IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

CLINTON L., by his guardian and next friend CLINTON L., SR., and TIMOTHY B., by his guardian and next friend ROSE B., VERNON W., by his guardian and next friend VERNON D. W., and STEVEN C.,	)	CIVIL CASE NO. 1:10-CV-00123
Plaintiffs,	)	MEMORANDUM IN SUPPORT OF PLAINTIFFS' RENEWED MOTION FOR PRELIMINARY INJUNCTION
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 of the Piedmont Behavioral Healthcare Local Management Entity,	)	
Defendants.	)	

In accordance with this Court's previous order dated February 19, 2010, Plaintiffs' counsel has located four additional individuals subject to the rate cut who are at risk for institutionalization owing to the reductions in their level of care. On March 30, 2010, a First Amended complaint was filed that added two additional clients, Steven C. and Vernon W. Filed together with this Renewed Motion for Injunctive Relief is a Motion to Intervene two additional clients, Jason A. and Diane D. Plaintiffs Timothy B., Vernon W., Steven C., and Plaintiff-Interveners Jason A. and Diane D.,[1] move the Court for a

[1] Clinton L. remains a Plaintiff in the case, but as the Court previously noted, "the evidence before the Court indicates that Clinton L. will receive the same services even after the rate cuts are imposed." Should Clinton L. receive notice from his provider discharging him from his current placement, he may return to the Court for further relief.

Preliminary Injunction prohibiting PBH from applying the $116 per day rate for YM 811 and YM 812 services.

This suit challenges the Defendants' actions in effectively eliminating medically necessary services that the Plaintiffs and Plaintiff-Interveners (collectively, "Plaintiffs") have long received. In order to maintain the *status quo* and preserve the funding for their community placements, Plaintiffs renew their motion for a Preliminary Injunction. Injunctive relief is required in order to prevent the elimination of the state-funded services that allow Plaintiffs to remain in the community. Defendants' proposed reduction of the reimbursement rate for Plaintiffs' state-funded services would indirectly but effectively eliminate these services in the five counties served by Defendant Piedmont Behavioral Healthcare, also known as PBH. Without these state-funded services, Plaintiffs are at risk of institutionalization and the simultaneous dismantling of their systems of care.

SUMMARY OF THE CASE

Plaintiffs are adults with dual diagnoses of a developmental disability and mental illness, as well as other chronic conditions. Plaintiffs require continuous supervision and support in nearly all aspects of their lives, which need is met through a combination of services. Some of these services are paid with state funds; some are federally-funded through the Medicaid system.

On February 15, 2010, as announced in a PBH "Communications Bulletin" dated January 11, 2010, Defendant Coughlin implemented a drastic cut to the daily rate paid by

PBH for the "Supervised Living – 1 Resident" service, otherwise known as service code YM811, and "Supervised Living – 2 Resident" service, otherwise known as service code YM812. These Supervised Living services are considered to be "wrap-around" services, paid with state funds and intended to augment the residential staffing services available to participants in the Innovations Waiver program. Prior to February 15, 2010, the rate for the "Supervised Living – 1 Resident" service was variable, while the rate for "Supervised Living – 2 Resident" service was a standard rate of $161.99 per day. Plaintiff Timothy B. has been authorized to receive "Supervised Living – 1 Resident" services at a rate of $250 per day. Plaintiff Diane D. has been authorized to receive "Supervised Living – 1 Resident" services at a rate of approximately $240 per day. All other Plaintiffs have been authorized to receive this service at the standard rate.

The rate reduction announced on February 15 was substantial, representing a 30% reduction for most recipients of the service. For Timothy B. and Diane D. the rate for Supervised Living services would be cut by more than 50%. The providers of Plaintiffs Timothy B. and Vernon W.'s Supervised Living services have informally agreed to continue providing Supervised Living services until April 15, 2010. Plaintiff Steven C.'s provider has agreed to continue providing Supervised Living services at the current level of support until April 13, 2010. As will be discussed below, the new rates for Supervised Living services have already affected the plans of care for both Plaintiff Jason A. and Plaintiff Diane D.

Providers' costs in offering Supervised Living services exceed the daily rate for Supervised Living services that became effective on February 15, 2010. By April 15, 2010, the providers of Plaintiffs' Supervised Living services will be forced to either offer Plaintiffs a reduced level of services, or will withdraw from offering the Supervised Living services altogether.

