

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

NORMAN BLOOMFIELD, individually and on behalf of all
persons similarly situated,

Plaintiff,

- against -

VINCENT CANNAVO, in his official capacity as Program
Director of the Adult Care Facility Program of the
Metropolitan Area Regional Office of the New York State
Department of Health, MARY HART, in her official capacity
as Director of the Division of Assisted Living, and NIRAV R.
SHAH, in his official capacity as Commissioner of the New
York State Department of Health,

Defendants.

NEW YORK
COUNTY CLERK'S OFFICE

JAN - 5 2012
No 40082/12
Date Indexed No. Purchased
January 5, 2012
NOT COMPARED
WITH COPY FILE

Summons


To the above-named Defendants:

PLEASE TAKE NOTICE that you are hereby summoned and required to answer
the complaint attached hereto and to serve your answer upon Plaintiff's attorney at the
address listed below within twenty (20) days after service of this summons, exclusive of
the day of service, or within thirty (30) days after service is complete if this summons is
not personally delivered to you within the State of New York.

The basis for venue in New York County is the New York State Department of
Health's Metropolitan Area Regional Office located at 90 Church Street, 15th Floor, New
York, New York, 10007 which is a public authority at which Defendant Vincent
Cannavo, sued in his official capacity, serves as Program Director of the Adult Care
Facility Program.

You are hereby notified that should you fail to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated: January 5, 2012
New York, New York

By: 
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Mary Hart
Division of Home & Community Based Services
New York State Department of Health
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Vincent Cannavo
Program Director, Adult Care Facility Program
New York State Department of Health
Metropolitan Area Regional Office
90 Church Street, 15th Floor
New York, NY 10007

Defendants

COMPLETE THIS STUB

Endorse This INDEX NUMBER ON All
Papers and advise your adversary of
the number assigned. Sec. 202.6,
Uniform Rules Of Trial Courts

DO NOT DETACH

Title of Action or Proceeding to be TYPED or PRINTED by applicant
SUPREME COURT, NEW YORK COUNTY

Norman Bloomfield

V.
Vincent Gannavo, Mary Hart, and Nizar Shah
in their official capacities at the NYS Dept. of Health.

**INDEX NUMBER FEE
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SHAH, in his official capacity as Commissioner of the New :
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Defendants. :

Index No.: /2012

CLASS ACTION COMPLAINT

----- X
Plaintiff NORMAN BLOOMFIELD, on behalf of himself and all other similarly situated,
current and future residents of adult homes in the New York City metropolitan area, through his
attorneys, alleges as follows:

PRELIMINARY STATEMENT

1. This is a civil rights action brought under Section 8, Article IV of the New York State Constitution, the New York State Administrative Procedure Act ("SAPA"), and the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et seq.* Plaintiff requests a judicial declaration that Defendants have failed to comply with the procedural safeguards embodied in the New York Constitution and SAPA and seeks injunctive relief to stop Defendants from violating the ADA through their discriminatory administrative procedures.

2. Adult homes are congregate care facilities "established and operated for the purpose of providing long-term residential care, room, board, housekeeping, personal care and supervision to five or more adults unrelated to the operator." 18 NYCRR § 487.2(a). Adult

homes must provide a variety of services to residents, including supervision, assistance with medication administration, and a range of individualized case management services. 18 NYCRR § 487.7.

3. These facilities are part of New York State's system for administering services to people with mental illness.

4. Under the New York Social Services Law ("SSL") and related regulations, the New York State Department of Health (the "Department"), through its Metropolitan Area Regional Office ("MARO"), inspects and supervises adult care facilities in New York City, Long Island, and the Hudson Valley.¹

5. A sizeable majority of adult home residents in facilities with high concentrations of persons with mental illness subsist on public benefits, including Supplemental Security Income ("SSI"). Their eligibility for SSI is determined based upon a finding that they are indigent and have met the government's disability criteria. At the current funding level, SSI provides adult home residents with money to cover their facility fees and approximately \$180 for all of their personal needs.

6. Adult home residents' ability to protect their rights within this institutional setting is frustrated by their isolation and lack of resources. Not all residents have access to cellular telephones, and adult homes only have to provide one pay phone for every forty residents at a facility.

7. Adult home residents rely upon the Department to ensure that adult home operators meet environmental, safety, and other resident rights standards.

¹ The Department includes the Hudson Valley counties of Dutchess, Orange, Putnam, Rockland, Sullivan, Ulster, and Westchester within the MARO region.

8. When an adult home resident believes that his or her rights have been violated or that some other harmful or dangerous condition exists within the facility, he or she can contact the Department's toll-free hotline to initiate an investigation into those allegations. Based upon the Department's evaluation of evidence gathered during its investigation, the Department may issue a report setting forth factual conclusions, issuing violations, and demanding that the facility implement corrective action to remedy the complained of conditions.

9. Defendants are state officials responsible for ensuring that adult homes comply with the SSL and regulations. The purpose of their complaint inspection process is to impartially evaluate complaints and remedy violations of residents' rights.

10. Defendants exercise fact-finding and quasi-adjudicative authority conferred upon the Department when they evaluate evidence at the close of an investigation, make factual conclusions, issue violations, and demand that a facility implement corrective action.

11. Central to the proper exercise of that authority is the need for Defendants to make accurate, unbiased factual determinations and take actions that are consistent with the Department's mandate.

12. Defendants' rules for exercising that authority with respect to appeals of corrective action orders and violations are both invalid and at odds with these two requirements. Specifically, their procedures: (1) expand Defendants' authority to excuse or ignore regulatory violations in contravention of SSL § 461-d; (2) define an administrative appeal process not contemplated by the SSL or departmental regulations; and (3) apply uniformly to all adult homes and adult home residents. Accordingly, they qualify as "rules" under SAPA and should have been – but never were – officially promulgated.

13. Defendants discriminate against adult home residents with disabilities in their implementation of these unofficial rules. Defendants deny Plaintiff and other class members: (1) the right to obtain detailed information about corrective action orders and violations at the close of investigations; (2) the right to appeal investigation outcomes; and (3) an opportunity to challenge the inadequacy of the Department's enforcement measures. Defendants' opaque rules allow adult home operators to stall or undermine the complaint inspection process.

14. For years, adult home residents have suffered egregious violations of their rights, including financial exploitation and psychological abuses. Yet, Defendants implement discriminatory administrative rules intended primarily to protect the financial interests of adult home operators. Defendants' acquiescence to adult home operators and systemic inaction has the practical effect of "de-regulating" many of worst facilities. All the while, Defendants have had ample knowledge that many adult home operators, particularly those operating facilities with high percentages of residents with mental illness, routinely target residents for exploitation and abuse precisely because of residents' psychiatric disabilities.

15. In this action, Plaintiff seeks, for himself and on behalf of the class: (1) a declaration that Defendants' rules violate the New York State Constitution, SAPA, and the ADA; and (2) to enjoin Defendants from discriminating against adult home residents in their implementation of those rules.

THE PARTIES

16. Plaintiff Bloomfield is a citizen of the State of New York. He lives at Surf Manor Home for Adults ("Surf Manor"), an adult home located at 2316 Surf Avenue, Brooklyn, New York 11224.

17. Defendant Vincent Cannavo is the Program Director of MARO, a public entity located at 90 Church Street, New York, New York 10007. At all times relevant to this action, Defendant Cannavo acted in his capacity as an agent of the Department.

18. Defendant Mary Hart is the Director of the Division of Assisted Living at the Department, a public entity located at Corning Tower, Empire State Plaza, Albany, New York, 12210. At all times relevant to this action, Defendant Hart acted in her capacity as an agent of the Department.

19. Defendant Nirav R. Shah is the Commissioner of the Department, a public entity located at Corning Tower, Empire State Plaza, Albany, New York 12210. At all times relevant to this action, Defendant Shah acted in his capacity as an agent of the Department.

