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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MAY 12 2000

NATIONAL CENTER
ON POVERTY LAW

MICHAEL OLESKY; LINDA PEREZ, by Her Guardian, ELVIRA PEREZ;
NICHOLAS CRISON, by His Guardian, ALICE RICHMOND of GUARDIAN INC. of
CALHOUN CO.; BERNICE SCHOONMAKER, by Her Guardian, BONNIE CAMBURN
of GUARDIAN INC. of CALHOUN CO.; REBECCA STEPHENS;
DAVID WATTS; and MICHIGAN PROTECTION AND ADVOCACY SERVICE, INC.;
individually and on behalf of all others similarly situated,

PLAINTIFFS,

HON. DOUGLAS W. HILLMAN

- v -

CASE NO: 5:99-cv-105

MICHIGAN DEPARTMENT OF COMMUNITY HEALTH;
JAMES K. HAVEMAN, JR, in his official capacity
as Director of the Michigan Department of Community Health;
DAVID T. VERSEPUT, in his official capacity as Director of
the Office of Specialized Nursing Home/OBRA Programs
within the Department of Community Health,

DEFENDANTS.

MICHIGAN PROTECTION AND
ADVOCACY SERVICE, INC.

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PLAINTIFFS' FIRST AMENDED COMPLAINT

PROOF OF SERVICE

I verify that I served a copy of the foregoing document upon all attorneys
of record of all parties to the above cause by First Class Mail to them at
their record addresses on May 2, 2000.

[Signature]

INTRODUCTION

1. This is a class action against the Michigan Department of Community Health (**DCH**) and its officials, James K. **Haveman**, Jr., and David T. **Verseput**.¹ The Plaintiffs represent a class of persons with disabilities who are being improperly confined to nursing facilities in violation of the Nursing Home Reform Act. 42 U.S.C. **1396r**. This Act requires DCH to evaluate whether persons with disabilities require nursing facility care and, if they do not, to provide for their discharge into community settings so that they may receive appropriate, non-institutional care.

2. This action consists of four causes of action:

- Count I is brought under 42 U.S.C. 1983 for prospective injunctive relief against **Haveman** and **Verseput** in their official capacities, and alleges that **Haveman** and **Verseput** have violated the Nursing Home Reform Act (**NHRA**) by failing to provide for the safe and orderly discharge of the class members into community settings and for failing to provide specialized mental health **services** in such settings, damaging named plaintiffs and plaintiff Michigan Protection and Advocacy Service, Inc. (**MPAS**). 42 U.S.C. **1396r(e)(7)**.
- Count II alleges that DCH and **Haveman** in his official capacity have violated the Americans with Disabilities Act (ADA), specifically its mandate that a public agency must administer its **services** “in the most integrated setting appropriate to the needs of qualified individuals with **disabilities**.” 28 **C.F.R. 35.130(d)**. DCH and **Haveman** have failed to provide mental health services in integrated community settings; rather, the

¹ Defendants **Haveman**, **Verseput** and the Michigan Department of Community Health are collectively referred to throughout this Complaint as “DCH,” except when distinctions are necessary to accomplish the purposes of a specific allegation.

Plaintiffs remain unnecessarily confined to nursing facilities, where they receive minimal mental health services, damaging named plaintiffs and plaintiff MPAS.

- Count III seeks mandamus due to the failure of DCH and **Haveman** to discharge their mandatory duties under the Michigan Mental Health Code (**MMHC**) to coordinate public mental health services and to assure that eligible persons, including the Plaintiffs, receive services which are suited to their conditions, provided in the least restrictive setting which is appropriate and available, and developed pursuant to an individual plan of services (**IPOS**) created under a “person-centered planning process,” damaging named plaintiffs and plaintiff **MPAS**. M.C.L. 330.1116(2)(a) and (b); M.C.L. **330.1708(1)** and (3); M.C.L. 330.1712. The services available to Plaintiffs and the proposed classmembers through the **IPOS** process include extensive mental health services financed through the Medicaid system.
- Count **IV** seeks injunctive relief under M.C.L. **330.1722(3)** against DCH and **Haveman** to remedy neglect, which is defined to include the denial to an eligible person with a mental disability of the standard of care to which the person is entitled under the **MMHC, damaging** named plaintiffs and **plaintiff MPAS**. Plaintiffs allege that they are entitled to the standard of care determined as appropriate by professional judgment, including placement in less restrictive settings.