Neither choice provides a level of care appropriate to Plaintiffs' needs. Without these Supervised Living services, Plaintiffs are at a risk of being forced out of their current placements into group homes or other congregate living arrangements, which will not provide the continuous supervision and support that Plaintiffs require to live in the community.

If Plaintiffs are no longer able to access Supervised Living services, the only remaining source of funding available to them would be the Innovations Waiver. However, the limitations in the service definitions and utilization guidelines governing the Innovations Waiver prohibit Plaintiffs from benefitting from the full array of services to which Plaintiffs should otherwise be entitled. Without the required supervision, it is likely that Plaintiffs would be forced into an institution, in violation of the Americans with Disabilities Act and the Rehabilitation Act of 1973. *See* 42 U.S.C. § 12101 *et seq.*; 29 U.S.C. § 794.

Defendant Coughlin has failed to properly exercise his discretion to assess Plaintiff's individual needs and maintain their state-funded services and permit them to remain in their long-time community placements. Defendant Cansler, who bears the

ultimate responsibility for the administration of mental health services in the state, has failed to exercise his authority and direct Defendant Coughlin to maintain state-funded services for Plaintiffs.

In a hearing before this Court on February 17, 2010, Defendants assured this Court that its actions have only affected a small number of individuals and purported to explain why each recipient of Supervised Living services had no need for these services. *See* Docket Entry 10-5, Declaration of Anna Yon. Since the hearing, counsel has located four individuals whose current residential setting will also be uprooted due to Defendants' cuts to Supervised Living services. In none of these cases have the Defendants conducted an individualized assessment of need or offered any alternate means of addressing the individual's need for one-on-one, 24-hour supervision and support. At the February 17 hearing, Defendants also represented that the process of re-assigning Timothy B. to the Wake County LME was already in motion and would be completed prior to his scheduled discharge date of April 15. Since then, Defendants have made no progress on this proposed transfer. As of the date of this filing, Timothy B. remains a client of the PBH LME, and there is no clear plan to transfer his plan of care to any other LME. Therefore, Plaintiffs renew their motion for a preliminary injunction directing Defendants to maintain Plaintiffs' Supervised Living rates at their current level ($161.99 per day and $240/$250 per day) pending a final resolution of Plaintiffs' claims by this Court.

STATEMENT OF FACTS

Plaintiffs are adults with dual diagnoses of mental retardation and mental illness (MR/MI) and other chronic and disabling conditions that require twenty-four hours of care and supervision. Plaintiffs receive health care and other federally-funded services through the PBH Medicaid Plan (the "Cardinal Health Plan"), as well as services through the Innovations Waiver. Plaintiffs are also eligible for and receive state-funded mental health, developmental disabilities, and substance abuse services in addition to Medicaid services.

Plaintiffs rely on a combination of Medicaid, Innovations Waiver, and state-funded services to live successfully in their own home and to participate in family and community life. Plaintiffs especially depend on the state-funded Supervised Living service to supplement the limited hours of residential staffing services available through the Innovations Waiver. Supervised Living is a "residential service which includes room and support care for one individual who needs 24-hour supervision; and for whom care in a more intensive treatment setting is considered unnecessary on a daily basis." *See* North Carolina's Department of Health and Human Services Division of Mental Health/Developmental Disabilities/Substance Abuse Services MH/DD/SA Service Definitions 164 (January 1, 2003). Currently, it is only through a combination of state-funded Supervised Living services and federally-funded Innovations Waiver services that Plaintiffs can access the twenty-four hours of care and supervision they require to live in their own homes.

Timothy B.

Timothy B.'s diagnoses include Intermittent Explosive Disorder, Major Depressive Disorder, Epilepsy, Deafness, and Severe Mental Retardation. *See* Timothy B. Annual Plan, attached as Plaintiffs' Exhibit 1. Timothy's community placement is his own house in Raleigh, North Carolina, where he lives independently with a rotating schedule of residential workers twenty-four hours a day. *See* Docket Entry 4-1. Timothy also requires staff capable of communicating with him using American Sign Language. On prior occasions when Timothy was unable to communicate with his supervisory staff, he often engaged in destructive outbursts. *Id.*

Timothy B. has a history of placements in group homes which have failed, such failures resulting in his institutionalization at the O'Berry Center in Goldsboro. One of Timothy's institutional placements was seven years in length. *Id.* Timothy has successfully lived in his own home for more than a decade. Timothy's current Individual Support Plan (ISP) calls for Timothy's continued receipt of one-on-one staff support 24 hours per day. *See* Ex. 1. In 2009, a clinician concluded that Timothy's current placement should be maintained, so long as "there [is] a caregiver who knows sign language." March 10 Letter and Evaluation from Dr. George Popper, Plaintiffs' Ex. 2. A recent evaluation, conducted by a psychologist with particular expertise in treating deaf clients, also concluded that Timothy. "will be best served by continuing to live in his current residence with staff supporting him 24 hours each day." *See* Declaration of Barrie Morganstein, Ph.D. ¶8, attached. The evaluation also states that it is

"exceptionally unlikely that [Timothy] will be able to successfully share a residence with another individual, especially another individual with special needs." *Id.* at ¶9.

