

FILED
JAMES BONINI
CLERK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

07 DEC 14 PM 4:23

new

D.M. :
350 Kolb Drive :
Fairfield, Ohio 45014 :

Case No. **1:07 CV 1015**

By and through her Next :
Friend, Ohio Legal Rights :
Service, :

and :

Judge:

~~A. BECKWITH~~
J. BLACK

J.K. :
350 Kolb Drive :
Fairfield, Ohio 45014 :

By and through his Next :
Friend, Ohio Legal Rights :
Service, :

and :

D.H. :
350 Kolb Drive :
Fairfield, Ohio 45014 :

By and through his Next :
Friend, Ohio Legal Rights :
Service, :

and :

OHIO LEGAL RIGHTS :
SERVICE :
50 W. Broad St., Suite 1400 :
Columbus, Ohio 43215 :

PLAINTIFFS, :
-vs- :

Butler County Board of :
Mental Retardation and :
Developmental Disabilities :

155 Donald Drive :
Fairfield, Ohio 45014 :

and :

Christina Hurr :
Superintendent :
Butler County Board of :
Mental Retardation and :
Developmental Disabilities :
155 Donald Drive :
Fairfield, Ohio 45014 :
In her official capacity :

and :

Alexson Holdings, Inc. :
DBA Fairfield Center :
350 Kolb Drive :
Fairfield, Ohio 45014 :

DEFENDANTS. :
:

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF
AND JURY DEMAND**

Now come Plaintiffs, by and through counsel, and for their Complaint state as follows:

Nature of the Action

1. Plaintiffs live in an institution that houses over one hundred people with mental retardation, the Fairfield Center, located in Butler County. The Fairfield Center is a Medicaid facility known as an intermediate care facility for people with mental retardation, ICF/MR.

2. The Fairfield Center is owned by Defendant Butler County Board of Mental Retardation and Developmental Disabilities. The County Board leases this property to Defendant Alexson Holdings, Inc.

3. Alexson Holdings, Inc. currently operates the Fairfield Center subject to state licensure laws and regulations as well as state and federal Medicaid certification laws and regulations.

4. In April, 2007 the Ohio Department of Mental Retardation (ODMR) notified Alexson Holdings, Inc. that it would seek revocation of the license to operate Fairfield Center for

a pattern of serious non-compliance and violations that created a substantial risk of health and safety to residents. The revocation process is currently stayed.

5. This action seeks declaratory and injunctive relief to redress the ongoing violations of Plaintiffs' rights under the federal Constitution and federal laws as well as Ohio laws which protect the civil rights of people with mental retardation.

Jurisdiction and Venue

6. This court has jurisdiction over Plaintiffs' Complaint pursuant to 28 U.S.C. § 1331 (federal question jurisdiction) and 28 U.S.C. § 1367 (supplemental jurisdiction). Venue is proper in this district under 28 U.S.C. § 1391 because all parties reside in this district and the events or omissions giving rise to Plaintiffs' Complaint occurred in this district.

Parties

Plaintiffs:

7. Plaintiff D.M. is a 50 year old woman who resides at Fairfield Center. She has lived at Fairfield Center since 1990. She has a medical guardian, Advocacy and Protective Services, Inc. (APSI).

8. Plaintiff D.M. has suffered and is suffering from the conditions and practices outlined in paragraphs 37 - 59 of this Complaint, and she faces the constant threat of continued suffering.

9. Plaintiff D.M. has repeatedly stated that she wants to leave Fairfield Center and live in the community.

10. Plaintiff D.M. would be appropriately placed in a more integrated community setting.

11. Plaintiff J.K. is a 56 year old man who resides at Fairfield Center. He has lived at Fairfield Center since 1983. He has a guardian of the person, Advocacy and Protective Services, Inc. (APSI).

12. Plaintiff J.K. has suffered and is suffering from the conditions and practices outlined in paragraphs 37 - 59 of this Complaint, and he faces the constant threat of continued suffering.