3. Plaintiffs and the proposed classmembers seek injunctive relief to compel their safe and orderly discharge into integrated settings where they can receive the services due them pursuant to their rights under the **NHRA**, the ADA, the MMHC, and Medicaid.

JURISDICTION AND VENUE

4. Jurisdiction is based on Defendants' removal from **Ingham** Circuit Court pursuant to 28 U.S.C. 1441, giving this court original jurisdiction over Counts I and II pursuant to 28 U.S.C. 133 1 and 28 U.S.C. 1343, and over Counts III and IV pursuant to 28 U.S.C. 1441 **(c)**.

FACTUAL ALLEGATIONS: THE **PAS/ARR** PROCESS

5. The **NHRA** requires States to have programs in place to evaluate prospective residents of nursing facilities to determine if they are mentally ill or mentally retarded and require nursing facility care. In addition, DCH evaluates current residents of nursing facilities with mental retardation or mental illness on an annual basis to determine if they need nursing facility care.

6. The purpose of these evaluations is to prevent the unnecessary institutionalization of persons with mental disabilities.

7. Specifically, the NHRA establishes two distinct assessments.

8. First, DCH must have in place a "preadmission screening" (PAS) program to determine whether a prospective resident is mentally ill or mentally retarded, whether he or she requires the level of care provided by a nursing facility, and whether he or she requires specialized **services** for their mental **disability**.² 42 U.S.C. **1396r(e)(7)(A)** and (b)(3)(f); 42 C.F.R. **483.106(a)(1)**.

9. If the person is determined to not require services at a nursing facility level, Medicaid may not be used to pay for such services. 42 U.S.C. **1396r(e)(7)(D)(ii)**; 42 C.F.R. 483.118(a).

10. Second, DCH must also conduct "annual resident reviews" (ARR) of persons with mental illness or mental **retardation** who reside in nursing **facilities** to determine whether they require

² "Specialized services" are defined as including continuous and aggressive implementation of a plan of treatment and services to reduce behavioral problems and improve independent functioning for persons with mental **illness**, and for persons with mental retardation or a related condition, a treatment to increase self-determination, independence, and prevent the loss of optimal functioning. 42 C.F.R 483.120 [**promulgated** pursuant to 42 U.S.C. **1396r(e)(7)(G)(iii)**] and 42 C.F.R. **482.440(a)(1)** (specialized services for mental retardation).

the level of care provided by the nursing facility and whether they require specialized services. 42 U.S.C. **1396r(e)(7)(B)**; 42 C.F.R. 483,106(a)(3).

11. If the annual resident review determines that the person does not require nursing facility services but does require specialized services for his or her mental condition, **DCH's** mandated response to such a determination must occur as of April 1, 1990 (but see the description of the "**alternative** disposition plan" in Paragraphs 69 - **72**), and its response depends on whether the affected person is a long-term or short-term resident.

12. For a long-term resident (defined as a person who has lived in a nursing facility at least 30 months before the date of their **PAS/ARR** determination), DCH must :

- (i) inform the resident of the institutional and noninstitutional alternatives covered under the State plan for the resident,
- (ii) offer the resident the choice of remaining in the facility or of receiving covered services in an alternative appropriate institutional or noninstitutional setting,
- (iii) clarify the effect on eligibility for services under the State plan if the resident chooses to leave the facility (including its effect on readmission to the facility), and
- (iv) regardless of the resident's choice, provide for (or arrange for the provision of) such specialized services for the mental illness or mental retardation.