CLASS ACTION ALLEGATIONS

20. Plaintiff Bloomfield brings this action on his own behalf and, pursuant to CPLR § 901, on behalf of a class defined as follows:

All current and future residents of adult homes, as defined by SSL § 2(25), located within the Metropolitan Area Regional Office Region, as defined by the New York State Department of Health, who have outstanding complaints or may lodge complaints with the New York State Department of Health's Adult Home Complaint Intake Unit.

21. Defendant Cannavo oversees approximately 172 adult homes in the region. Those facilities house more than 19,000 residents. The class, which includes all of these current residents as well as future residents in those facilities, is so numerous that joinder of all members is impracticable.

22. The allegations present numerous common questions of law and fact, including:

- Do Defendants' procedures for appealing violations and corrective action orders constitute "rules" under SAPA?

- Does Defendants' practice of affording adult home operators opportunities to challenge violations at administrative proceedings, from which complaining residents are excluded, violate the ADA?
- Does Defendants' practice of forcing residents with disabilities to commence costly and burdensome litigation to contest investigation outcomes while providing free administrative remedies to non-disabled adult home operators violate the ADA?
- Does Defendants' administrative appeal process have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the Department's complaint inspection process with respect to individuals with disabilities?

23. Certification under CPLR § 901 is appropriate since Plaintiffs seek declaratory and injunctive relief against Defendants. Plaintiffs do not seek to impose statutory penalties or obtain an award of money damages in connection with their claims; they do seek litigation costs and attorney's fees compensable under CPLR § 8601 and 42 U.S.C. § 12205.

24. The requested declaratory and injunctive relief is appropriate with respect to the class as a whole because Defendants' administrative rules apply uniformly to all adult home residents living in this geographic area. For this same reason, the legal questions regarding Defendants' policies that are common to the class predominate over any factual questions or interests pertaining to an individual member of the Plaintiff class.

25. Plaintiff Bloomfield can fairly and adequately protect the interests of the class.

26. The Plaintiff class is represented by MFY Legal Services, a public interest law firm that provides civil legal services to poor and low-income New Yorkers. MFY Legal Services has the legal resources and experience to protect the interests of all members of the class in this action. Counsel also has expertise litigating class actions and civil rights matters.

27. Plaintiffs know of no actual or potential conflicts of interest among members of the class.

28. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Among other things, members of the Plaintiff class have no interest in individually controlling the prosecution of separate actions because all class members are indigent, have disabilities, and individually lack sufficient resources for the prosecution of separate actions. Moreover, the prosecution of separate actions would be inefficient and wasteful of legal resources; the issues raised can be more fairly and efficiently resolved in a single class action rather than in separate actions. The resolution of the litigation in a single forum will avoid the danger and resultant confusion of potentially inconsistent determinations.

FACTUAL ALLEGATIONS COMMON TO THE CLASS

Background

29. An adult care facility provides “temporary or long-term residential care and services to adults who, though not requiring continual medical or nursing care ... are by reason of physical or other limitations associated with age, physical or mental disabilities or other factors, unable or substantially unable to live independently.” SSL § 2(21).

30. An adult home is a type of adult care facility “established and operated for the purpose of providing long-term residential care, room, board, housekeeping, personal care and supervision to five or more adults unrelated to the operator.” SSL § 2(25).

31. As originally conceived, adult care facilities in New York State were designed to house the “frail elderly,” not people with psychiatric disabilities. However, in the early 1970s, as New York State began to deinstitutionalize its state psychiatric hospitals, adult care facilities became a place for people with mental illness to live and receive services. See generally Disability Advocates, Inc. v. Paterson, 653 F.Supp.2d 184, 197 (E.D.N.Y. 2009), appeal filed, No. 10-235(L) (2d Cir. filed Jan. 20, 2010).

32. Certain adult homes are classified as “impacted.” The Department defines “impacted homes” as facilities in which at least 25 residents or 25% of the residents have a mental illness-based disability. Mental Hygiene Law §§ 45.09(a) and 45.10(a).

33. According to the Department’s own census data, “[a]ll of the adult homes in New York State are populated entirely by people with disabilities and/or mental illness.” Disability Advocates, Inc. v. Paterson, 598 F.Supp.2d at 295.

34. Upon information and belief, Defendant Shah is responsible for, among other things, promulgating regulations that govern adult homes, protect residents’ rights, and outline procedures for conducting inspections and enforcement proceedings to ensure that adult home operators comply with the regulations.

35. Upon information and belief, Defendant Hart is responsible for overseeing the inspection of adult homes and other adult care facilities throughout New York State, as well as the Department’s enforcement of the regulations in those facilities.

36. Upon information and belief, Defendant Cannavo is responsible for: (1) reviewing inspection reports; (2) determining whether to “substantiate” complaints and issue violations in connection with adult home inspections; (3) issuing written communications to parties to the complaint process; and (4) conducting appeals of the Department’s findings upon request by a facility after MARO drafts an inspection report and issues violations against an adult home in the MARO region.

Defendants Have An Affirmative Obligation To Enforce Adult Homes’ Compliance With The Law And The Complaint Review Process Was Created For That Purpose.

37. Defendants are required to protect “the mental health of the inhabitants of the state” in accordance with the SSL and inspect “all institutions either public or private used for

the care and treatment of persons suffering from mental disorder or defect” to fulfill that mandate. N.Y. Const., art. XVII, § 4

38. Defendants have an obligation “to protect the health and well-being of mentally disabled persons.” SSL § 461(2).

39. Defendants have a responsibility to require “that every adult care facility shall adopt and make public a statement of the rights and responsibilities of the residents who are receiving care in such facilities, and shall treat such residents in accordance with the provisions of such statement.” SSL § 461-d(2).

40. The SSL establishes that the Department² is responsible for the inspection and supervision of adult care facilities throughout New York State.

41. Defendant Shah, as Commissioner of the Department, may alter or amend regulations to establish standards for all adult care facilities subject to the Department’s inspection and supervision mandate.

42. Upon information and belief, Defendant Hart implements the Department’s complaint inspection and regulatory enforcement procedures within adult homes and other assisted living facilities throughout New York State.

43. An inspection is:

[A] process of inquiry and investigation which shall include, but need not be limited to, announced and unannounced on-site investigations, private interviews with residents, review and investigation of the books and records of the facility, gathering of written, photographic or other physical evidence, and such collateral contacts as the department deems necessary for the purpose of determining compliance with applicable laws and regulations. 18 NYCRR § 486.2(a).

² As of April 1, 1997, the Department replaced the New York State Department of Social Services as regulator of adult care facilities, pursuant to 1997 N.Y. Laws 436 § 122(e).

44. The Department is required to conduct a minimum of one unannounced inspection of each adult care facility every twelve or eighteen months depending on the facility's "rating." SSL § 461-a.

45. The Department also conducts a "complaint inspection" in response to residents' allegation of harm, hazardous conditions, or violations of the regulations.

46. A complaint inspection is a type of investigation conducted by the Department, through each of its regional offices, "to determine the validity of a complaint" made by a resident concerning a facility and issue corrective action orders when necessary. 18 NYCRR § 486.2(e)(4).

47. Upon information and belief, the Department's Adult Home Complaint Intake Unit is responsible for reviewing written and verbal complaints related to resident rights violations in adult homes and forwarding those complaints to the appropriate regional office.

48. Upon information and belief, Defendant Cannavo exercises discretion to determine the frequency and scope of complaint inspections of adult homes located in the regional office that covers adult homes within New York City, Long Island, and the Hudson Valley.

49. Upon information and belief, Defendant Hart has access to a statewide database containing all complaints made by adult home residents throughout New York State, as well as investigation notes and other information regarding the Department's efforts to enforce the regulations that govern adult homes.