13. Plaintiff J.K. also wants to leave Fairfield Center and live in a smaller community setting.

14. Plaintiff J.K. would be appropriately placed in a more integrated community setting.

15. Plaintiff D.H. is a 22 year old man who resides at Fairfield Center. He has lived at Fairfield Center since 2004. He has a guardian of the person, Advocacy and Protective Services, Inc. (APSI).

16. Plaintiff D.H. has suffered and is suffering from the conditions and practices outlined in paragraphs 37 - 59 of this Complaint, and he faces the constant threat of continued suffering.

17. Plaintiff D.H. wants to leave Fairfield Center and live in a smaller community setting.

18. Plaintiff D.H. would be appropriately placed in a more integrated community setting.

19. Plaintiff Ohio Legal Rights Service (OLRS) is the protection and advocacy agency for the State of Ohio, and is authorized by the federal Developmental Disabilities Assistance and Bill of Rights Act (DDA) and state law to pursue legal actions on behalf of persons with mental retardation and developmental disabilities. 42 U.S.C. §10805(a)(1), O.R.C. §5123.60(A).

20. OLRS, as Next Friend to Plaintiffs for purposes of this litigation, has the statutory capacity to bring suit pursuant to 42 U.S.C. §10805 and Ohio Revised Code § 5123.60, and the necessary authority to proceed on behalf of Plaintiffs, who are clients of OLRS.

21. Plaintiffs' guardian, APSI, has been given notice of Plaintiffs' action and has no objection to its filing.

22. Plaintiffs seek to proceed by pseudonym in this action because they are challenging a governmental entity and actors and prosecution of their suit will require them to disclose medical and background information of an extremely sensitive and personal nature, such confidential information that is protected by 42 U.S.C. §10806, O.R.C. §5122.31 and Ohio Administrative Code §5122-14-13.

Defendants:

23. Defendant Christina Hurr is, and was at all relevant times, the Superintendent of the Butler County Board of Mental Retardation and Developmental Disabilities (hereinafter referred to as "Board").

24. The Board provides services, care, and treatment to individuals with mental retardation and developmental disabilities in Butler County, Ohio pursuant to Ohio Revised Code § 5126 and, among other things, administers and operates facilities, programs, and services as provided by Ohio Revised Code §§ 5126.05 and 3323 and establishes policies for their administration and operation; coordinates, monitors, and evaluates existing services and facilities available to individuals with mental retardation and developmental disabilities; and provides service and support administration in accordance with Ohio Revised Code § 5126.15.

25. The Board owns Fairfield Center. The Board leases Fairfield Center to Defendant Alexson Holdings, Inc., which operates Fairfield Center.

26. Defendant Alexson Holdings, Inc. acts as the agent of the Board in managing the Fairfield Center.

27. As operator of Fairfield Center, Defendant Alexson Holdings, Inc. must be certified for continuing participation in the Medicaid program by the Ohio Department of Health (ODH). The Ohio Department of Health surveys Fairfield Center at least annually for compliance with Medicaid rules and regulations.

28. Defendant Alexson Holdings, Inc. is also licensed and regulated by the Ohio Department of Mental Retardation and Developmental Disabilities (ODMR) to operate Fairfield Center. ODMR's oversight includes annual licensure surveys of the facility.

29. The Board provides day programming services at its sheltered workshop, staffed by Board employees, for many people who live at Fairfield Center.

30. The Board is responsible for investigating all "major unusual incidents" (MUI's) that occur at Fairfield Center.¹ The "investigative agent" for all MUI's at Fairfield Center is a Board employee.

31. The Board and Superintendent Hurr have had regular discussions with Alexson Holdings, Inc. and CEO Andrea Levenson, about the need to plan for the future of Fairfield Center as well as the need to assure the health and safety, and quality of living, of Fairfield Center residents.

32. Defendant Hurr is a "person" under 42 U.S.C. §1983 and at all times relevant to this case acted under color of state law. She is sued in her official capacity.

33. The Defendant Butler County Board is a "person" under 42 U.S.C. §1983 and at all times relevant to this case acted under color of state law.