42 U.S.C. **1396r(e)(7)(C)(i)**; 42 C.F.R. **483.118(c)(1)**.

13. For a short-term resident (less than 30 months), DCH must:

- (i) arrange for the safe and orderly discharge of the resident from the facility, consistent with the requirements of subsection (c)(2) of this section,
- (ii) prepare and orient the resident for such discharge, and
- (iii) provide for (or arrange for the provision of) such specialized services for the mental illness or mental retardation.

42 U.S.C. **1396r(e)(7)(C)(ii)**.; 42 C.F.R. **483.118(c)(2)**.

14. Medicaid payment cannot be made for nursing facility services for short-term residents who do not require nursing facility services or for long-term residents who do not need such services who do not choose to remain in the nursing facility. 42 U.S.C. **1396r(e)(7)(D)(ii)**.

FACTUAL ALLEGATIONS: DEFENDANTS

15. The Michigan Department of Community Health (**DCH**) is the State agency responsible for compliance with the Nursing Home Reform Act, including the **PAS/ARR** requirements discussed above. James K. **Haveman, Jr.** is the chief executive officer of DCH who is responsible for assuring compliance with the **NHRA**, and David T. **Verseput** is the officer of DCH with direct responsibility for compliance with the **NHRA**.

16. DCH is the designated State agency responsible for the Medicaid program.

17. DCH is the agency responsible under the MMHC for coordinating the provision of public mental health services in Michigan.

18. DCH is sued as a public entity under Counts II, III, and IV.

19. James K. **Haveman, Jr.** is the Director of DCH with ultimate responsibility for the legal obligations of DCH. **Haveman** is sued in his official capacity for prospective relief under Counts I, II, III, and IV.

20. David T. **Verseput** is the Director of the **Office** of Specialized Nursing Home/OBRA Programs with DCH with direct responsibility for assuring State compliance with the **NHRA**. **Verseput** is sued in his official capacity for prospective relief under Count I.

FACTUAL ALLEGATIONS: PLAINTIFFS

MIKE OLESKY

21. Michael (Mike) Olesky is 23 years old and has been diagnosed with a mental illness, specifically, depressive disorder. He has resided at the Martha T. Berry nursing facility in Mt. Clemens, Michigan, since November **26, 1996**.

22. On June 9, 1998, Defendant **Verseput** issued a letter to the **Macomb** County Community Mental Health (**CMH**) agency stating that, pursuant to **DCH's** review of Mr. Olesky's Annual Resident Review, "he requires no nursing facility services but requires specialized services." The same determination had been made for Mr. Olesky's prior Annual Resident Review on February 11, 1997. Various evaluations by mental **health** officials have consistently recommended that Mr. Olesky be placed in a community setting.

23. As of the date of filing of the original lawsuit, Mr. Olesky continues to live at Martha T. Berry, and he is seeking to live in the community and receive specialized mental health services.

LINDA PEREZ

24. Linda Perez is 41 years old and has been diagnosed with Down Syndrome, blindness, mental retardation, and a variety of health problems. As of the date of filing of the original lawsuit, she has lived in the Integrated Health Services nursing facility (formerly, The **Greenery**) in Farmington, Michigan, since 199 1.

25. On February **22, 1999**, Defendant **Verseput** issued a letter to Oakland County **CMH** stating that, based on **DCH's** review of Ms. Perez' Annual Resident Review, "she requires no nursing facility services but requires **specialized** mental health services."

26. As of the date of filing of the original lawsuit, Ms. Perez and her legal guardian, her mother Elvira **Perez**, wish for her to be placed in a community setting with appropriate services, and

her **Annual** Resident Review recommends group facility placement and a variety of group and individual therapeutic activities.

NICHOLAS CRISON

27. Nicholas Crison is 76 years old and has been diagnosed with mental retardation and a gait abnormality.

28. Mr. **Crison** was admitted to The Laurels of Bedford, a nursing facility in Battle Creek, Michigan, on January **23, 1997**, where he still resides as of the date of filing of the original lawsuit.,

29. On February **18, 1998**, Defendant **Verseput** issued a letter to Calhoun County CMH stating that, based upon **DCH's** review of Mr. Crison's Annual Resident Review, "he requires no nursing facility services but requires specialized mental health services."