50. Defendants provide a guide to adult home residents setting forth residents' rights with regard to the Department's annual inspection of adult homes. Defendants' guide advises residents that they have a right to "tak[e] part in a formal interview" with an inspector.

Defendants also advise residents: “If non-compliance [with the regulations] is found and the operator is cited, information provided by residents may be confidentially included in the Inspection Report. [The] home receives this report 30 to 35 days after the inspection has been completed. All homes must post this report in a common area. ... The Department of Health’s first priority is ensuring [residents’] well-being and safety and protecting [residents] from any type of retaliation from [their] home.”

51. Defendants’ guide does not advise adult home residents that adult home operators may fail to comply with the regulations without receiving violations.

52. Defendants’ guide does not advise adult home residents that operators who receive violations may request an “Inspection Review Process” (“IRP”). An IRP is a closed-door appellate proceeding at which an adult home operator may lobby Defendants to reverse, rescind or revise their findings and any corrective action ordered following the inspection. The guide also fails to advise Plaintiffs that operators may avoid posting copies of their inspection report if they request an IRP.

53. Defendants’ guide does not advise adult home residents that the purpose of an IRP is to review information in a light most favorable to adult home operators, not adult home residents.

54. Upon information and belief, a post-IRP “formal hearing,” which is a closed-door appeal of an IRP, is also available to adult home operators.

55. Defendants’ guide does not provide any information to adult home residents about the post-IRP “formal hearing.”

Defendants' Complaint Review Process Promotes The Financial Interests Of Adult Home Operators And Subverts The Complaint Investigation and Regulatory Enforcement Processes.

56. The Department's regulations provide:

After a complaint investigation has been completed, the [D]epartment shall advise the complainant of the findings and corrective action, if any. However, a complainant shall not be advised of the outcomes of an investigation which is being contested by an operator or when civil or criminal action might be compromised by such notice. 18 NYCRR § 486.2(o).

57. Defendant Cannavo interprets the requirement that "the [D]epartment shall advise the complainant of the findings and corrective action" to simply mean that MARO must "identify the areas reviewed during the inspection" when he believes a complaint has been "substantiated."

58. The Department's regulations outline a process for adult home operators to "challenge an order of the commissioner made under section 460-d(8) of the [SSL], or a temporary suspension of an operating certificate made under section 460-d(4) of the [SSL]." 18 NYCRR § 493.1(e).

59. SSL § 460-d outlines certain emergency measures that may be undertaken by the Department with the approval of "a justice of the supreme court."

60. Neither SSL § 460-d nor 18 NYCRR § 493.1(e) provides a method for adult home operators to request IRPs or post-IRP "formal hearings."

61. However, upon information and belief, since 2004, adult home operators who have received violations and "statements of deficiencies" through an annual inspection or a complaint investigation may request an IRP.

62. Defendant Cannavo describes the IRP as "the opportunity for the [adult home] operator to discuss any violations for findings in the [investigation] report and provide justification for modifying or deleting these."

63. Upon information and belief, Defendants developed the IRP in response to a special proceeding commenced by adult home operators in 2003.

64. In an unpublished Supreme Court of the State of New York, Albany County decision dated September 15, 2004, the Department was ordered to submit a proposal for an inspection review process to allow adult home operators to “address the charges made against them before [] sanctions are applied.”

65. Defendants never officially promulgated any rules in response to that litigation.

66. No adult home resident participated in or was consulted in connection with that proceeding.

67. Defendant Cannavo has advised adult home operators that during the IRP, he makes “every effort ... to evaluate the information submitted and to give consideration to the facility’s position regarding the violations cited by the survey staff.” Defendant Cannavo does not impartially review corrective action orders or consider the interests of the Plaintiff class implicated in those proceedings.

68. The Department, thus, reviews the information submitted by the adult home during an IRP in a light most favorable to adult home operator.

69. Under the regulations governing adult homes, adult home operators – unlike Plaintiff and other adult home residents – do not have disabilities. See 18 NYCRR § 487.9(a)(10).

70. Upon information and belief, adult home operators may appeal an IRP by requesting a “formal hearing” with the Department.

71. Upon information and belief, the post-IRP “formal hearing” is distinct from and fails to comply with the hearing procedures set forth in 18 NYCRR § 493.

Defendants' Clandestine Appeal Processes Weaken The Regulations And Impose Unfair Burdens Upon Residents With Disabilities Who Lack Resources To Protect Their Rights.

72. Defendants implement a policy of withholding from adult home residents all details about corrective action ordered following a complaint investigation - even if Defendants order restitution or other remedies specifically crafted to remedy violations of the complainant's rights.

73. According to the Department, adult home residents cannot request copies of inspection reports by simply calling the Department's toll-free hotline. Instead, they must make a Freedom of Information Law Request for such information.

74. Upon information and belief, Defendants may revise a corrective action order, including measures specifically designed to remedy violations of a complainant's rights, issued in connection with violations to force an adult home's compliance with the regulations as a result of an IRP.

75. Upon information and belief, Defendants' policy is to not create transcripts of IRPs and not allow adult home residents to review any additional evidence that an adult home operator presents in support of its appeal.

76. Upon information and belief, an adult home that has requested an IRP may delay implementation of the corrective action ordered by the Department until the IRP is completed and Defendants make a final determination on the appeal.

77. Upon information and belief, Defendants do not require adult home operators to preserve evidence gathered during an initial investigation during the pendency of an IRP or post-IRP "formal hearing."

78. Neither the SSL nor the Department's implementing regulations set forth procedures governing how Defendants grant requests for IRPs.

79. Neither the SSL nor the Department's implementing regulations specify which evidentiary standards or burdens must be satisfied to overturn the Department's findings made through an inspection or investigation.

80. Upon information and belief, the Department may amend a corrective action order at an IRP while not reversing the violations issued against an adult home after a complaint investigation.

81. Members of the Plaintiff class have no opportunity to learn about specific changes to statements of deficiencies or corrective action orders made as a result of an IRP.

82. The regulations governing adult care facilities do not afford complainants an opportunity to challenge any revisions to Statements of Deficiencies or corrective action orders made as a result of an IRP. Members of the Plaintiff class whose complaints are unsubstantiated by the Department or inadequately remedied must commence litigation against the adult home operator or initiate an Article 78 proceeding against the Department if they wish to challenge the Department's determination.

Defendants Developed Their Complaint Appeal Rules For The Sole Purpose Of Protecting Adult Home Operators' Financial Interests, And Without Regard For The Detrimental Impact Of Those Rules On The Rights Of Adult Home Residents With Disabilities.

83. In stark contrast to the administrative remedies available to adult home operators, Defendants have no policy which guarantees complaining residents an opportunity to be heard – even during an original complaint investigation – or to appeal Defendants' decision reached after a complaint investigation.

84. The IRP is just one of several complaint-related procedures put into place by the Department to promote the financial and other interests of adult home operators.

85. In a letter dated October 7, 2011, the Department advised Plaintiff Bloomfield that “the Department affords the facility due process” in order to protect adult home operators from the “adverse consequences” of receiving violations. The Department attempts to justify its denial of due process rights to adult home residents by suggesting that residents have “no need for a [complaint] appeal process within the Department of Health, since the Department is representing the interest of the public in its investigation.” The Department also opined that residents are not “adversely affected” when the Department finds that a complaint is “unsubstantiated.”

86. In an August 8, 2011 hearing in federal court, Defendants’ counsel described the IRP as a procedure designed to protect adult homes operators’ “substantive due process rights” and financial interests with respect to a now-defunct grant program and other profits to be realized from new admissions to a facility.