34. Defendant Alexson Holdings, Inc. is a "person" under 42 U.S.C. §1983 and at all times relevant to this case acted under color of state law.

35. The Defendant Butler County Board is public entity as defined in the Americans with Disabilities Act, ADA, 42 U.S.C. §12131(1).

36. The Defendant Butler County Board is a program or activity that receives federal funds as defined by Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (b).

¹ A "major unusual incident" is "the alleged, suspected, or actual occurrence of an incident when there is reason to believe that the health or safety of an individual may be adversely affected or an individual may be placed at reasonable risk of harm...." Ohio Admin. Code §5123:2-17-02 (C) (13).

Factual Allegations

37. Since April, 2001 ODMR has suspended admissions to Fairfield Center four separate times (April 27, 2001; January 2, 2004; March 14, 2006; and April 2, 2007) for failure to comply with licensure requirements.

38. History keeps repeating itself at Fairfield Center. The pattern of serious violations that cause a substantial risk to residents' health and safety is well documented in surveys and reports by ODMR and ODH.

39. The environment at Fairfield Center has been and continues to be dirty, depressing and hazardous.

40. In surveys and monitors' reports done from 2005 - 2007, ODMR and/or ODH staff consistently made the findings, including but not limited to:

- (a) bathrooms that reeked of the strong odor of urine and were soiled with fecal matter;
- (b) broken tiles and peeling paint in shower areas;
- (c) badly stained carpets, broken and stained furniture smelling of urine;
- (d) grimy floors and walls;
- (e) broken beds and mattresses with holes in them;
- (f) overflowing outdoor garbage cans;
- (g) broken sidewalks that were a hazard to residents with mobility impairments or unsteady gaits.

41. Fire and emergency safety has also been a recurring problem at Fairfield Center in surveys done by ODMR and ODH from 2005 - 2007 including but not limited to inspections finding:

- (a) that staff did not have the keys to activate the alarm pull stations;
- (b) that Fairfield Center failed to maintain two means of exit remote from each other in areas of the facility;
- (c) that, in at least six of the units, there was not a second means of exit that was unlocked, and keys to the doors were not available;
- (d) that designated fire exits doors that led to patios with enclosed and locked fences;
- (e) that a generator for emergency lighting did not work, there were damaged smoke detectors and corroded sprinkler heads.

42. Residents at Fairfield Center have been and continue to be at risk from abuse and neglect by direct care staff and medical staff including but not limited to:

- (a) failing to give prescribed medications;
- (b) failing to follow bowel protocols for residents as recommended by their doctors;
- (c) failing to ensure that residents received timely preventative evaluations and treatments;
- (d) failing to ensure that residents receive needed medications and nutritional supplements.

43. Fairfield Center's failure to take basic steps to protect residents from each other led to a homicide in 2006.

44. The homicide occurred on February 21, 2006. Without implementing a safety plan, the facility assigned a resident, E.S., with a known and lengthy history of physical aggression, to be the roommate of another resident with a known history of aggressive behaviors, J.B. E.S. strangled J.B. with a belt.

45. The facility received multiple citations from ODH and ODMR for failing to develop policies and procedures to protect residents from physical attacks by other residents; failing to complete a preliminary evaluation for admission of new residents; and failing to adequately monitor residents who were known to have severe aggressive behaviors.

46. The facility was also cited by ODH and ODMR after a resident, J.E., died on February 20, 2007.

47. J.E. was diagnosed with a serious bowel condition that included constipation, impaction, and abdominal pain. In 2006, his physician ordered him to be checked for impaction and for manual removal if necessary, and also ordered a fleet enema to be given every three days as needed for constipation.

48. During the ensuing months, however, facility staff did not implement these measures as ordered by the physician.

49. On February 18, 2007, two days preceding his death, J.E. complained to the staff of Fairfield Center that he was not feeling well, a fact communicated to nursing.

50. The next day, February 19, 2007, J.E.'s condition worsened significantly.

51. The facility did not transport J.E. to the hospital until after midnight. According to hospital records, J.E.'s body temperature was 84 degrees upon his arrival in the early morning of February 20, 2007. He died later that day of a massive bowel impaction.