30. Mr. **Crison's** Annual Resident review recommends consideration for a less restrictive setting, as well as specific recommendations such as an Occupational Therapy evaluation and an ambulation program.

31. As of the date of **filing** of the original lawsuit, Mr. **Crison's guardian**, Alice Richmond, seeks a community placement for Mr. Crison.

BERNICE SCHOONMAKER

32. **Bernice (Tootie)** Schoonmaker is 68 years old and has been diagnosed with moderate mental retardation and congenital deformities of her extremities.

33. Ms. Schoonmaker was admitted to the Cedar Care Center, a nursing facility in Cedar Spring, Michigan, in December of 1984.

34. Ms. Schoonmaker has had numerous Annual Resident Reviews while living in the Cedar Care Center. Annual reviews completed in January of 1998, February of 1997, January of

1996, February of 1994, and previously have all concluded that Ms. Schoonmaker does not need nursing facility services but requires specialized mental health services.

35. Ms. Schoonmaker's 1998 review recommends placement in a barrier-free group home with **24-hour** supervision, noting that "[s]he strongly desires placement in a specialized group home which would be very appropriate." The review also recommends psychiatric consultation for medication review, as well as activities which promote **community** integration and participation in activities of daily living.

36. As of the date of filing of the original lawsuit, Ms. Schoonmaker's guardian, Guardian Inc. of Calhoun County, supports her desire to move to an appropriate group home setting.

37. As of the date of filing of the original lawsuit, Ms. Schoonmaker continues to reside in the Cedar Care Center nursing facility.

REBECCA STEPHENS

38. **Rebecca** Stephens is 62 years old and is diagnosed with a major depressive disorder.

39. Ms. Stephens was admitted to Northfield Place on May **30, 1997**.

40. **An** annual review conducted on June **30, 1998**, indicates that Ms. Stephens does not require nursing facility services, but requires other mental health services.

DAVID WATTS

41. David Watts is 47 years old and has mental retardation or a related condition, specifically a seizure disorder and a brain tumor.

42. As of the date of filing of the original lawsuit, Mr. Watts resides at the Wayne Living Center in Wayne, Michigan, and he was admitted to this nursing facility on September **30, 1993**.

43. **In November** of 1998, an Annual Resident Review was conducted regarding Mr. Watts.

44. This review determined that Mr. Watts does not require nursing facility care but does require other mental health services.

45. Specifically, the review states that “David’s most conducive and least restrictive environment would be in a small specialized group home.”

46. The review also recommends that Mr. Watts receive mental health **counseling**, physical therapy, and occupational therapy.

ALL NAMED INDIVIDUAL PLAINTIFFS

47. Upon information and belief, all individual Plaintiffs are eligible for Medicaid assistance to pay for mental health services in the community.

MICHIGAN PROTECTION AND ADVOCACY SERVICE, INC. (MPAS)

48. MPAS is the Michigan entity charged via M.C.L. 330.193 1 with implementing the federal protection and advocacy (P&A) laws enacted to protect the rights of people with disabilities. The statutes are the Developmental Disabilities Assistance and Bill of Rights Act of 1975, 42 U.S.C. 6000 et seq, the Protection and Advocacy for Mentally Ill Individuals Act of 1986, 42 U.S.C. 10801 et seq, and the Protection and Advocacy for Individual Rights Act of 1992, 29 U.S.C. 794e(a).

49. The P&A statutes empower MPAS to pursue legal, administrative, and other remedies, in its own name as a party, and on behalf of individual party plaintiffs, to vindicate the rights of its constituents. 42 U.S.C. 6042(a)(2)(A)(1); 42 U.S.C. 10805(a)(1)(B); 29 U.S.C. 794e(f)(3).

