fatally flawed, this motion for reconsideration now follows in order to correct a clear error of law.

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STANDARD OF REVIEW FOR RECONSIDERATION

In New Jersey, motions for reconsideration are governed by Fed. R. Civ. P. 59(e) and L. Civ. R. 7.1. Wingate Inns Int'l Inc. v. Hightech Inn.com, LLC, No. 07-5014, 2010 U.S. Dist. Lexis 61361 (D.N.J. June 21, 2010); Mars, Inc. v. Coin Acceptors, Inc., No. 90-0049, 2007 U.S. Dist. Lexis 38957 (D.N.J. 2007) (describing Local Rule 7.1(i) as the "analog" to Rule 59(e)). Under the applicable standard, a district court has the discretion to grant consideration if the moving party establishes at least one of the following grounds "(1) an intervening change in controlling law; (2) the availability of new evidence not available previously; or (3) the need to correct clear error of law or prevent manifest injustice." N. River Ins. Co. v. Cigna Reins. Co., 52 F.3d 1194, 1203, 1218 (3d Cir. 1995). In this case, reconsideration is appropriate because there is an intervening change in controlling law and reconsideration is needed to correct a clear error.

LEGAL ARGUMENT

RECONSIDERATION SHOULD BE GRANTED AND THE DISMISSAL ORDER VACATED BECAUSE THE PPA CLARIFIES AND EXPANDS THE DEFINITION OF THE TERM "MEDICAL ASSISTANCE" TO INCLUDE RENDERING ACTUAL SERVICES

On March 23, 2010, the PPA was signed into law and became effective. Section 2304 of the PPA, entitled "Clarification of definition of medical assistance," amends the Medicaid Act, specifically 42 U.S.C. 1396d(a), by clarifying that the term "medical assistance" to mean both financial assistance and the actual medical services themselves. PPA at § 2304. Thus, the Medicaid Act now reads as follows:

> The term "medical assistance" means payment of part or all of the cost of the following care and services **or the care and services themselves, or both**, (if provided in or after the third month before the month in which the recipient makes application for assistance....

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42 U.S.C. § 1396d(a). (emphasis added).

The purpose of Congress in enacting Section 2304 of the PPA was "[t]o correct any misunderstandings as to the meaning of the term" medical assistance. H.R. Rep. No. 299, 111th Cong., 1st Sess. 2009, at 693-694, 2009 WL 3321420 (Oct. 14, 2009). The relevant legislative history states as follows:

> Section 1905(a) of the Social Security Act defines the term "medical assistance." The term is expressly defined to refer to payment but has generally been understood to refer to both the funds provided to pay for care and services and to the care and services themselves. The Committee, which has legislative jurisdiction over Title XIX of the Social Security Act, has always understood the term to have this combined meaning. Four decades of regulations and guidance from the program's administering agency, the Department of Health and Human Services, have presumed such an understanding and the Congress has never given contrary indications.
>
> Some recent court opinions have, however, questioned the longstanding practice of using the term "medical assistance" to refer to both the payment for services and the provision of the services themselves. These opinions have read the term to refer only to payment; this reading makes some aspects of the rest of Title XIX difficult and, in at least one case, absurd. If the term meant only payments, the statutory requirement that medical assistance be furnished with reasonable promptness "to all eligible individuals" in a system in which virtually no beneficiaries receive direct payments from the state or federal governments would be nearly incomprehensible.
>
> Other courts have held the term to be payment as well as the actual provision of the care and services, as it has long been understood. The Circuit Courts are split on this issue and the Supreme Court has declined to review the question. **To correct any misunderstandings as to the meaning of the term, and to avoid additional litigation, the bill would revise section 1905(a) to read, in relevant part: "The term 'medical assistance' means payment of part or all of the cost of the following care and services, or the care and services themselves, or both." This technical correction is made to conform this definition to the longstanding administrative use and understanding of the term. It is effective on enactment.**

Id. (emphasis added).