52. ODH, after investigation, cited Fairfield Center for multiple failures to provide adequate treatment for J.E.'s bowel condition.

53. Despite the citations and oversight that accompanied J.E.'s death, the facility was once again cited in the 2007 ODH survey for failing to implement bowel protocols for residents to prevent constipation and impaction.

54. ODMR and ODH surveys from 2005 to present also contain repeated citations for direct care staff's abuse and neglect of residents, including but not limited to:

- (a) failing to provide the level of supervision required for residents;
- (b) not reporting residents' falls or injuries;

(c) failing to investigate client injuries at all or failing to investigate them in timely fashion;

(d) failing to observe residents' dietary restrictions;

55. Fairfield Center has chronically failed to provide its residents with active treatment, one of the most basic needs of any person who lives in an institutional setting.

56. Medicaid regulations require all ICFs/MR to provide continuous active treatment for every resident to promote deinstitutionalization.²

57. The purpose of active treatment is to teach residents basic daily living skills that will allow them a greater degree of independence in living, fulfill their potential to the greatest extent possible and prevent regression of those skills and abilities that residents have developed.

58. The 2005 - 2007 surveys and monitors' reports by ODMR and ODH repeatedly cite the facility for lack of active treatment, with residents allowed to sleep in chairs, wheelchairs or bedrooms without intervention by or interaction with facility staff and for leaving residents alone for long periods of time in front of TV programs beyond their comprehension.

59. These surveys and reports fault direct care staff at the facility for feeding residents instead of teaching them to feed themselves; for dressing residents instead of teaching them to dress themselves; for bathing and washing residents instead of teaching them to bathe or wash themselves; or for performing grooming and hygiene for residents such as hair and tooth brushing instead of teaching residents to do this for themselves.

First Cause of Action - 42 U.S.C. §1983 (Youngberg claim)

60. Plaintiffs incorporate paragraphs 1 through 59 of this Complaint as if fully rewritten herein.

61. Defendants, acting under color of state law, have denied and continue to deny Plaintiffs a healthy and safe living environment, a safe environment at the county board workshop, adequate medical and nursing care, freedom from undue bodily restraint, and

² This is defined as follows in 42 C.F.R. § 483.440, Condition of participation: Active treatment services.

(a) Standard: Active treatment. (1) Each client 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 described in this subpart, that is directed toward—

(i) The acquisition of the behaviors necessary for the client to function with as much self determination and independence as possible; and

(ii) The prevention or deceleration of regression or loss of current optimal functional status.

adequate active treatment in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution which can be remedied through 42 U.S.C. §1983.

Second Cause of Action - Americans with Disabilities Act

62. Plaintiffs incorporate paragraphs 1 through 61 of their Complaint as if fully rewritten herein.

63. The Board and Defendant Hurr are governed by Title II of the Americans with Disabilities Act, which applies to public entities pursuant to 42 U.S.C. § 12131.

64. Plaintiffs are persons with disabilities under Title II of the Americans with Disabilities Act who have mental impairments, including mental retardation and developmental disabilities, that substantially limit one or more major life activities.

65. Plaintiffs are otherwise qualified individuals with a disability under Title II of the Americans with Disabilities Act because they meet the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by the Board.

66. Defendants Hurr and the Board have discriminated against Plaintiffs under Title II of the ADA by failing to place them in integrated community settings that are appropriate to their needs. 42 U.S.C. §12132; 28 C.F.R. §35.130(d).

Third Cause of Action - Rehabilitation Act

67. Plaintiffs incorporate paragraphs 1 through 66 of their Complaint as if fully rewritten herein.

68. Defendants Hurr and the Board are recipients of federal funds as defined under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794.

69. Under Section 504, no otherwise qualified person with a disability shall, solely by reason of disability, be excluded from participating in, denied the benefits of or be subjected to discrimination under any program or activity that receives federal funds.