50. MPAS has been given a special responsibility by Congress to protect persons with disabilities from abuse, neglect, and life-threatening actions, and this includes provisions to secure confidential information and pursue legal action without guardian consent or cooperation. 42 U.S.C. 6042(a)(2)(B) and (a)(2)(G)(iii); 42 U.S.C. 10805(a)(1)(A) and (a)(4)(C); 29 U.S.C. 794e(f)(2).

51. **MPAS** is an aggrieved entity as to the allegations contained in this Complaint, in that **DCH's** failure to **comply** with the **NHRA**, the ADA, and the MMHC has impaired **MPAS'** ability to allocate and assign resources to other issues and activities germane to its purpose and consistent with its mandates.

52. Because of Defendants' collective actions, MPAS has suffered damages as an **organization** in the pursuit of relief for the named plaintiffs and all others similarly situated, including:

- (1) the need to divert agency resources away from other clients and priorities and to plaintiffs and others similarly situated in order to obtain for them the legal relief to which they are entitled;
- (2) the continuing need and duty to respond to the requests for assistance from all those members of the **MPAS** constituency who are similarly situated to the named plaintiffs because those MPAS **constituents** are in greater peril than are other members of the **MPAS** constituency, thereby under-serving the **non-**similarly situated MPAS constituents and exposing MPAS to criticism from those whom MPAS cannot help;
- (3) the need to invest both personnel time and money into litigating this lawsuit; and
- (4) the continuing probability that MPAS will have to divert resources to plaintiffs' lawsuit and the needs of others similarly situated if the defendants collectively are not in compliance with the NHRA, ADA and MMHC.

CLASS ALLEGATIONS

53. Pursuant to Fed. R. Civ. P. 23(b)(2):

(1) Plaintiffs **Olesky**, Perez, **Crison**, and Schoonmaker bring this action as a class action on behalf of all persons with mental illness or mental retardation or related conditions who are currently residing in nursing facilities who have been screened as not needing nursing facility services but requiring specialized services, and

(2) Plaintiffs Stephens and Watts brings this action as a class action on behalf of all persons with mental illness or mental retardation or related conditions who are currently residing in nursing home facilities who have been screened as not needing nursing facility services but requiring other mental health services.

54. The size of the two classes is so numerous that joinder is impracticable.

55. According to records of DCH, there are approximately 281 persons with mental illness or mental retardation or related conditions residing in nursing facilities who have been screened as not needing nursing facility services but requiring specialized services. There are other individuals who may qualify as members of this class action even after this action has **commenced** since they may in the future be screened as not needing nursing facility services but requiring specialized services.

56. Similarly, there are approximately 244 persons with mental illness or mental retardation or related conditions residing in nursing facilities who have been screened as not needing nursing facilities services but requiring other mental health services.

57. Joinder is also impracticable since the Plaintiff class is dynamic and because the members of the Plaintiff classes lack the knowledge, sophistication, and financial means to maintain individual actions.

58. There are questions of law and fact **common** to members of the Plaintiff classes, and the claims of the representative Plaintiffs are typical of the claims of the Plaintiff classes, including:

(a) Defendants **Haveman, Verseput** and DCH have failed to provide for the safe and orderly discharge, into an appropriate setting, of individuals with mental illness or mental retardation or related conditions who have been screened as not needing nursing facility services but requiring specialized services or other mental health services.

(b) Defendants DCH and **Haveman** have failed to provide specialized services to Plaintiffs in the most integrated setting appropriate to their needs in violation of the ADA.

(c) Defendants DCH and **Haveman** have failed to provide services required under the Michigan Mental Health Code to the Plaintiff class.

(d) Defendants DCH and **Haveman** have failed to protect the Plaintiff classmembers from neglect, specifically, by failing to provide them with the standard of care and treatment which they are entitled to under the Mental Health Code.

59. The representative parties will fairly and adequately protect the interests of the class. Plaintiffs will vigorously represent the interests of the unnamed class members, and all members of the proposed classes will benefit by the efforts of the named Plaintiffs. The interests of the proposed classmembers and those of the named Plaintiffs are identical.

