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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SHAWN MURINKO,

Plaintiff

v.

CHERYL STRANGE, in her official capacity as
Secretary of the Washington State Department of
Social and Health Services, and SUSAN BIRCH,
in her official capacity as Director of the
Washington State Health Care Authority,

Defendants

NO. 19-cv-00943

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

I. OVERVIEW

1. Plaintiff Shawn Murinko has been separated from his wife, his two daughters, his home, his job, and his community for more than six months because Defendants have failed to provide him necessary services to enable him to return home. Despite having no medical reason to be hospitalized since December 8, 2018, Plaintiff has been residing at Harborview Medical Center because Defendants have not provided him with residential habilitation services for which he is eligible that would enable him to return to his life. Plaintiff is an adult with developmental disabilities who is now at imminent, serious risk of institutionalization.

2. Plaintiff has intensive needs for long-term supports and habilitative services and has no desire to receive these services in an institutional setting. He has been determined eligible

1 to receive residential and habilitative support services in the community. However, due to
2 Defendants' failure to ensure such services are available, Plaintiff lost support services when he
3 was hospitalized for an injury and the Defendants have been unable to replace these necessary
4 services. He has been unable to discharge from the Harborview Medical Center ("Harborview")
5 because the Defendants have failed to provide the necessary services. Now, Plaintiff is at risk of
6 being discharged to a setting where he would be indefinitely separated from his family and
7 community. As a result, Plaintiff is at risk of suffering unnecessary institutionalization and
8 segregation.

9 3. The Defendants and their agencies, the Department of Social and Health Services
10 (DSHS) and the Health Care Authority (HCA), are responsible for providing Plaintiff with
11 Medicaid services to ensure his health and welfare with reasonable promptness and in the most
12 integrated setting appropriate to his needs.

13 4. Despite assessing Plaintiff to be eligible for and authorizing residential support
14 services, Defendants have no plan to ensure that Plaintiff will actually receive these services and
15 avoid unnecessary institutionalization and segregation. Defendants are failing to meet his health
16 and welfare needs, provide him services with reasonable promptness, or furnish reasonable
17 modifications to its service models to prevent him from being placed in a facility where he would
18 be unnecessarily segregated from his community and family. This failure violates his rights
19 under Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12132 *et seq.*,
20 Section 504 of the Rehabilitation Act of 1973 ("Rehabilitation Act"), 29 U.S.C. § 794 *et seq.*, the
21 United States Supreme Court's landmark decision in *Olmstead v. L.C.*, 527 U.S. 581 (1999), and
22 the Social Security Act, 42 U.S.C. § 1396 *et seq.*

1 program is administered in a manner consistent with all state and federal laws. Ms. Birch is sued
2 in her official capacity only. All alleged acts by Ms. Birch and the HCA were taken under color
3 of state law.

4 **III. JURISDICTION AND VENUE**

5 9. Jurisdiction of this Court arises under 28 U.S.C. § 1331 because this action arises
6 under the laws of the United States, and 28 U.S.C. § 1343(3) and (4), which confer on the federal
7 district courts original jurisdiction over all claims asserted pursuant to 42 U.S.C. § 1983 to
8 redress deprivations of rights, privileges or immunities guaranteed by Acts of Congress and the
9 United States Constitution.

10 10. Venue is proper pursuant to 28 U.S.C. § 1391(b). A substantial part of the events
11 or omissions giving rise to Plaintiffs' claims occurred in the Western District of
12 Washington and Defendants may be found here.

13 **IV. LEGAL FRAMEWORK**

14 **A. The Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act**

15 11. Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12131-
16 12134, and the Rehabilitation Act of 1973, 29 U.S.C. § 794, are designed to ensure that
17 individuals with disabilities receive their services in the least restrictive, most integrated setting
18 appropriate.

19 12. The ADA was enacted in 1990 “to provide a clear and comprehensive national
20 mandate for the elimination of discrimination against individuals with disabilities[.]” 42 U.S.C.
21 § 12101(b)(1). In enacting the ADA, Congress found that “historically, society has tended to
22 isolate and segregate individuals with disabilities, and, despite some improvements, such forms
23

1 of discrimination against individuals with disabilities continue to be a serious and pervasive
2 social problem[.]” 42 U.S.C. § 12101(a)(2).

3 13. Congress further recognized that “people with disabilities, as a group, occupy an
4 inferior status in our society, and are severely disadvantaged socially, vocationally,
5 economically, and educationally; [and] the Nation’s proper goals regarding individuals with
6 disabilities are to assure equality of opportunity, full participation, independent living, and
7 economic self-sufficiency for such individuals[.]” 42 U.S.C. § 12101(a)(6)-(7).