70. Plaintiffs are persons with disabilities under Section 504 because they have mental impairments, including mental retardation and developmental disabilities, that substantially limit one or more major life activities. 45 C.F.R. §84.3(j).

71. Plaintiffs are otherwise qualified handicapped persons under Section 504 because they meet the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by the Board. 45 C.F.R. §84.3(l).

72. Under Section 504, recipients of federal funds must afford persons with handicaps an equal opportunity to benefit from aids and services in the most integrated setting appropriate to the persons' needs. 45 C.F.R. §84.4(b)(2).

73. Defendants Hurr and the Board have subjected Plaintiffs to discrimination under Section 504 by failing to place them in integrated community settings that are appropriate to their needs.

Fourth Cause of Action - 42 U.S.C. §1983 - violation of Medicaid standards

74. Plaintiffs incorporate paragraphs 1 through 73 of their Complaint as if fully rewritten herein.

75. Defendant Alexson Services, Inc. has, under color of state law, violated and continues to violate Plaintiffs' rights mandated by 42 U.S.C. §1396(d)(1) and the regulations for Medicaid ICF/MR standards that implement this statute:

- a. Failed to ensure residents receive continuous active treatment, 42 C.F.R. §483.440;
- b. Failed to maintain the facility in good repair, 42 C.F.R. §483.410;
- c. Failed to ensure that outside services and day programs meet client needs, 42 C.F.R. §483.410;
- d. Failed to ensure that clients are provided with protection from neglect, 42 C.F.R. §483.420;
- e. Failed to protect clients' rights, 42 C.F.R. §483.420;
- f. Failed to develop and implement written policies and procedures that prohibit client abuse, neglect and mistreatment, 42 C.F.R. §483.420;
- g. Failed to ensure that all allegations of client abuse, neglect or mistreatment are reported timely to officials in accordance with state law, 42 C.F.R. §483.420;
- h. Failed to ensure timely and thorough investigations of client injuries, 42 C.F.R. §483.420;
- i. Failed to ensure sufficient staff to provide clients with care, services and active treatment in accordance with their needs, 42 C.F.R. §483.430;
- j. Failed to ensure that direct care staff were sufficiently trained to perform their duties efficiently and competently, 42 C.F.R. §483.430;
- k. Failed to ensure that clients' Individual Program Plans state the specific objectives necessary to meet their needs, 42 C.F.R. §483.430;

- l. Failed to develop and implement Individual Program Plans for training in activities of daily living, privacy and communication, 42 C.F.R. §483.430;
- m. Failed to document data on clients' accomplishment of their goals, 42 C.F.R. §483.430;
- n. Failed to revise behavior plans as appropriate when needs and conditions change, 42 C.F.R. §483.430;
- o. Failed to ensure that the human rights committee reviewed and approved programs and restraints designed to manage client behaviors, 42 C.F.R. §483.430;
- p. Failed to provide interventions for behavior management with sufficient safeguards to ensure client safety, civil and human rights, 42 C.F.R. §483.450;
- q. Failed to provide preventive and general medical care, timely evaluations and tests, adequate nursing services and failed to ensure client medications were administered without error, 42 C.F.R. §483.460;
- r. Failed to furnish, maintain and teach clients how to use their dentures, glasses, hearing aids, braces and other adaptive equipment, 42 C.F.R. §483.70;
- s. Failed to ensure that clients received nourishing and well balanced diets including modified and specially prescribed diets, 42 C.F.R. §483.480;
- t. Failed to ensure that clients eat in a manner consistent with their developmental levels, 42 C.F.R. §483.480.