60. The prosecution of individual actions would create a risk of **inconsistent** or varying adjudications establishing incompatible rules of law for the provision of services to individuals in nursing facilities who have been **PAS/ARR** screened as not needing nursing facility services.

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

COUNT I: VIOLATIONS OF THE NURSING HOME REFORM ACT
Brought through 42 U.S.C. 1983 against Haveman and Versept in Their Official Capacities

62. Plaintiffs Olesky, Perez, Crison, and Schoonmaker (as described in Paragraphs 21 - 37), and others similarly situated, all have been determined by DCH professionals to not require nursing facility services but to require specialized services for their disabilities.

63. Plaintiffs Olesky, Perez, Crison, and Schoonmaker, and others similarly situated, remain in nursing facilities as of the date of filing of the original complaint.

64. Medicaid funds have continued to flow to nursing facilities to finance the unnecessary institutionalization of Plaintiffs Olesky, Perez, Crison, Schoonmaker, and others similarly situated.

65. Plaintiffs Stephens and Watts (as described in Paragraphs 38 - 46), and others similarly situated, all have been determined by DCH treatment professionals to not require nursing facility services but to require other mental health services.

66. **Plaintiffs** Stephens and Watts, and others similarly situated, remain in nursing facilities as of the date of filing of the original complaint.

67. Medicaid funds have continued to flow to nursing facilities to finance the unnecessary institutionalization of Plaintiff Stephens, Watts, and others similarly situated.

68. **Haveman** and **Versept** have violated the provisions of the NHRA by:

- failing to arrange for the safe and orderly discharge of eligible persons. 42

U.S.C. 1396r(e)(7)(C)(ii); 42 C.F.R. 483.130(m)(5).

- ◆ failing to provide for or arrange for the provision of the specialized services, or the other mental health services, determined to be needed for each person. 42 U.S.C. **1396r(e)(7)(C)(ii)**; 42 C.F.R. **483.130(m)(5)**.
- continuing to funnel Medicaid payment to nursing facilities for persons determined not to need nursing facility services. 42 U.S.C. **1396r(e)(7)(D)(ii)**.

69. The **NHRA** also includes a provision which provides some leeway to States. Specifically, the **NHRA** allows States the opportunity to enter into an agreement with the U.S. Secretary of Health and Human Services for an “alternative disposition plan” which essentially extends the April 1, 1990, deadline for the required responses to PASARR to a date “not later than April 1, 1994.” 42 U.S.C. **1396r(e)(7)(E)**.

70. Michigan developed such an alternative disposition plan (ADP).

71. This ADP guaranteed that the mandated responses, including the safe and orderly discharge **from** the nursing facility and the provision of specialized services for eligible persons, would be accomplished by April 1, 1994.

72. Upon information and belief, persons covered by the ADP remain in nursing facilities as of the date of filing of the original complaint.

73. 42 U.S.C. 1983 provides a cause of action against persons acting under color of law for deprivations of rights secured by federal law.

74. **Haveman** and Versept, in their **official** capacities, are persons acting under color of law for purposes of prospective injunctive relief.

75. The **NHRA** is a federal statute which is properly enforced through 42 **U.S.C.** 1983.

76. The violations of the **NHRA** are brought under 42 U.S.C. 1983, and the Plaintiffs seek prospective relief to require **Haveman** and **Verseput** to arrange for their **safe** and orderly discharge

from the nursing facilities and assure the provision of specialized mental health services in the community.

77. MPAS has suffered the damages stated in Paragraph 52.

**COUNT II: THE AMERICANS WITH DISABILITIES ACT (ADA)
Brought against DCH and James Haveman in His Official Capacity**

78. The ADA provides that “no qualified individual with a disability shall, by reason, of such disability, be excluded **from** participation in or be denied the benefits of the services, programs or activities of a public entity, or be subjected to **discrimination** by any such entity.” 42 U.S.C. 12132.

79. Pursuant to a mandate of Congress, set forth in 42 U.S.C. 12134(a), the Department of Justice, as part of its general prohibitions against discrimination, has promulgated the following regulation, known as the ADA’s “integration mandate:”

A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of the qualified individuals with disabilities.