In response to the original filing of this action, Defendants alleged that, based on his residence, Timothy should properly be a client of the Wake County LME. Defendants assured the Court that this transition to Wake LME would be made shortly. As of the date of this filing, Defendants have completed no such transition. In fact, no plan is in place for Timothy to be transferred to the responsibility of the Wake LME; to the contrary, Wake LME has not been appropriated sufficient federal and state funds for his care, and has resisted any transfer. *See* March 26 letter from Wake LME, attached as Plaintiffs' Exhibit 3.

Meanwhile, Timothy's family would prefer that Timothy B. live closer to his relatives, all of whom live in Davidson County, so long as his "current staffing could be maintained." *See* Declaration of Rose Bryan ¶13, attached. However, no arrangements have been made to provide an equivalent level of care in the Davidson County. While the Wake LME and PBH debate which LME should be responsible for Timothy's care, Timothy remains at imminent risk of discharge from his current home on April 15, 2010. *Id.* at ¶12.

Vernon W.

Plaintiff Vernon W.'s diagnoses include Depressive Disorder, Severe Mental Retardation, and Epilepsy. *See* Vernon W. Worrell Annual Plan, attached as Plaintiff's Exhibit 4, page 15.

Vernon's community placement is his own house in Lexington, N.C., where he lives independently with a rotating schedule of workers twenty-four hours a day. *Id.* at ¶11-12. Prior to his current placement, Vernon had a history of failed group home placements due to his behaviors. *Id.* at ¶7-10. Vernon experienced multiple institutionalizations at Dorothea Dix Hospital, and spent approximately five years in the O'Berry Center in Goldsboro, N.C. *Id.* at ¶ 7-8.

An independent clinician recently concluded that "Vernon's current staffing pattern should be maintained if at all possible," due to Vernon's risk of self-harm and the likely disruption of his current stability. *See* Oct. 2010 Evaluation by Jane Kelman, Attached as Plaintiffs' Exhibit 5. Nonetheless, due to the reduction in Supervised Living services, the provider of Vernon's Supervised Living services will no longer offer those services to Vernon W. on April 15, 2010. *See* January 21 Letter from Youth/Adult Care Management, attached as Plaintiffs' Exhibit 6. Because Vernon owns his current home, Vernon's provider has offered Vernon's family a choice between a group home placement or a reduced level of staffing in the home. Worrell Declaration ¶ 16.

Steven C.

Plaintiff Steven C.'s diagnoses include Depressive Disorder and Mild Mental Retardation. Steven's current community placement is his own home in Lexington, N.C., where he lives independently with a rotating schedule of workers twenty-four hours a day. *See* Declaration of Steven C. ¶2, attached. Prior to his current placement, Steven was discharged from a group home because of his behaviors. At that time, Steven would engage in explosive outbursts, often resulting in injuries to staff or other residents. On at least one occasion, Steven was criminally charged with assaulting another resident. *Id.* at ¶4. Steven's most recent ISP reflects a clinical judgment that "Steven requires highly trained staff for 1:1 habilitative training" to "prevent injury to him or others, and especially to obey laws." *See* Steven C. Annual Plan, attached as Plaintiffs' Exhibit 7.

Due to PBH's recent cuts to Supervised Living services, Steven's provider issued a notice to Steven that they can "no longer support [his] need for 24-hour supervision." *See* January 21 letter from Monarch, attached as Plaintiffs' Exhibit 8. As a result of this letter and PBH's threats to Steven's guardianship, Steven C. applied to a local group home, which has provisionally offered a placement to him; however, Steven is concerned that the level of support he will receive in the group home will cause him to revert to his earlier behaviors. *See* Steven C. Declaration, ¶8-12.

Jason A.