8 14. Title II of the ADA applies to public entities, including state or local governments
9 and any departments, agencies, or other instrumentalities of state or local governments. 42
10 U.S.C. §§ 12131, 12132. It provides that “no qualified individual with a disability shall, by
11 reason of such disability, be excluded from participation in or be denied the benefits of the
12 services, programs, or activities of a public entity, or be subjected to discrimination by any such
13 entity.” 42 U.S.C. § 12132.

14 15. Title II’s implementing regulations prohibit public entities from utilizing “criteria
15 or methods of administration” that “have the effect of subjecting qualified individuals with
16 disabilities to discrimination,” or “[t]hat have the purpose or effect of defeating or substantially
17 impairing accomplishment of the objectives of the public entity’s program with respect to
18 individuals with disabilities[.]” 28 C.F.R. § 35.130(b)(3)(i), (ii).

19 16. The Title II implementing regulation known as the “integration mandate” requires
20 that public entities “administer services, programs, and activities in the most integrated setting
21 appropriate to the needs of qualified individuals with disabilities.” 28 C.F.R. § 35.130(d). “The
22 most integrated setting” is one that “enables individuals with disabilities to interact with
23 nondisabled persons to the fullest extent possible.” 28 C.F.R. § Pt. 35, App. B.

1 17. The U.S. Supreme Court has held that Title II of the ADA prohibits the
2 unjustified institutionalization of individuals with disabilities, noting that segregation of people
3 with disabilities “perpetuates unwarranted assumptions that persons so isolated are incapable or
4 unworthy of participating in community life,” and “severely diminishes the everyday life
5 activities of individuals, including family relations, social contacts, work options, [and]
6 economic independence.” *Olmstead v. L.C.*, 527 U.S. 581, 597-600 (1999).

7 18. According to case law and the Statement of the Department of Justice on
8 Enforcement of the Integration Mandate of Title II of the ADA and *Olmstead v. L.C.*, the ability
9 to state a claim under Title II of the ADA and *Olmstead* is not limited to people currently in
10 institutional or other segregated settings, but applies equally to those at serious risk of
11 institutionalization or segregation (*e.g.*, if a public entity’s failure to provide community
12 services “will likely cause a decline in health, safety, or welfare that would lead to the
13 individual’s eventual placement in an institution”). *Available at*
14 http://www.ada.gov/olmstead/q&a_olmstead.htm. As a result, “[i]ndividuals need not wait until
15 the harm of institutionalization or segregation occurs or is imminent” before they may state a
16 claim for illegal discrimination. *Id.*

17 19. Title II implementing regulations require a public entity to make “reasonable
18 modifications in policies, practices, or procedures when the modifications are necessary to avoid
19 discrimination on the basis of disability.” 35 C.F.R. § 35.130(b)(7)(i).

20 20. Like the ADA, the Rehabilitation Act prohibits discrimination against people with
21 disabilities under any program or activity that receives federal financial assistance. 29 U.S.C. §
22 794(a). The Rehabilitation Act’s implementing regulations prohibit recipients of federal
23 financial assistance from utilizing “criteria or methods of administration” that have the effect of

1 subjecting qualified persons with disabilities to discrimination on the basis of disability, or that
2 have the purpose or effect of defeating or substantially impairing accomplishment of the
3 objectives of the recipient's program with respect to persons with disabilities. 45 C.F.R. §
4 41.51(b)(3)(i)-(ii); 45 C.F.R. § 84.4(b)(4)(i)-(ii). These implementing regulations also require
5 entities receiving federal financial assistance to "administer programs and activities in the most
6 integrated setting appropriate to the needs of qualified . . . persons [with disabilities]." 28 C.F.R.
7 § 41.51(d); *see also*, 45 C.F.R. § 84.4(b)(2).

8 **B. Title XIX of the Social Security Act**

9 21. Having chosen to participate the Medicaid program, the State of Washington is
10 required to operate its Medicaid services in compliance with the Social Security Act, 42 U.S.C.
11 § 1396, and its implementing regulations. Section 1915(c) of the Social Security Act, 42 U.S.C.
12 § 1396n(c), allows states to submit a request to the U.S. Secretary of Health and Human
13 Services ("Secretary") to "waive" certain federal Medicaid requirements in order to offer a
14 broad range of home and community-based services as an alternative to institutional care in an
15 Intermediate Care Facility (ICF).