28 C.F.R. 35.130(d).

80. Plaintiffs all have “disabilities” under the ADA because they have physical and/or mental impairments which substantially limit one or more of their major life activities. 42 U.S.C. **12102(2)**.

81. Plaintiffs are “qualified individuals with disabilities” under the ADA, as they meet the essential eligibility requirements for mental health services because they each have a mental illness and/or mental retardation or a related condition. 42 U.S.C. **12131(2)**.

82. DCH is a “public entity” which is subject to the requirements of the ADA, 42 U.S.C. 12131 (1)(A) and **(B)**, and **Haveman** is the Chief Executive Officer of DCH.

83. The classmembers are eligible to receive services in the community, and **DCH’s** failure to provide such community-based **services** violates the integration mandate of the ADA. Under the

NHRA, the Plaintiffs and classmembers have the right to receive **specialized** services in the community, and many of these services -- such as physical therapy, occupational therapy, counseling, rehabilitation training, day programming, transportation, and case **management** -- are covered by Medicaid.

84. The treatment professionals used by DCH have determined that community placement is appropriate for the needs of each Plaintiff and classmember.

85. The Plaintiffs do not choose to remain in the nursing facility.

86. The placement of Plaintiffs and classmembers into community settings would not impose a fundamental alternation on DCH, as DCH has resources, including Medicaid **financing**, and these resources will be enhanced if Medicaid funds are no longer illegally directed to nursing facilities on behalf of persons who do not need or want to be there.

87. DCH has no comprehensive and effectively working plan for placing the Plaintiffs and classmembers in the less restrictive settings recommended by professional judgment.

88. In essence, DCH is illegally directing Medicaid and other public monies into the institutional setting of nursing facilities for persons whom DCH treatment professionals have determined do not require such institutionalization, instead of investing such monies into **community-**based services which would enable the persons who are unnecessarily institutionalized to live independently in the wmmunities of their choice.

89. MPAS has **suffered** the damages stated in Paragraph 52.

**COUNT III: THE MICHIGAN MENTAL HEALTH CODE (MMHC)
Mandamus against DCH and Haveman**

90. Under the MMHC, DCH has the mandatory duty to assure services are provided to persons who have a serious mental illness or developmental disability. Specifically, Section 116 of

the Code states that DCH “shall . . . direct services to individuals who have a serious mental illness [or] developmental disability.” M.C.L. 330.1116(2)(a).

91. The **Plaintiffs** in this action are persons with serious mental illness or developmental disabilities, as defined in the Code. M.C.L. 330.11 **00d(3)(definition** of “serious mental illness”) and 330.11 **00a(20)(definition** of “developmental disability”).

92. Under the MMHC, DCH also has the mandatory duty to administer Chapter 2 of the Code, which establishes the Community Mental Health (**CMH**) system, in order to “maintain an adequate and appropriate system of **community** mental health services programs throughout the State.” M.C.L. 330.1116(2)(b). See also M.C.L. 330.1244(a).

93. The CMH system governed by Chapter 2 includes a mandate to provide a “comprehensive array of mental health services,” including identification and diagnosis to determine the specific needs of eligible persons and to develop an “individual plan of services.” M.C.L. **330.1206(1)(b)**.

94. Such an individual plan of services (**IPOS**) is required by Chapter 7 of the Code, which establishes the rights of recipients of public mental health services. M.C.L. 330.1712.

95. Such an IPOS must be developed through a “**person-centered** planning” process, which is defined as a process of supporting the person through mental health services which “promote community Me and . . . honors the individual’s preferences, choices, and abilities.” M.C.L. 330.1712 (**IPOS**) and **330.1700(g)(definition** of “person-centered planning.”)

96. The services available to **Plaintiffs** and the proposed classmembers through the IPOS process include extensive mental health services available under the Medicaid program to “mental health clinics,” including psychotherapy, behavior managements, day/vocational programs, speech

therapy, occupational therapy, **physical therapy, skill training, medication review**, and transportation to such programs and services, as well as case management to coordinate such services.