In the present case, the Court relied on circuit cases decided before the enactment of the PPA. [Dkt. 82 at 6-7, citing Mandy R. v. Owens, 464 F.3d 1139, 1143 (10th Cir. 2006), Bruggeman v. Blagojevich, 324 F.3d 906, 910 (7th Cir. 2003), Westside Mothers v. Olszewski, 454 F.3d 523 (6th Cir. 2006)]. These circuit courts interpreted the term "medical assistance" to mean financial assistance only. Even if these three circuit court decisions at the time accurately held that for purposes of 42 U.S.C. § 1396d(a) the term "medical assistance" includes only financial assistance, they have since been overruled by the PPA which clarifies the term to mean otherwise. This Court's opinion and order granting Defendants' motion for summary judgment as to the Medicaid Claim was based on the assumption that the above holdings were valid interpretations of § 1396d(a) under current law. Specifically, this Court's opinion and decision states: "[Plaintiffs] complain that they are being hindered from accessing specific medical services available under New Jersey's waiver program. Because Plaintiffs are not requesting the type of assistance – financial assistance – provided for by the Medicaid Act, the Court finds that Plaintiffs do not have a valid claim and will grant summary judgment in favor of Defendants." Dkt. 82 at 6-7]. Though the Court's opinion and order dismissing Plaintiffs' Medicaid Claim cites to 42 U.S.C. § 1396d(a), the opinion does not make any mention of Section 2304 of the PPA and its amendment of the Medicaid Act. If this Section 2304 were considered, the ruling could not possibly stand because Plaintiffs' Medicaid Claim is based on rendering of services, which is now expressly contemplated under the Medicaid Act.

In view of this omission of the controlling law, reconsideration is appropriate and this error must be corrected. Further, the fact that the parties did not present the overlooked controlling law at the prior hearing is irrelevant. Indeed, such an error is similar to the error

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recognized by the Court in McGarvey v. Penske Automotive Group, Inc., No. 08-5610, 2010 U.S. Dist. Lexis 32228 (March 29, 2010). In that case, the court granted plaintiffs' partial summary judgment and denied defendants' motions to dismiss certain claims involving automobile theft system warranties. On defendants' motion for reconsideration, defendants raised interpretations of governing statutory provisions of the federal Magnuson Moss Warranty Act ("MMWA") there were not previously before the court. The McGarvey court determined that the incorporation of the two previously unconsidered statutory sections changed the court's interpretation of the statute's application, and thus resulted in "a clear error of law" requiring the court to vacate its prior decision granting partial summary judgment to the plaintiffs. McGarvey at *28. See also, Interfaith Community Org. v. Honeywell International, 215 F.Supp 2d 482, 506-07 (D.N.J. 2002).

Here, like in McGarvey, the Court failed to consider the PPA. The reason for this omission in recognizing the applicable statute is readily apparent. The PPA was enacted by Congress on March 23, 2010 – only two days prior to the submission of Plaintiffs' Motion for Summary Judgment. It is the most comprehensive piece of health care legislation ever enacted, and encompasses over one-thousand pages in length. Due to the voluminous size of the PPA and the timing of its adoption, neither the Plaintiffs nor this Court could reasonably have been expected to be aware of the existence of an isolated paragraph buried in the Act that would clarify the meaning of "medical assistance" in a wholly separate act, the Medicaid Act.

Neither the Plaintiffs nor this Court were aware of the relevant change that had occurred in the law merely two days prior to submission of the initial summary judgment briefs, nor could one expect that they should have been thoroughly versed in the PPA given the comprehensive nature and extent of the health care reform bill passed by Congress. For this

reason, because an error of law occurred in the Court's failure to consider this controlling statute, Plaintiffs respectfully request that the Court grant the motion for reconsideration and reinstate the Medicaid Claim.

CONCLUSION

This Court should grant the Plaintiff's Motion for Reconsideration because the Court's granting of partial summary judgment was based on an error of law – an error that even the most diligent court might make given the extensive nature of the PPA.

PEPPER HAMILTON LLP
(A Pennsylvania LLP)

By: /s/ Travis Nelson
Angelo A. Stio III
Travis P. Nelson

DISABILITY RIGHTS NEW JERSEY, INC.

By: /s/ William Emmett Dwyer
William Emmett Dwyer

Attorneys for Plaintiffs