16 22. In order to comply with federal requirements governing Medicaid Home and
17 Community-Based Services (HCBS) waivers for people with intellectual and developmental
18 disabilities, the Defendants must ensure that Medicaid services for which each individual is
19 eligible are provided with reasonable promptness to ensure each participant's health and
20 welfare. 42 U.S.C. § 1396a(a)(8); 42 U.S.C. § 1396n(c)(2)(C). Defendants must also ensure that
21 HCBS Waiver participants have a "person-centered service plan" that "[r]eflect[s] that the
22 setting in which the individual resides is chosen by the individual." 42 C.F.R. §
23 441.301(c)(2)(i).

VI. BACKGROUND

23. Defendants provide and authorize payment for community-based residential habilitation services for individuals with developmental disabilities in individuals’ own homes. Defendants fund community-based residential habilitation services through the Core and Community Protection Waivers, both of which are Home and Community-Based Services (HCBS) Medicaid waivers.

24. Community-based residential habilitation services are typically delivered by privately operated for-profit or non-profit supported living agencies. In addition, residential habilitative services are also delivered through the State Operated Living Alternatives (SOLA) program, which is a supported living program run by DDA.

25. Residential habilitation services provided by private supported living agencies and the SOLA program are a combination of training, personal care, and supervision to address outcomes in several areas of the individual’s life, including “personal power and choice,” “competence and self-reliance,” “positive recognition by self and others,” and “positive relationships.” These services should be provided in integrated settings and support individuals in opportunities to engage in a variety of community-based activities. 42 C.F.R. § 441.301(c)(2)(i).

26. Under the approved Core and Community Protection HCBS waivers, the limit to the amount, frequency, or duration of residential habilitation services is determined by the negotiated daily rates, which are “based on residential support levels (assigned by DD[A] assessment), specific support needs listed in the assessment, support provided by others (e.g. family members), and the number of people living in the household who can share the support

1 hours.” Individuals may receive anywhere from a few hours a week (Levels 1-3) to daily
2 support with intermittent checks through the night (Level 4) to 24/7 onsite support (Levels 5-6).

3 27. When waiver participants are seeking new residential habilitation service
4 providers, their DDA case managers prepare a “referral packet” with information about their
5 support needs, history, and preferences. The case managers then submit this referral packet to
6 DDA resource managers, who send the packets to private supported living agencies that are
7 certified to deliver community-based residential habilitation services.

8 28. If a supported living agency receiving a referral packet is interested in serving an
9 individual, the agency can notify DDA to proceed with starting services. DDA permits
10 supported living agencies to decline referrals or rescind their offers to serve individuals, for any
11 reason.

12 29. Once contracted, DDA permits a supported living agency to also terminate
13 services if it determines it can no longer meet an individuals’ health and welfare needs. DDA
14 imposes no obligations on agencies to continue serving a client until a new provider is found.

15 30. If no supported living agency receiving the packet agrees to serve an individual,
16 DDA may send referral packets to additional agencies, or resend referral packets to the same
17 agencies.

18 31. If all private supported living agencies decline DDA’s referrals, DDA does not
19 provide the individual with alternative services that do not require the use of a private agency.
20 Nor does DDA provide the individual with any notice of their right to a fair hearing to address
21 DDA’s failure to provide services with reasonable promptness or notice of other available
22 options. Instead, individuals must continue to wait indefinitely for a private supported living
23 agency willing to provide them with services, which may never occur, entirely defeating the

1 objective of administering services in the most integrated setting and with reasonable
2 promptness.

3 32. In addition to SOLA and certified supported living agencies, residential
4 habilitation services may be delivered in “companion home” settings. *See* WAC 388-829C. This
5 model provides for an individual in-home provider and expands the pool of potential providers
6 to include individuals chosen by the Medicaid waiver participant who can meet the client needs
7 and meet the requirements in WAC 388-829C-040.

8 33. Defendants also provide for in-home caregiving services, or personal care
9 services, to assist individuals in their basic activities of daily living through the Community
10 First Choice (CFC) program. WAC 388-106-0270. Defendants authorize CFC personal care
11 hours based on an assessment of needs. Individuals authorized CFC personal care hours may
12 hire agencies to provide staff to serve as their in-home caregivers.

13 34. Individuals who need long-term care may also receive facility-based services in
14 Adult Family Homes or Skilled Nursing Facilities (SNF). Both of these facility-based settings
15 require individuals to live with other individuals with disabilities needing long-term care
16 services, limit privacy for raising a family or require separation from family, and are more
17 segregated than in-home services.