87. Upon information and belief, the Department issued a public statement on March 2, 2005 in support of proposed amendments to 18 NYCRR § 486.2 and other regulations regarding complaint investigations, but not IRPs and post-IRP “formal hearings.” That statement explained, “The Supreme Court rulings necessitating these regulations were the direct result of a legal proceeding commenced by the [Empire State] Association [of Adult Homes and Assisted Living Facilities] and their member facilities against the Department’s regulations and practices.”

88. The Empire State Association of Adult Homes and Assisted Living Facilities advertises itself as an “organization dedicated to strengthening New York State’s assisted living industry” and states that it “is the only association that exclusively represents the assisted living

industry, serving 250 Assisted Living Residences, Adult Homes and Enriched Housing Programs throughout New York State.”

Defendants Know That Adult Homes Residents Have Limited Resources And Are Subjected To Frequent Abuse By Adult Home Operators.

89. The New York State Office of the State Comptroller conducted an audit and issued a report dated February 7, 2003 (“the Comptroller Report”) regarding Defendants’ complaint investigation and enforcement processes in the MARO region.

90. The Comptroller Report found “that the Department is often slow to respond to complaints, particularly in the New York City metropolitan area. As a result of these weaknesses in the Department’s oversight, the health and safety of the residents in some [facilities] may not be adequately protected.”

91. The Comptroller Report further concluded, “[A]dult care facilities with repeated violations are not penalized, and adult care facilities are not submitting ... required reports documenting the actions taken to correct findings described in inspection reports.”

92. On December 10, 2003, Defendant Hart issued a “Dear Administrator Letter” to adult home operators which stated, “[T]he Department continues to receive complaints of threats and retaliation against residents by facility operators or staff when they have had contact with advocacy organizations, advocates or other parties.”

93. Defendants know, based on the longstanding history of abuse and retaliation within adult homes, that Plaintiff Bloomfield and members of the plaintiff class are persons who need support in lodging complaints against adult home operators, including opportunities to appeal erroneous inspection reports and challenge operators’ efforts to overturn violations.

94. A federal court has held that the segregation of persons with mental illness into “impacted” adult homes violates the Americans with Disabilities Act. See Disability Advocates, Inc. v. Paterson, 653 F.Supp.2d at 267.

95. Upon information and belief, expert testimony proffered in during the Disability Advocates trial showed that, due to institutionalization within an adult home, many adult home residents have “lost their ability to advocate for themselves” and “speak up on their own behalf.”

96. Upon information and belief, expert testimony proffered during the Disability Advocates trial also showed that, for example, one adult home operator exploited its power over a resident with a mental illness-based disability by punishing that resident with involuntary commitment to a psychiatric hospital when he “spoke out” about problems in his adult home. The expert further testified that the resident was unlawfully evicted from the adult home after being subjected to a retaliatory commitment to the psychiatric hospital.

97. In holding that the State has violated the ADA, the court found that many adult home residents have expressed fear and have actually experienced retaliation if they complain to the Department about the adult home where they reside. See Disability Advocates, Inc. v. Paterson, 653 F.Supp.2d at 202 & n.81.

Defendants’ Refusal To Provide Administrative Remedies To Residents And Implementation Of Procedures That Explicitly Favor Operators Results In Repeated Regulatory Violations.

98. Upon information and belief, the Department’s primary source of evidence gathered to assess residents’ complaints is a facility’s own records.

99. Upon information and belief, only one in ten inspection reports completed by Defendant Cannavo’s office identify complainant interviews as sources of information for

complaint inspections. In other words, *in approximately 90% of complaints*, the Department does not cite to any information provided by complainants in reaching its final determination.

100. Upon information and belief, Defendants do not prepare any inspection reports if they deem the complaint to be “unsubstantiated.”

101. Upon information and belief, Defendant Cannavo routinely refuses to issue violations against adult homes, even when MARO investigators find evidence to substantiate residents’ complaints.

102. Upon information and belief, Defendant Cannavo refused to issue violations in July 2010 for medication-related endangerment at the Garden of Eden Adult Home even though MARO’s investigation uncovered evidence in support of a resident’s complaints.

103. Upon information and belief, more than one in five medication-related violations issued by the Department in adult care facilities between 2002 through 2010 was an uncorrected violation found in a prior inspection.

104. Defendants make unfavorable, discretionary credibility findings based upon residents’ psychiatric diagnoses. Upon information and belief, Defendant Cannavo’s investigators unnecessarily referred to a complaining resident’s mental illness-based disability in a September 29, 2010 investigation report to disregard evidence in support of a resident’s medication-related complaint against the Garden of Eden Adult Home.

105. Upon information and belief, Oswald Sancho, a senior administrator at MARO, has disregarded complaints made by residents about their adult homes and justified the Department’s conclusion that the complaints were “unsubstantiated” by saying that adult home residents are “mentally ill” and “won’t transcribe things correctly.”

106. Defendant Hart testified under oath on October 5, 2004, at a deposition related to the Disability Advocates case that even if the Department finds that an adult home has “a failure of systems” and that “the rights of residents are endangered,” the Department had “nothing in writing” and “[n]othing formal” as an agency procedure to protect residents, other than to commence an enforcement proceeding against the facility.

107. Upon information and belief, only 8% of the violations issued by the Department result in enforcement actions against adult homes and other assisted living facilities.

108. Upon information and belief, 7% of all resident endangerment violations remain pending for up to five years without a final resolution or penalty ever being imposed upon the facility.

109. Defendant Hart testified under oath on October 5, 2004, that the Department has refused to implement an administrative law judge’s recommendation, made at the close of an enforcement proceeding, to remove an adult home administrator who was found to have abused residents.

Defendants’ Biased Administrative Procedures Subvert The Objectives Of The Department’s Complaint Inspection Process By Allowing Adult Homes To Act With Virtual Impunity.

110. Defendants infrequently commence enforcement actions against adult homes and rarely impose civil penalties on adult home operators for violating residents’ rights.

111. Defendants’ failure to effectively enforce the regulations allows many adult homes to violate residents’ rights for years without fear of consequences or civil penalties.

112. Defendants’ exclusion of adult home residents from the IRP process leads to indigent residents enduring years of uncorrected violations and abuses at adult homes in the MARO Region.

Example of Defendants' Failed Enforcement Procedures: Brooklyn Manor Home for Adults, Brooklyn, New York

113. Upon information and belief, Brooklyn Manor Home for Adults (“Brooklyn Manor”) is an impacted facility located within Defendant Cannavo’s region of oversight.

114. Defendant Hart testified under oath on October 5, 2004 that a former administrator of Brooklyn Manor “was verbally abusive to residents,” “retaliated against residents for speaking out,” unlawfully evicted residents, and employed staff who “physically abused residents.”

115. Upon information and belief, this former administrator verbally abused residents with mental illness-based disabilities by, among other things, calling them “crazy.”

116. Upon information and belief, this former administrator retaliated against residents for speaking out by, among other things, unnecessarily subjecting at least one resident with a mental illness-based disability to an involuntary commitment to a psychiatric hospital.

117. Defendant Hart also testified that a subsequent administrator of Brooklyn Manor Adult Home had been accused of stealing residents’ money and violating residents’ rights. At the time that Defendant Hart testified about those residents’ complaints, that administrator still worked at the home.

118. Defendants allowed Brooklyn Manor Adult Home’s operators to challenge the Department’s actions through IRPs that permit the home to delay or avoid the facility’s implementation of corrective action.

119. Defendants exclude residents of Brooklyn Manor Adult Home from the IRP and post-IRP “formal hearing” proceedings through which residents could provide justification for modifying the Department’s determinations and/or upholding violations against the facility to better protect residents’ rights.

Examples of Defendants' Failed Enforcement Procedures Resulting In Repeated Violations of Residents' Rights: Elm York Home for Adults, Queens, New York

120. Upon information and belief, Elm York Home for Adults ("Elm York") is an impacted adult home located within Defendant Cannavo's region of oversight.