Plaintiff-Intervener Jason A.'s diagnoses include Mood Disorder with aggression, Obsessive-Compulsive Disorder, Attention Deficit Hyperactivity Disorder with Autistic

Tendencies, and Moderate Mental Retardation. *See* Declaration of Brenda Arthur ¶5, attached. For nearly 10 years, Jason has lived in a two-person group home where he lives with one other resident and a rotating schedule of workers twenty-four hours a day. *Id.* at ¶14. Because he has difficulty expressing his needs and frustrations and has virtually no impulse control, Jason has a long history of severe verbal and physical aggression, as well as self-injurious behavior. *See* Jason A. Annual Plan, attached as Plaintiffs' Exhibit 9.

Clinical evaluations of Jason have consistently determined that he should not live with more than one roommate. *See* Arthur Declaration ¶17; s*ee also* Ex. 9. Jason has several documented incidents of physical aggression towards his current roommate. *See* Ex. 9; *see also*, Declaration of Deborah Thome ¶9, attached; and Arthur Declaration ¶19. As a result of PBH's rate cut to Supervised Living funds, it was no longer financially feasible for Jason's provider to serve only two people living in the home. The provider therefore moved a third resident into the home, which has resulted in a reduced staffing level for Jason. *See* Arthur Declaration, ¶26. It appears that the addition of another resident has upset Jason, and has led to an increase in his maladaptive behaviors. *See* Thome Declaration ¶ 9; s*ee also,* Arthur Declaration at ¶26 and 27.

Diane D.

Plaintiff-Intervener Diane D.'s diagnoses include Intermittent Explosive Disorder, Mild Mental Retardation, Scoliosis, and Cohen Syndrome. *See* Declaration of Thomas Smith ¶4, attached. When agitated, Diane engages in destructive behaviors, which have

included destroying furniture, hitting and kicking others, cursing at staff members, and self-injurious behavior. *Id.* at ¶5 and ¶11. Additionally, Diane is at risk of elopement from the home; when she attempts to leave the home, she does not have any concerns for her safety and will place herself in dangerous situations such as walking in front of traffic. *See* Diane D. Annual Plan, attached as Plaintiffs' Exhibit 10.

For at least the past 10 years, Diane has lived in her own apartment where she lives alone under supervision by a rotating schedule of workers twenty-four hours a day. See Smith Declaration ¶10. Prior to her current placement, Diane attempted to live in two different group homes. However, due to her behaviors, she was discharged from both group homes. *Id.* at ¶8-9. Diane also spent multiple periods of time at different psychiatric hospitals. *Id.* As a result of PBH's rate cut to Supervised Living services, Diane's provider attempted to provide a reduced level of staffing for Diane; however, the provider has since informed Diane's family that they must discontinue Diane's Supervised Living services due to financial concerns. *Id.* at ¶14-15.

As a result of the announced rate cuts, Plaintiffs will be forced to vacate their current placements and move to other, inappropriate congregate placements that do not provide Plaintiffs with the close supervision and care, twenty-four hours a day, that they all require. Without twenty-four hours of care and supervision, it is anticipated that Plaintiffs will be forced into more restrictive, segregated, institutional settings. Away from their homes and communities, Plaintiffs will face increased risk of community-

acquired infections, malnutrition, and depression. They also face immediate risk of loss of the independence and dignity they have enjoyed living successfully in the community.

ARGUMENT

A. Standard of Review

To prevail in a motion for a preliminary injunction the trial court must consider (1) whether plaintiffs are likely to succeed on the merits; (2) whether they are likely to suffer irreparable harm in the absence of the preliminary relief; (3) if the balance of hardships tips in their favor; and (4) whether the injunction is in the public interest. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. __ , 129 S.Ct. 365, 374 (2008); *The Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 346 (4th Cir. 2009), *adopting Winter and overruling Blackwelder Furniture Co. v. Seilig Mfg. Co.,* 550 F.2d 189 (4th Cir. 1977) . As will be shown, Plaintiffs meet all four requirements and should be granted the requested injunctive relief.

B. Plaintiffs Are Likely To Succeed On The Merits.

1. The unwarranted termination of Plaintiffs' funding and services places Plaintiffs at risk of institutionalization and violates the Americans with Disabilities Act.