18 35. Under the federal Nursing Home Reform Act’s Pre-admission Screening and
19 Resident Review (PASRR) requirements, individuals with developmental disabilities may not
20 be admitted to a SNF unless the placement is necessary and appropriate to meet their needs. 42
21 U.S.C § 1396r(b).

VII. FACTUAL ALLEGATIONS

36. Plaintiff is a Core waiver participant who, until last year, had a supported living provider that been delivering 24/7 residential habilitative services to meet his health and welfare needs. These services enabled Plaintiff to live in his own home with his wife and two children, enjoy a successful career, and live a typical integrated lifestyle.

37. On or about October 31, 2018, Plaintiff suffered a broken leg while trick-or-treating with his children and was hospitalized at Harborview Medicaid Center (hereinafter “Harborview”). Upon Plaintiff’s hospitalization, DDA stopped paying his supported living provider, who then terminated services. Defendants have not promulgated any rules, contract provisions, or policies for preventing providers from terminating services at will, nor has it established any practices to ensure the financial viability of continuing services in the event waiver participants such as Plaintiff are hospitalized.

38. By December 8, 2018, Plaintiff recovered from his broken leg to the extent that he no longer required inpatient hospitalization. But without a provider to deliver the in-home care he had been receiving and continued to need, Plaintiff was unable to timely discharge and has remained essentially trapped at Harborview until the present day, more than seven month later.

39. On February 1, 2019, DDA assessed Plaintiff to need 24-hour residential care. For example, DDA assessed Plaintiff to need full support for hygiene tasks and household tasks, physical support to participate fully in the community, and full support getting from place to place throughout the community in order to assure his health and welfare.

40. DDA referred Plaintiff to other supported living agencies but was unsuccessful in identifying any provider willing and able to offer Plaintiff the services he needs to safely discharge home. Although DDA provides Core waiver funded residential habilitation services

1 directly in its State Operated Living Alternatives (SOLA) program, it did not make these
2 services available to Plaintiff.

3 41. In March 2019, Plaintiff agreed to accept in-home personal care through the CFC
4 program from a home care agency as an interim solution while DDA searched for a new
5 residential habilitation provider. However, the home care agency has been unsuccessful in
6 recruiting enough staff to fill the hours of care that Plaintiff would require for a safe discharge.

7 42. On May 1, 2019, Plaintiff requested a companion home, with reasonable
8 modifications that would meet the needs DDA assessed Plaintiff to have. Plaintiff requested an
9 adjustment to the daily rate to provide sufficient compensation for the hours of care he would
10 need, as well as approval to relax the live-in requirement to allow the provider to live nearby
11 and available to him as needed. To date, this request has not been granted.

12 43. On May 23, 2019, Harborview informed Plaintiff that a SNF in Bremerton had
13 agreed to admit him, although he did not meet the level of care criteria for skilled nursing. He
14 declined to discharge to a setting that was inappropriate to his needs and where he would be
15 ineligible for the Core waiver, unable to continue his job, and distanced from his wife and two
16 children who live in Thurston County.

17 44. On June 11, 2019, Harborview issued Plaintiff a notice that he had not met
18 inpatient criteria since December 8, 2018, and provided him with a target discharge date of June
19 17, 2019. Harborview noted that services to discharge home are not available, but provided no
20 specific discharge alternatives, except the SNF in Bremerton. Having not received a response to
21 his request for a modified Companion Home, Plaintiff notified DSHS of his imminent discharge
22 and requested SOLA services to support him in his home upon discharge.
23

1 45. On June 14, 2019, during a care conference with Plaintiff, Harborview continued
2 to plan for discharge either to a SNF or to Plaintiff's home with CFC personal care services.
3 However, no SNF was currently available and the home-care agency to provide CFC personal
4 care services had still not recruited sufficient staff to provide a minimally adequate amount of
5 in-home care services. That afternoon, DDA requested that Plaintiff sign a consent to refer him
6 to an Adult Family Home, but did not offer SOLA services or approve his request for a
7 modified Companion Home.

8 46. Plaintiff is at imminent risk of being unnecessarily segregated in a facility that is
9 not appropriate to his needs, or at risk of being discharged to his home without appropriate
10 services.

11 VII. CLAIMS FOR RELIEF

12 **FIRST CLAIM: DECLARATORY AND INJUNCTIVE RELIEF FOR VIOLATIONS OF** 13 **THE AMERICANS WITH DISABILITIES ACT**

14 47. Mr. Murinko re-alleges the paragraphs above.

15 48. Mr. Murinko is a "qualified individual with a disability" within the meaning of 42
16 U.S.C. § 12131(2). Although he has proven fully capable of living in an integrated setting in the
17 community, Defendants have not provided him the services he would need to do so.