121. Defendant Hart testified under oath in 2004 that Elm York had been the subject of prior enforcement proceedings to punish the facility for violating the regulations and residents' rights.

122. Upon information and belief, the Department issued violations following an inspection of Elm York that occurred on April 21, 2010. Those violations were issued based upon the facility's failure to adequately provide for residents' mental health care, medication needs, and case management.

123. Upon information and belief, the Department issued violations following an inspection of Elm York that occurred on April 13, 2011. Those violations were issued based on the facility's noncompliance with medication-control regulations, failure to provide food sufficient to meet residents' nutritional needs, and failure to adhere to sanitation requirements.

124. On June 2, 2011, the Department issued violations following an inspection of Elm York that occurred on or about May 4, 2011. Those violations were issued based upon the facility's failure to adequately provide case management and the administrator's falsification of documents and other violations of residents' rights.

125. Defendants have not commenced enforcement proceedings against Elm York in connection with the April 21, 2010, April 13, 2011, and June 2, 2011 violations.

126. Defendants have allowed Elm York's operator to challenge the Department's actions through IRPs that permit the home to delay or avoid the facility's implementation of corrective action.

127. Defendants exclude residents of Elm York from the IRP and post-IRP “formal hearing” proceedings through which residents could provide justification for modifying the Department’s determinations and/or upholding violations against the facility to better protect residents’ rights.

Examples of Ongoing Resident Abuse and an IRP Resulting In Delayed Action to Protect Residents from Endangerment: Garden of Eden Home for Adults, Brooklyn, New York

128. Upon information and belief, Garden of Eden Home for Adults (“Garden of Eden”) is an impacted facility located within Defendant Cannavo’s region of oversight.

129. Defendant Hart testified under oath on October 5, 2004 that the administrator of the Garden of Eden had been “verbally abusive to residents.” Seven years later, that same administrator continues to work at Garden of Eden.

130. Upon information and belief, Defendant Cannavo issued violations and a corrective action order against the Garden of Eden after a July 3, 2009 inspection showed that the home had been unlawfully taking money from a resident’s public benefit payments.

131. Upon information and belief, Defendant Cannavo issued violations and a corrective action order against the Garden of Eden on July 9, 2009, after substantiating residents’ complaints that the administrator verbally abused them.

132. Upon information and belief, Defendant Cannavo issued violations and a corrective action order against the Garden of Eden on December 10, 2009, after substantiating residents’ complaints that the administrator verbally abused and retaliated against them.

133. Upon information and belief, Garden of Eden’s operator requested an IRP to appeal the December 10, 2009 violations.

134. Upon information and belief, on January 20, 2011, Defendant Cannavo ordered Garden of Eden to prevent the administrator from interacting with and verbally abusing Garden

of Eden residents. Defendant Cannavo did not issue that order until after Garden of Eden exhausted its administrative appeals. For over a year, while Garden of Eden appealed the violations, Defendants did not enforce the December 10, 2009 violations and corrective action order.

135. Upon information and belief, Defendant Cannavo's office issued a follow-up report to the December 10, 2009 inspection report on or about March 21, 2011 saying, "[T]he surveyor determined that the operator failed to ensure that residents ... were not threatened with retaliation or reprisals from the operator and staff."

136. Upon information and belief, verbal abuse and financial exploitation of residents has continued at Garden of Eden since Defendant Hart testified about the facility in 2004 and since Defendants issued their July 3, 2009 and March 21, 2011 violations.

137. Upon information and belief, Defendant Cannavo has substantiated complaints by Garden of Eden residents based on the administrator's continued harassment of residents, including violations issued on June 3, 2011, in response to a complaint that Garden of Eden used psychological pressure to unlawfully take money from a resident's statutorily-protected personal needs allowance.

138. Defendants' policies allowed Garden of Eden to delay enforcement of the July 9, 2009 and December 10, 2010 investigations by conducting an IRP and exposed residents with disabilities to ongoing abuse.

139. Upon information and belief, Defendants did not commence enforcement proceedings in connection with the July 3, 2009 and June 3, 2011 violations related to psychological abuse and financial exploitation at Garden of Eden.

140. Defendants have allowed Garden of Eden's operator to challenge the Department's actions through IRPs that permit the home to delay or avoid the facility's implementation of corrective action.

141. Defendants exclude residents of Garden of Eden from the IRP process through which residents could provide justification for modifying the Department's actions and/or upholding violations against the facility to better protect residents' rights.

Example of Administrator's Animus Reflected In Regulatory Violations and Defendants' Failure to Enforce the Regulations: Lakeside Manor, Staten Island, New York

142. Upon information and belief, Lakeside Manor is an impacted facility located within Defendant Cannavo's region of oversight.

143. Defendant Hart testified under oath on October 5, 2004 that Lakeside Manor had been subjected to an enforcement proceeding for violating residents' rights.

144. The Lakeside Manor administrator about whom Defendant Hart testified continues to work at the facility.

145. Upon information and belief, Defendant Cannavo issued violations in 2007 against Lakeside Manor for failing to provide adequate telephone services as required under the regulations and charging residents for toll-free calls, thereby contributing to residents' isolation from the community and overall vulnerability. Defendant Cannavo issued those violations only after several residents of Lakeside Manor commenced a lawsuit to force the facility to comply with the regulations.

146. The administrator of Lakeside Manor testified under oath that persons with mental illness tend to lie and that "lying is part of the disease." He also testified that persons with mental illness often complain about things that have no "foundation" or "substance." He also suggested that residents have no friends or family to contact outside the facility.

147. Residents had to commence litigation to force Lakeside Manor to provide adequate telephone service, and Defendants have taken no actions to make these changes permanent.

148. Defendants have allowed Lakeside Manor's operator to challenge the Department's actions through IRPs that permit the home to delay or avoid the facility's implementation of corrective action.

149. Defendants exclude residents of Lakeside Manor from the IRP process through which residents could provide justification for modifying the Department's actions and/or upholding violations against the facility to better protect residents' rights.

Examples of Defendants' Inadequate Complaint Investigation Procedures: New South Shore Manor, Brooklyn, New York

150. Upon information and belief, New South Shore Manor is an impacted adult home located within Defendant Cannavo's region of oversight.

151. Upon information and belief, a Spanish-speaking resident of the New South Shore Manor complained to the Department in 2011 that he was not receiving services, including case management services, in a language that he could understand.

152. Upon information and belief, Defendant Cannavo found that the resident's claim was "unsubstantiated" after MARO conducted an investigation, but that "investigation" did not include an interview of the relevant resident.

153. The complaining resident left the facility because of its failure to provide appropriate case management services for his health needs. The resident moved out without receiving any health or benefit-related discharge assistance from the facility, including help he needed to manage serious, chronic illnesses.

154. Another resident of New South Shore Manor filed a complaint with the Department on May 12, 2011 that her case manager attempted to have her involuntarily and unnecessarily committed to a psychiatric facility. The resident also complained of ongoing verbal and psychological abuse at the home.

155. Upon information and belief, MARO did not conduct an investigation into the complaints until approximately three months later.

156. Defendant Cannavo found that the resident's claim was "unsubstantiated" after MARO conducted an "investigation" without ever interviewing witnesses to the event specifically identified by the resident.

157. Defendants allow New South Shore Manor's operator to challenge the Department's responses to residents' complaints and the determinations made at the close of investigations actions through IRPs and post-IRP "formal hearings."

158. Defendants provide no administrative procedures for the residents of New South Shore Manor to challenge the Department's responses to their complaints and the determinations made at the close of investigations actions.

Example of Defendants Excluding Residents from the Investigation Process: Oceanview Manor Home for Adults, Brooklyn, New York

159. Upon information and belief, Oceanview Manor Home for Adults ("Oceanview") is an impacted adult home located within Defendant Cannavo's region of oversight.

