

CLINTON L., by his guardian and next
friend CLINTON L., SR., and
TIMOTHY B. by his guardian and next
friend ROSE B., and others similarly
situated,

Plaintiffs,

v.

LANIER CANSLER, in his official
capacity as Secretary of the Department
of Health and Human Services, and DAN
COUGHLIN, in his official capacity as
CEO and Area Director of Piedmont
Behavioral Healthcare Local
Management Entity,

Defendants

CIVIL CASE NO. 1:10-CV-00123

Plaintiff Clinton L., by his guardian and next friend Clinton L., Sr., and Timothy B., by his guardian and next friend Rose B., hereby move the court for a Temporary Restraining Order and a Preliminary Injunction, pursuant to Fed. R. Civ. P. 65, prohibiting Defendants from implementing any reductions to the daily reimbursement rate for Supervised Living services currently in effect as of the date of this filing, otherwise known by their service codes YM811 and YM812, to preserve Plaintiffs' level of care and community placements in their own homes. In support of their motion, Plaintiffs state as follows:

Background

1. Plaintiffs suffer from a variety of chronic and disabling conditions, including mental retardation and some form of mental illness (MR/MI) that require twenty-four hours of care and supervision each day. Additionally, Named Plaintiff Timothy B. is deaf.

2. Plaintiffs are recipients of *Thomas S.* funding (now called MR/MI funding) who have been receiving state-funded Supervised Living services through North Carolina's DHHS Division of Mental Health, Developmental Disabilities, and Substance Abuse Services. In addition, Plaintiffs receive health care and other services through the Cardinal Health Plan and Innovations Waiver programs offered by their Local Management Entity (LME). Piedmont Behavioral Healthcare is the Plaintiffs' LME.

3. Defendant Lanier Cansler is the Secretary of the North Carolina Department of Health and Human Services (DHHS). DHHS is the "single state agency" responsible for the administration and supervision of North Carolina's Medicaid program under Title XIX of the Social Security Act. 42 C.F.R. § 431.10 (2008). Defendant Cansler is also responsible for the ultimate oversight of Local Management Entities to ensure that they provide publicly-funded services in accordance with the law. *See* N.C.G.S. § 122C-111, *et seq.*

4. Defendant Dan Coughlin is the CEO and Area Director of Piedmont Behavioral Healthcare (PBH), an LME with a geographic service area encompassing Cabarrus, Davidson, Rowan, Stanly, and Union Counties. Within

the State and Medicaid-funded system of mental health, developmental disabilities, and substance abuse services in North Carolina, LMEs are the locus of coordination for these services at the community level. *See* N.C.G.S. § 122C-101; N.C.G.S. § 122C-115.4(a). Defendant Coughlin's responsibilities include financial management and accountability for the use of State and local funds and information management for the delivery of publicly funded services. *See* N.C.G.S. § 122C-115.4(b)(7).

5. Defendant Coughlin is also responsible for the implementation and management of PBH's Medicaid Home and Community-Based Services (HCBS) Community Alternatives Program Waivers (the Innovations Waiver), consistent with federal law.

6. These Medicaid and State-funded services have allowed Plaintiffs to live successfully and independently in their own homes and to participate in family and community life; Named Plaintiff Clinton L. for more than eight years and Named Plaintiff Timothy B. for more than a decade. The Plans of Care for Named Plaintiffs Clinton L. and Timothy B. both call for these services to be delivered, reflecting a determination by their treatment teams that the service is medically necessary. This determination of medical necessity has been ratified by PBH by its authorization for delivery of the service.

7. On January 11, 2010, PBH issued a memorandum to providers describing cuts to the Supervised Living services. Effective February 15, 2010, the per diem rate for Supervised Living services will decrease to \$116.15. The memorandum

does not state that PBH will permit any exception to these rate cuts. PBH did not notify Plaintiffs of these rate cuts, choosing instead to give notice only to providers.

8. For Named Plaintiff Clinton L., the proposed rate is nearly 30% less than the current rate. For Named Plaintiff Timothy B., the proposed rate is nearly 55% less than the current rate.

9. The costs incurred by the providers of residential services for Supervised Living consumers such as Clinton L. and Timothy B. will substantially exceed PBH's proposed per diem rate of \$116.15. Because providers would only be able to operate Supervised Living services at a loss, they will no longer offer it in the five counties served by PBH. The rate cuts create a substantial certainty that all Supervised Living providers in the five counties served by PBH will withdraw from offering the services.

10. As a result of the provider elimination, Plaintiffs will no longer have access to Supervised Living services. Plaintiffs will then be forced out of their community placement in their own homes into more restrictive congregate placements and/or institutions.

11. Residential staffing services available through the Innovations Waiver cannot be combined in any way to achieve twenty-four hour staffing and supervision without reasonable modification of the service definitions. Consequently, a plan of care under the Innovations Waiver must be supplemented

with additional state-funded services, such as Supervised Living services, if twenty-four hour staffing is required.

12. Currently, Plaintiffs are faced with two equally discriminatory options when the rate cut becomes effective on February 15, 2010: (1) transition to congregate placements that cannot meet Plaintiffs' need for constant care, support, and supervision or (2) enter institutions.

13. Pursuant to Fed. R. Civ. P. 65(b)(1)(B), Plaintiffs' counsel certifies that it made efforts to give notice to Defendants of its intent to litigate this matter. On January 29, 2010, Plaintiffs' counsel faxed a copy of a demand letter to Defendant Coughlin at his place of business and delivered a copy of the same demand letter to Defendant Cansler.

14. The Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et seq.* and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, require that individuals with disabilities, such as Plaintiffs, be served in the least restrictive environment in the community when that option is cost-neutral as compared to an institution. Plaintiffs' placements have been successful and cost-effective as compared to their care in an institution for many years.

15. Defendant Coughlin has failed to properly exercise his authority and discretion to assess Plaintiffs' individual needs and maintain their state MR/MI funding and keep them in their long-time community placements. By his actions in sharply reducing the reimbursement rate for Plaintiffs' Supervised Living

services, Defendant Coughlin has effectively abolished this necessary service in the area served by PBH.

16. Plaintiffs will suffer irreparable injury if the Defendants are permitted to eliminate or significantly reduce their funding and services. Plaintiffs will exchange the safety and independence of their individual community placements, where they have been able to receive regular and reliable treatment and care, for more restrictive and inappropriate institutional or congregate settings that do not meet their needs. In addition, the entire system of care that Plaintiffs have enjoyed for years will be dismantled and is in danger of being permanently lost.

WHEREFORE, Plaintiffs seek a Temporary Restraining Order and a Preliminary Injunction to enjoin Defendants from implementing any reductions to the daily reimbursement rate currently in effect for Supervised Living services to allow Plaintiffs to preserve their access to twenty-four hour care and supervision and to maintain their community placements in their own homes.

Pursuant to Local Rule 65.1(b), Plaintiffs also request leave to present oral argument and testimony in support of their Motion for a Temporary Restraining Order and Preliminary Injunction.

Dated: February 11, 2010

/s/ John R. Rittelmeyer

John R. Rittelmeyer
john.rittelmeyer@disabilityrightsnc.org
N.C. State Bar No. 17204

Jennifer L. Bills
jennifer.bills@disabilityrightsnc.org
N.C. State Bar No. 37467

Andrew B. Strickland
andrew.strickland@disabilityrightsnc.org
N.C. State Bar No. 40490

DISABILITY RIGHTS NC
2626 Glenwood Avenue, Suite 550
Raleigh, NC 27608
Phone: (919) 856-2195
Fax: (919) 856-2244
Attorneys for Plaintiffs