**Fifth Cause of Action - Ohio Bill of Rights for Persons with
Mental Retardation**

76. Plaintiffs incorporate paragraphs 1 through 75 of their Complaint as if fully rewritten herein.

77. Defendants Hurr, the Board and Alexson Holdings, Inc. have deprived and continue to deprive Plaintiffs of their rights under Ohio Revised Code § 5123.62, entitled "Bill of Rights for persons with mental retardation or a developmental disability," including, but not limited to, the following:

- a. The right to be treated at all times with courtesy and respect and with full recognition of their dignity and individuality;
- b. The right to an appropriate, safe, and sanitary living environment that complies with local, state, and federal standards and recognizes the persons' need for privacy and independence;

- c. The right of timely access to appropriate medical or dental treatment;
- d. The right of access to necessary ancillary services, including, but not limited to, occupational therapy, physical therapy, speech therapy, and behavior modification and other psychological services;
- e. The right to receive appropriate care and treatment in the least intrusive manner;
- f. The right of access to opportunities that enable individuals to develop their full human potential; the right to be treated equally as citizens under the law;
- g. The right to be free from emotional, psychological, and physical abuse; and the right to be free from unnecessary chemical or physical restraints.

Need for Relief

78. Defendant Alexson Holdings, Inc. has caused Plaintiffs to live in an institutional setting that has been and continues to be detrimental to their health, safety, right to fulfill their potential as human beings and their rights of personal dignity and privacy.

79. The actions of Defendant Alexson Holdings, Inc. violate Plaintiffs' federal constitutional and statutory rights, and constitute an ongoing violation for each day the Plaintiffs are unnecessarily placed at risk in the Fairfield Center.

80. Defendants Hurr and the Board have failed to implement a process to place Plaintiffs from Fairfield Center into more integrated settings in the community appropriate to their needs.

81. The failure of Defendants Hurr and the Board to place Plaintiffs in a community setting appropriate to their needs violates Plaintiffs' federal statutory rights, and is an ongoing violation for each day they are unnecessarily confined and placed at risk in the Fairfield Center.

82. Plaintiffs have no remedy at law, and suffer and will continue to suffer irreparable harm in the absence of injunctive relief.

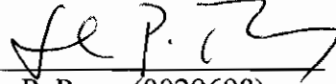
Prayer for Relief

WHEREFORE, Plaintiffs respectfully request that this Court:

1. Assume jurisdiction over this matter;
2. Issue a declaratory judgment holding that Defendant Alexson Holding, Inc. has violated Plaintiffs' rights under the Due Process Clause of the Fourteenth Amendment as enforced through 42 U.S.C. §1983;

3. Issue a declaratory judgment holding that Defendants Hurr and the Board have violated Plaintiffs' rights under Title II of the Americans with Disabilities Act;
4. Issue a declaratory judgment holding that Defendants Hurr and the Board have violated Plaintiffs' rights under Section 504 of the Rehabilitation Act of 1973;
4. Issue a declaratory judgment holding that Defendants have violated the Plaintiffs' rights under O.R.C. §5123.62;
5. Issue a declaratory judgment holding that Defendant Alexson Holdings, Inc. violated the Plaintiffs' rights under 42 U.S.C. §1396(d)(1) and implementing Medicaid regulations;
6. Issue such temporary or preliminary relief as requested by Plaintiffs in the course of these proceedings to prevent irreparable harm from occurring to them;
7. Enjoin the Defendants from continuing to violate Plaintiffs' rights as set forth in this Complaint;
8. Order Defendants Hurr and the Board to assess all residents of Fairfield Center to determine if they wish to move into the community and, if so, to determine the most appropriate community setting for each individual;
9. Order Defendants Hurr and the Board to immediately begin development of a comprehensive, effective plan that includes timelines and measureable targets to place Plaintiffs from Fairfield Center into community settings appropriate to their needs and to provide appropriate services for them in the community;
9. Order Defendant Alexson Holdings, Inc. to cease its operation of Fairfield Center;
10. Order Defendants Hurr and the Board to terminate the lease agreement with Alexson Holdings, Inc. to operate Fairfield Center;
11. Appoint a person or entity to operate Fairfield Center in compliance with all applicable federal and state regulations and to oversee the downsizing and eventual closure of this facility in an orderly and expeditious manner that protects the health, safety and rights of all residents;
12. Award Plaintiffs their attorneys' fees and costs as permitted by law;
13. Provide such other relief as is just and equitable.

Respectfully submitted,



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