160. Defendant Hart testified under oath on October 5, 2004 that Oceanview had a history of withholding residents' public benefits and unlawfully conditioning residents' receipt of those benefits upon following "rules" imposed by the adult home administrators.

161. Residents of Oceanview commenced a class action lawsuit in 2004 to stop the administrators from unlawfully withholding statutorily-protected personal needs allowances when the Department failed to enforce the regulations.

162. Upon information and belief, the Department received complaints from multiple residents at Oceanview in 2010 and 2011 that the administrators were, again, unlawfully conditioning residents' receipt of benefits upon following "rules" imposed by the adult home administrators.

163. Upon information and belief, Defendant Cannavo found that these complaints were "unsubstantiated" after MARO conducted an investigation. However, the Department failed to interview any of the complaining residents about these allegations.

164. Defendants allow Oceanview's operator to challenge the Department's responses to residents' complaints and the determinations made at the close of investigations actions through IRPs and post-IRP "formal hearings."

165. Defendants provide no administrative procedures for the residents of Oceanview to challenge the Department's responses to their complaints and the determinations made at the close of investigations actions.

FACTS OF NAMED PLAINTIFF AND PROPOSED CLASS REPRESENTATIVE
NORMAN BLOOMFIELD

Background

166. Plaintiff Bloomfield resides at Surf Manor, an impacted adult home located within Defendant Cannavo's region of oversight.

167. Upon information and belief, Surf Manor houses approximately 200 residents.

168. Upon information and belief, Surf Manor is an "impacted" facility.

169. Plaintiff Bloomfield has a psychiatric disability. He receives SSI based on his indigence and disability.

170. Plaintiff Bloomfield is the president of the Surf Manor Residents' Council. In that capacity, Plaintiff Bloomfield has acquired personal knowledge of the adult home's operator and administrator financially exploiting and psychologically abusing residents on multiple occasions.

Defendants Document Violations At Surf Manor But Do Not Adequately Protect Residents' Rights.

171. Surf Manor has failed to implement adequate grievance procedures within the facility and has otherwise refused to comply with the Department's regulations. As a result, Plaintiff Bloomfield frequently seeks Defendants' assistance to address unsanitary conditions, rights violations, and a variety of other complaints at Surf Manor.

172. Over the years, Defendants have consistently failed to effectively enforce compliance with the regulations underlying Plaintiff Bloomfield's complaints.

173. The Department has conducted an average of approximately one inspection of Surf Manor every two months since 2010. However, these frequent inspections have done little to protect residents' rights at Surf Manor.

174. Between November 2009 and September 2011, Plaintiff Bloomfield made approximately thirty-five complaints to the Department regarding rights violations and hazardous conditions impacting Surf Manor residents.

175. Upon information and belief, the Department issued an inspection report on February 25, 2010 in connection with certain of Plaintiff Bloomfield's complaints. In that report, Defendants concluded that Surf Manor housed a resident who was "chronically unable to walk without constant one to one supervision" on an upper-level floor. The inspector reported

that another resident with a mobility impairment had become “more disabled” as a result of Surf Manor’s failure to obtain appropriate services for him.

176. Defendants’ February 25, 2010 inspection report stated that “[d]uring the months of January/February 2010, on two separate occasions, two independent contractors that regularly work for the operator at the facility made remarks to the Resident Council President, [Plaintiff Bloomfield], that were both threatening to the well being of the resident and were disrespectful, discourteous and intimidating.” The investigator further reported, “(4) Resident ’s [sic] spoke to this surveyor regarding the disrespect showed to them and other residents by staff ... [c]omplainants were only willing to disclose their identity to the surveyor and to further protect their identity, th[e] surveyor did not meet with them on site preferring to interview them on the telephone and handing a handwritten letter given to this surveyor by [Plaintiff Bloomfield].”

177. Upon information and belief, the February 25, 2010 inspection report required Surf Manor’s operator to resubmit the qualifications for the facility’s case manager along with a justification for why that person should remain as case manager.

178. Upon information and belief, the Department issued violations and a corrective action order on April 20, 2010, after finding that Surf Manor’s staff members continued to dismiss residents’ serious grievances with sarcasm, criticism, hostility, and a lack of respect.

179. Upon information and belief, the April 20, 2010 inspection report included many of the same complaints identified in the February 25, 2010 report. It stated that “employee #1” at Surf Manor did not deny telling a resident to “call either the Italian mafia or the Jewish Mafia” to remedy the resident’s complaint but instead that he attempted to justify this statement by saying that “he and the residents will frequently joke around with each other.” The inspector

noted that the resident was so fearful of retaliation that he or she insisted on reporting the incident anonymously.

180. Upon information and belief, the April 20, 2010 inspection report stated that two residents “both felt physically ill and extremely stressed” after the adult son of Surf Manor’s operator intimidated them.

181. In June of 2010, Plaintiff Bloomfield complained to Defendants on behalf of a resident who did not receive SSI for four months after moving into the facility.

182. Upon information and belief, the Department issued violations and a corrective action order on June 30, 2010. The investigation report concluded that, among other things, Surf Manor had failed to implement adequate grievance procedures. It also identified multiple case management failures and a lack of personal care services required under the regulations.

183. Upon information and belief, the Department issued violations and a corrective action order on September 13, 2010, after finding that the facility failed to provide essential case management services needed to help residents obtain health services from a cardiologist, ophthalmologist, and other providers.

184. Upon information and belief, the September 13, 2010 inspection report also stated that “the operator failed to arrange for appropriate professional evaluation of (1) resident when the resident exhibited a deterioration of mental health” after moving into the facility.

Defendants Routinely Refuse To Issue Violations After Investigators Uncover Evidence of Surf Manor’s Violations Of Residents’ Rights, And Plaintiff Bloomfield Has No Administrative Recourse To Challenge These Determinations.

185. Not only have Defendants failed to enforce their corrective action orders and violations, Defendant Cannavo has repeatedly advised Plaintiff Bloomfield that the Department

did not issue violations against the home even when investigators found that Surf Manor infringed on residents' rights and safety or failed to remedy previous violations.

186. Plaintiff Bloomfield received post-investigation letters from Defendant Cannavo on or about April 2, 2010, May 3, 2010, July 16, 2010, August 5, 2010, February 23, 2011, and September 14, 2011, wherein Defendant Cannavo stated that Plaintiff Bloomfield's complaints were "found to be substantiated but no violation [was] issued."

187. In his February 23, 2011 letter, Defendant Cannavo advised Plaintiff Bloomfield that the Department's investigation noted violations in "Resident Services-Case Management, Resident Services – Personal Care, Resident Services – Medication Management, Resident Rights, Physical Environmental-Furnishings/Equipment, Physical Environment – Housekeeping, and Physical Environment – Maintenance and Safety" but was not issuing violations against the facility.

188. In his September 14, 2011 letter, Defendant Cannavo advised Plaintiff Bloomfield that the Department's investigation again identified violations in the area of "Resident Rights" but was not issuing violations against the facility.

189. These letters did not "advise the complainant of the findings" made during Defendants' investigations as required under 18 NYCRR § 486.2(o).

Defendants Deny Plaintiff Bloomfield An Opportunity To Appeal Complaint Investigation Outcomes.

190. On or about January 12, 2011 and January 20, 2011, Plaintiff Bloomfield called the Department's Adult Home Complaint Intake Unit on behalf of two residents who felt that their rights were being violated by Surf Manor.

191. After learning of several egregious case management failures and hazardous conditions affecting a number of other residents, Plaintiff Bloomfield sent a letter to Defendant

Hart on February 7, 2011. That letter carefully detailed Surf Manor's failure to remedy previously-issued violations and described other cases in which the facility seriously endangered residents' health and safety.