18 49. Defendants have failed to provide Mr. Murinko community-based services that he
19 needs in order to avoid segregation in an institution in violation of Title II of the ADA, 42
20 U.S.C. § 12132 and its implementing regulations.

21 50. Defendants' "methods of administration" further have the effect of subjecting Mr.
22 Murinko to discrimination on the basis of disability by placing him at risk of unnecessary and
23 unjustified segregation, in violation of 28 C.F.R. § 35.130 (b)(3).

1 51. Pursuant to 42 U.S.C. § 12133 and 42 U.S.C. § 1983, Plaintiff is entitled to
2 declaratory and injunctive relief as well as reasonable attorneys' fees and costs incurred in
3 bringing this action.

4 **SECOND CLAIM: DECLARATORY AND INJUNCTIVE RELIEF FOR VIOLATIONS**
5 **OF SECTION 504 OF THE REHABILITATION ACT**

6 52. Mr. Murinko re-alleges the paragraphs above.

7 53. Mr. Murinko is a qualified individual with disabilities under Section 504 of the
8 Rehabilitation Act, 29 U.S.C. § 794 (a). Defendants' agencies, DSHS and HCA, receive federal
9 financial assistance.

10 54. Defendants and their agencies violate Section 504 of the Rehabilitation Act and
11 its implementing regulations by denying Mr. Murinko access to integrated community-based
12 programs appropriate to meet his needs, thereby putting Mr. Murinko at risk of
13 institutionalization.

14 55. Pursuant to 29 U.S.C. § 794 and 42 U.S.C. § 1983, Plaintiff is entitled to
15 declaratory and injunctive relief as well as reasonable attorneys' fees and costs incurred in
16 bringing this action.

17 **THIRD CLAIM: DECLARATORY AND INJUNCTIVE RELIEF FOR VIOLATIONS OF**
18 **TITLE XIX OF THE SOCIAL SECURITY ACT**

19 56. Mr. Murinko re-alleges the paragraphs above.

20 57. Mr. Murinko is entitled to declaratory and injunctive relief pursuant to 42 U.S.C.
21 § 1983 that Defendants have acted under color of state law to violate Title XIX of the Social
22 Security Act by failing to provide Mr. Murinko with (1) Medicaid benefits with reasonable
23 promptness, 42 U.S.C. § 1396a(a)(8); (a)(10)(A) and its implementing regulations; (2) a
meaningful choice of providers, including a choice between institutional and community-based

1 services, 42 U.S.C. § 1396n(c)(2)(B); (C); and (3) necessary safeguards to protect his health
2 and welfare needs, 42 U.S.C. § 1396n(c)(2)(A). Plaintiff is also entitled to reasonable attorneys'
3 fees and costs incurred in bringing this action.

4 **VIII. DEMAND FOR RELIEF**

5 WHEREFORE, Plaintiffs requests that this Court:

- 6 1. Enter judgment in favor of Plaintiff;
- 7 2. Declare that the Defendants' failure to provide community based residential
8 habilitation services under the Core waiver to Mr. Murinko places him at risk of unnecessary
9 institutionalization and segregation, and violates the Title II of the ADA, Section 504 of the
10 Rehabilitation Act, the Medicaid Act.
- 11 3. Preliminarily and permanently enjoin Defendants from continued violations of
12 Title II of the ADA, Section 504 of the Rehabilitation Act, the Medicaid Act, and require
13 Defendants to ensure that Mr. Murinko (a) is provided with appropriate, integrated, community-
14 based residential services with reasonable promptness to ensure his health and welfare are
15 protected; (b) is not discharged from the hospital without adequate home care supports; and (c) is
16 not discharged to an inappropriate institutional setting.

17 3. In order to ensure the above, Plaintiff asks that the Court issue:

18 a) An injunction ordering Defendants to, as soon as the Court deems
19 practicable, assign SOLA staff to Mr. Murinko, permanently or until such time that a
20 supported living provider contracts with Mr. Murinko; or

21 b) An injunction ordering Defendants to immediately contract with a
22 supported living provider to deliver services to Mr. Murinko and if necessary, grant an
23

1 Exception to Rule (ETR) to increase reimbursement rates for providers to a level where a
2 provider will accept Mr. Murinko as a client; or

3 4. Plaintiff asks that the Court award him his attorney fees and costs; and

4 5. Award such other relief as is just and proper.

5 DATED: June 17, 2019.

6 **DISABILITY RIGHTS WASHINGTON**

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