97. The Plaintiffs in this matter do not currently have **IPOSs** developed through a **person-centered** planning process.

98. DCH has failed to **fulfill** its mandatory statutory duties to direct services to persons **with serious mental illness** and developmental disabilities, to coordinate CMH services, and to assure that **persons** receive services under an individual plan of services developed through a **person-centered** planning process.

99. MPAS has **suffered** the damages stated in Paragraph 52.

100. Mandamus is an appropriate remedy in this matter, as DCH has violated clear statutory commands which are not discretionary in nature and for which no other remedy at law or equity is adequate. M.C.L. 600.4401; MCR 3.305.

COUNT IV: INJUNCTIVE RELIEF UNDER THE MENTAL HEALTH CODE Brought against DCH and Haveman

101. The MMHC provides that “[a] recipient of mental health services who is abused or neglected has a right to pursue injunctive and other appropriate civil relief.” M.C.L. **330.1723(3)**.

102. The **Plaintiffs** and classmembers are all recipients of **mental** health services or eligible **to become** recipients of mental health services.

103. The **Plaintiffs** and classmembers have all been neglected within the meaning of M.C.L. **330.1723(3)**, as the MMHC defines “neglect” as including a “failure to act . . . that denies a recipient the standard of care or treatment to which he or she is entitled under this act.” M.C.L. **330.1100b(18)**.

104. The **Plaintiffs** and **classmembers** have been denied the standard of care and treatment they are entitled to under the MMHC, including receiving **services** which are suited to their conditions.

In this regard, the Plaintiffs and classmembers have all been determined to be suitable for **community** placement.

105. MPAS has **suffered** the damages stated in Paragraph 52.

RELIEF REQUESTED

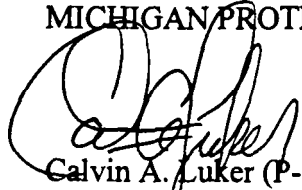
Plaintiffs request that this Court issue orders that:

- A. CERTIFY the Plaintiff classes;
- B. DECLARE defendants have violated:
 - I. The Nursing Home Reform Act;
 - ii. The Americans with Disabilities Act;
 - iii. 42 U.S.C. 1983; and
 - iv. The Michigan Mental Health Code;
- C. DIRECT the defendants, their successors in office, agents, employees and assigns, and all persons acting in **concert** with them, to:
 - I. Immediately arrange for the safe and orderly nursing home discharge of persons screened as not needing nursing facility services, and prepare and orient plaintiffs for discharge;
 - ii. Provide or arrange for the provision of specialized services for the treatment of mental illness or mental retardation for those persons determined to require such specialized services who do not choose to remain in a nursing facility;
 - iii. Immediately provide class members with specialized services in the most integrated setting appropriate to their needs; and
 - iv. Implement the provisions of the Michigan Mental Health Code, including the provisions requiring that person-centered planning be used to develop individualized plans of service and that mental health service recipients are not subjected to neglect by a failure to provide the standard of care or treatment to which they are entitled;

- D. AWARD plaintiffs costs, litigation expenses, and reasonable attorney fees as authorized under Michigan and federal law, including 42 U.S.C. 1988 and 42 U.S.C. 12205; and
- E. AWARD all other relief authorized by law that this Court deems just and proper.

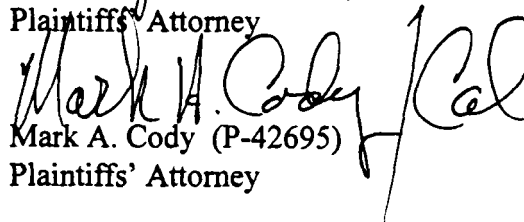
Respectfully submitted:

MICHIGAN PROTECTION & ADVOCACY SERVICE



Calvin A. Luker (P-32371)

Plaintiffs' Attorney



Mark A. Cody (P-42695)

Plaintiffs' Attorney

Dated: May 2, 2000