192. An investigator from Defendant Cannavo's office investigated these complaints on or about May 6, 2011.

193. On or about June 8, 2011, Plaintiff Bloomfield received two letters from Defendant Cannavo.

194. One of the letters dated June 8, 2011 stated, "Please be advised that staff from this office investigated your complaints regarding above [sic] facility and no evidence of non-compliance with Department regulations related to your complaint could not [sic] be substantiated at this time." Although the letter identified two complaint numbers, it did not provide any information about the substance of the complaints or the basis for the Department's determination.

195. The other letter dated June 8, 2011 stated, "This is to advise you that we have completed our investigation regarding Surf Manor Home for Adults, and were able to substantiate your complaint. The Department is required to identify the areas reviewed during the inspection. The following area was reviewed: Misappropriation of Property – Personal Allowances. An appropriate violations [sic] is being issued for the facility to correct. The operator has the right to contest this violation. Should there be a change in the status of the report, you will be notified."

196. On or about June 22, 2011, Plaintiff Bloomfield spoke directly with the inspector who had conducted the May 6, 2011 inspection and expressed disappointment in the outcome of the investigation. The inspector told Plaintiff Bloomfield that many of the issues raised in the

complaints had been previously investigated. The inspector did not advise Plaintiff Bloomfield how, if at all, he might appeal the outcome of the inspection.

Defendants Inform Plaintiff Bloomfield That Their Complaint Investigation And Review Policies Are Only Designed To Protect Adult Home Operators' Interests.

197. On August 8, 2011, Plaintiff Bloomfield sent a letter to Defendant Hart and to the Department's counsel imploring Defendants to remedy case management failures at Surf Manor and requesting that Defendants reassess their findings with regard to his February 7, 2011 complaints. Plaintiff Bloomfield also asked Defendant Hart, "Why is it that residents do not have the right to appeal DOH decisions while operators do?"

198. On October 7, 2011, Plaintiff Bloomfield received a letter from Jean O. Quarrier, Acting Director of the Department's Bureau of House Counsel, which stated, "If the Department determines that the facility has violated relevant laws and/or regulations, that determination results in enforcement proceedings against a facility's operating certificate. Because enforcement may lead to significant adverse consequences to the holder of the operating certificate, (e.g. license suspension or termination, fiscal penalties) the Department affords the facility due process prior to enforcement. This includes the right to appeal the determination to the Department When an investigation of a complaint by a public agency has determined that the operation of the facility was in compliance with the law, the complainant's allegations of harm have not been supported and the complainant has not been adversely affected. As such, there is no need for an appeal process within the Department of Health, since the Department is representing the interest of the public in its investigation."

Defendants Categorically Deny Adult Home Residents With Disabilities Access To Existing Administrative Procedures.

199. Defendants have denied Plaintiff Bloomfield essential information regarding the Department's investigation of his February 7, 2011 complaints.

200. Defendant Cannavo's June 8, 2011 letter stating that certain of his complaints were "unsubstantiated" failed to provide any information about the substance of the inspection or findings underlying the Department's decision.

201. Defendant Cannavo's June 8, 2011 letter stating that one of his complaints was "substantiated" provided no information on the basis of the Department's finding or the substance of the corrective action ordered.

202. Defendants denied Plaintiff Bloomfield's requests to assess his complaints and to contest Defendant Cannavo's determination that certain of his complaints were "unsubstantiated."

203. Defendants' policies deny Plaintiff Bloomfield and other adult home residents the opportunity to request an IRP or another method to challenge the Department's finding that a complaint was "unsubstantiated."

**AS AND FOR A FIRST CAUSE OF ACTION AGAINST DEFENDANTS
VIOLATION OF SECTION 8, ARTICLE IV OF THE NEW YORK STATE CONSTITUTION AND
THE STATE ADMINISTRATIVE PROCEDURES ACT § 202**

204. Plaintiff hereby incorporates by reference each of the preceding allegations as if fully set forth herein.

205. Section 8 of Article IV of the New York State Constitution requires state agencies to publish their rules and regulations:

No rule or regulation made by any state department, board, bureau, officer, authority or commission, except such as relates to the organization or internal management of a state department, board,

bureau, authority or commission shall be effective until it is filed in the office of the department of state. The legislature shall provide for the speedy publication of such rules and regulations, by appropriate laws.

206. The Department is an agency of the State of New York as defined in Section 102(1) of the New York State Administrative Procedure Act.

207. A “rule” within the meaning of SAPA § 102(2)(a) is:

The whole or part of each agency statement, regulation or code of general applicability that implements or applies law . . . or the procedure or practice requirements of any agency, including the amendment, suspension or repeal thereof and (ii) the amendment, suspension, repeal, approval, or prescription for the future of rates, wages, security authorizations, corporate or financial structures or reorganization thereof, prices, facilities, appliances, services

208. Defendants have established and implemented policies related to reviewing adult home residents’ complaints against adult home operators and appeal of agency determinations – including their IRP and post-IRP “formal hearing” procedures – which amount to “rules” within the meaning of SAPA.

209. Defendants’ policies: (1) expand Defendants’ authority to excuse or ignore regulatory violations in contravention of SSL § 461-d; (2) define an administrative appeal process not contemplated by the SSL or departmental regulations; and (3) apply to all adult homes and adult home residents.

210. Defendants’ procedures for conducting IRPs are not interpretive or general policies which have no legal effect; rather, they are rules within the meaning of SAPA since they consist of fixed, generalized procedures that direct the action that must be taken in order for adult home operators to appeal a Department determination, regardless of individual circumstance.

211. Defendants’ IRP procedures apply to all adult homes operators, adult home residents, and other persons within the adult home setting.

212. Pursuant to SAPA § 202, prior to the adoption of a rule, an administrative agency is required to submit a notice of the proposed rule to the Secretary of State for publication in the State Register and is mandated to afford the public an opportunity to submit comments on the proposed rule. The proposed rule must then be published in the State Register for at least 45 days prior to the enactment of the regulation.

213. Defendants have not submitted notice of their IRP rules to the Secretary of State for publication in the State Register or afforded the public an opportunity to submit comments on the change. Defendants have also failed to publish appropriate changes in the State Register for at least 45 days prior to their implementation.

214. Therefore, Defendants' challenged policies regarding the conduct of IRPs and post-IRP "formal hearings" violate Article IV, Section 8 of the New York State Constitution and SAPA and should be annulled.

215. Defendants' failure to officially promulgate rules regarding the IRP and post-IRP "formal hearing" are unjustified and have caused members of the Plaintiff class to suffer harm.

216. Plaintiffs are entitled to the declaration and attorney's fees prayed for below.

**AS AND FOR A SECOND CAUSE OF ACTION AGAINST DEFENDANTS
VIOLATION OF TITLE II OF THE AMERICANS WITH DISABILITIES ACT,
42 U.S.C. §§ 12131-34; 28 C.F.R. § 35.102-178**

217. Plaintiff hereby incorporates by reference each of the preceding allegations as if fully set forth herein.

218. Title II of the ADA § 12132, 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."

219. Section 12102(1) of the ADA explains that the term “disability” includes physical and mental impairments that substantially limit one or more major life activities.

220. Plaintiff Bloomfield has a psychiatric disability that substantially limits his ability to care for himself or work without significant support.

221. Members of the Plaintiff class are persons who, under SSL § 2(21) and 18 NYCRR § 485.2, “are, by reason of physical or other limitation associated with age, physical or mental disabilities ... unable or substantially unable to live independently.” Members of the Plaintiff class also have a record of such impairments and are regarded as having such impairments. Thus, Plaintiffs are “disabled” for purposes of the ADA.

222. Plaintiff Bloomfield and members of the Plaintiff class are qualified to fully participate in the complaint review process because: (1) Article XVII, Section 4 of the New York State Constitution, SSL §§ 461(2) and 461-d, and 18 NYCRR § 486.2 require Defendants to implement the process in order to protect their rights; (2) they have information relevant to fair and effective determinations regarding the issuance of violations and demand for corrective action by the adult home; and (3) they have a direct and substantial interest in ensuring that they are not subjected to conduct and conditions within their own homes that endangers their health, safety, and overall well-being.

223. A “public entity” includes state and local governments, their agencies, and their instrumentalities. Accordingly, the Department is a “public entity,” within the meaning of 42 U.S.C. § 12131 and 28 C.F.R. § 35.104. Defendants are being sued in their official capacities within the Department.

224. Under 42 U.S.C. § 12132, public entities are prohibited from excluding persons with disabilities from participating in or receiving the benefits of services, programs, or activities provided by a public entity, or subjecting persons with disabilities to discrimination.

225. 28 C.F.R. § 35.130(b)(8) explains that Title II of the ADA prevents government agencies from unnecessarily imposing burdens on persons with disabilities that are not placed on persons without disabilities.

226. The IRP and complaint review processes for which Defendants are responsible constitute governmental services covered by the ADA and its implementing regulations.

227. Upon information and belief, Defendants are collectively responsible for reviewing and granting a facility's request to schedule a "formal hearing" to challenge the outcome of an IRP.

228. Defendants have discriminated against Plaintiffs by, *inter alia*: (i) excluding them from participation or denying them a benefit or service by reason of their disability and have otherwise discriminated against Plaintiffs by reason of their disability; (ii) imposing burdens upon adult home residents with disabilities that are not imposed upon non-disabled adult home operators who participate in Defendants' complaint investigation and enforcement program; and (iii) conducting biased administrative appeals in place that undermine the purpose of the complaint inspection process.

Methods of Administration that Subject Members of the Plaintiff Class to Discrimination

229. The ADA specifically prohibits public entities from "utiliz[ing] criteria or methods of administration: (i) That have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability; [or] (ii) That have the purpose or effect of

defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities" 28 C.F.R. § 35.130(b)(3).

230. The complaint review process is a government service that, in accordance with Section 4 of Article XVII of the New York Constitution, SSL § 461(2), SSL § 461-d, and 18 NYCRR § 486.2, is intended to protect members of the Plaintiff class from unlawful conduct and hazardous conditions within adult homes.

231. Defendants afford adult home operators an opportunity to challenge violations and corrective action orders through two administrative proceedings - IRPs and post-IRP "formal hearings."

232. Defendants prevent adult home residents, who are persons with disabilities, from participating in IRPs and post-IRP "formal hearings."

233. Defendants' preferential treatment of adult home operators in IRPs and post-IRP "formal hearings" contravenes the express purpose of the complaint investigation process and the Department's constitutional and statutory mandate to protect adult home residents with disabilities.

234. Defendants' conduct of IRPs and post-IRP "formal hearings" has a disparate impact on persons with disabilities and, therefore, is prohibited under the ADA.

Disparate Treatment

235. Defendants have intentionally discriminated against members of the Plaintiff class in the implementation of the complaint review process.

236. Defendants have exhibited a deliberate indifference to the strong likelihood that their inspection and enforcement policies will result in the Plaintiff class's federally-protected rights being violated.

237. Defendants' complaint review and appeal procedures are motivated by Defendants' misperceptions of mental illness and the animus of adult home operators, to whom Defendants are knowingly responsive, toward the Plaintiff class based on their psychiatric disabilities.

238. Defendants are knowingly responsive to and have designed their complaint investigation, review, and appeal procedures to promote the interests of adult home operators.

239. Defendants intentionally discriminate against members of the Plaintiff class, who are all persons with disabilities, by denying them meaningful participation in Defendants' complaint review process, including IRPs.

240. Defendants intentionally discriminate against members of the Plaintiff class by withholding material information about their complaint review process, including corrective action orders, IRPs, and post-IRP "formal hearings," from members of the Plaintiff class.

241. Defendants also intentionally discriminate against members of the Plaintiff class by: (i) denying them an opportunity to contest the outcome of a complaint investigation; (ii) preventing Plaintiffs from participating in IRPs and post-IRP "formal hearings" while failing to conduct those proceedings in an impartial manner; and (iii) imposing upon Plaintiffs the burden of commencing costly litigation to challenge the results of Defendant Cannavo's complaint review processes. This denies members of the Plaintiff class meaningful access to Defendants' complaint review and administrative appeal processes.

242. Defendants' policies have a discriminatory impact on members of the Plaintiff class by affording adult home operators an opportunity to challenge the Department's actions with respect to the complaint review process through administrative appeals while denying

members of the Plaintiff class the opportunity to protect their rights through that same administrative appeal process.

Disparate Impact – Implementation of 18 NYCRR § 486.2(o)

243. Defendants' regulations state:

After a complaint investigation has been completed, the department shall advise the complainant of the findings and corrective action, if any. However, a complainant shall not be advised of the outcomes of an investigation which is being contested by an operator or when civil or criminal action might be compromised by such notice. 18 NYCRR § 486.2(o).

244. 18 NYCRR § 486.2(o) is "facially neutral" insofar as it does not expressly distinguish between people who are disabled and non-disabled people.

245. Defendants' implementation of 18 NYCRR § 486.2(o) has a disparate impact on disabled adult home residents inasmuch as it: (1) restricts the information provided to members of the Plaintiff class to simply the area of inspection involved in a substantiated complaint while providing detailed findings to adult home operators; (2) prevents current and prospective adult home residents from obtaining critical information about regulatory violations and residents' rights violations that have occurred within the facility; (3) increases the likelihood that current and prospective adult home residents will suffer ongoing rights violations and abuses within adult homes; and (4) places adult home residents at an evidentiary disadvantage in any litigation they may commence that arises out of complaints.

246. Defendants' regulations and conduct in connection therewith violate the equal access to government services and programs requirements of 42 U.S.C. § 12132 and constitute discrimination on the basis of disability against Plaintiffs.

247. Defendants' discrimination harms Plaintiffs by: (1) resulting in ongoing violations of their rights by adult home operators and administrators; (2) imposing upon Plaintiffs the costs

of litigation to remedy rights violations by adult home operators and administrators;
(3) impairing Plaintiffs' ability to commence litigation by withholding material information from Plaintiffs and conducting IRPs in secrecy.

248. Defendants' conduct constitutes an ongoing and continuous violation of the ADA and, unless restrained from doing so, Defendants will continue to violate said law. The conduct complained of herein, unless enjoined, will continue to inflict injuries for which Plaintiffs have no adequate remedy at law. Consequently, Plaintiffs are entitled to injunctive relief pursuant to Section 203 of the ADA, 42 U.S.C. § 12133, and attorney's fees.

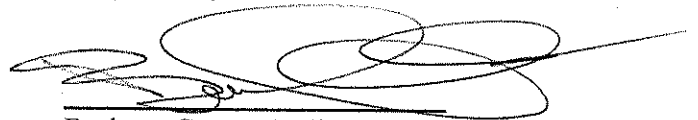
PRAYER FOR RELIEF

WHEREFORE, Plaintiff Norman Bloomfield, on behalf of himself and all other members of the putative class, respectfully requests that this Court:

- a) Declare that the acts and practices complained of herein violate the Article IV, § 8 of the New York State Constitution and the State Administrative Procedure Act § 202;
- b) Declare that the acts and practices complained of herein violate the Americans with Disabilities Act;
- c) Enjoin and permanently restrain these violations of state and federal law;
- d) Award reasonable attorney's fees, costs and disbursements, pursuant to CPLR § 8601 and 42 U.S.C. § 12205; and
- e) Order such other further relief as this Court deems just and proper.

Dated: New York, New York
January 5, 2012

Respectfully submitted,



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