On April 15, 2010, Plaintiffs' ability to access state-funded Supervised Living services will be drastically reduced or eliminated, which will force Plaintiffs to transition to institutional placements, either immediately or imminently. Title II of the Americans with Disabilities Act (ADA) protects qualified individuals with disabilities from discrimination by public entities such as DHHS and PBH. "Qualified individuals with

disabilities" are those who "with or without reasonable modifications to rules, policies, or practices . . . mee[t] the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2). Prohibited discrimination by public entities includes the failure to provide persons with disabilities a community-based placement when such placement is appropriate; the individual wishes to reside in the community; and the placement can be reasonably accommodated. *Olmstead v. L.C.*, 527 U.S 581, 587 (1999).

Plaintiffs are qualified individuals with disabilities who are being illegally discriminated against by the two defendant public entities. Defendant Cansler is the Secretary of the North Carolina Department of Health and Human Services, which is unquestionably a public entity. Defendant Coughlin is the CEO and Area Director of PBH, a local political subdivision of the State and a public entity. *See* N.C.G.S. § 122C-116(a). As the director of PBH, Defendant Coughlin is vested with the authority to manage state-funded services in the area served by his LME and to oversee the operation of the PBH Innovations Waiver. N.C.G.S. § 122C-115.4(a). Plaintiffs are individuals with disabilities in that they are diagnosed with mental retardation and mental illness. Plaintiffs are qualified persons with disabilities in that they meet the essential eligibility requirements for and are in receipt of services from the PBH Medicaid program, the Innovations Waiver program, and State-funded mental health, developmental disabilities, and substance abuse services programs with or without reasonable modification to the rules, policies, and practices of those programs. *See* 42 U.S.C. §12131(2).

Defendants' actions constitute illegal discrimination under *Olmstead*. The community-based placements for Timothy B., Vernon W., Steven C., Jason A., and Diane D. have been deemed to be appropriate as demonstrated by their long history of living safely and successfully in their own homes –Timothy B. for over a decade, Vernon W. for over five years, Steven C. for over seven years, Jason A. for over nine years, and Diane D. for over a decade. Community-based treatment is especially appropriate for Plaintiffs as it guarantees them the required level of one-on-one attention that is otherwise unavailable in any congregate or institutional setting.

Plaintiffs' continued residential placement can be reasonably accommodated through continuation of their state-funded services or, alternatively, through modifications to the Innovations Waiver service definitions. However, despite Plaintiffs' successful integration into their communities and their continued eligibility for the Innovations Waiver and state-funded Supervised Living services, Plaintiffs could be forced to leave their homes after the new rate structure is applied to Plaintiffs' care by April 15, 2010. Defendant Coughlin's threatened abolition of Plaintiffs' Supervised Living services violates Plaintiffs' rights to be free from discrimination based on their disability under the ADA, as recognized in *Olmstead*.

2. Defendants' reduction of Plaintiffs' funding and services will result in Plaintiffs' unnecessary institutionalization in violation of Section 504 of the Rehabilitation Act of 1973.

The reduction of Plaintiffs' access to state-funded Supervised Living services places them at immediate risk of unnecessary institutionalization in violation of the

Rehabilitation Act of 1973. In the Rehabilitation Act of 1973, Congress stated that "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a), *referencing* 29 U.S.C. § 705(2). "Program or activity" includes a department, agency, special purpose district, or other instrumentality of a State or of a local government. 29 U.S.C. § 794(b)(1)(A). The Rehabilitation Act defines disability as a physical or mental impairment that substantially limits one or more major life activities. 29 U.S.C. § 705(20)(B), *referencing* 42 U.S.C. § 12102(1). Prohibited discrimination includes denial of the opportunity to participate in or benefit from an aid, benefit, or service. 28 C.F.R. § 41.51(b). Moreover, a recipient of federal funds must administer its services, programs, and activities in the "most integrated setting appropriate" to the needs of the qualified individual. 28 C.F.R. § 41.51(d).

Plaintiffs are qualified persons with disabilities in that they meet the essential eligibility requirements for and are in receipt of services from the PBH Medicaid program, the Innovations Waiver program, and state-funded mental health, developmental disabilities, and substance abuse services programs with or without reasonable modification to the rules, policies, and practices of those programs. *See* 42 U.S.C. §12131(2); 29 U.S.C. § 794(a). Defendant Cansler is the Secretary of the North Carolina Department of Health and Human Services, a state agency receiving federal

financial assistance. Defendant Coughlin is the CEO and Area Director of PBH, an instrumentality of the State of North Carolina receiving federal financial assistance.

Defendant Coughlin has failed to properly exercise his authority and discretion by reducing the rate for Supervised Living services so drastically that the network of providers that currently offer these services will terminate or dilute the service rather than operate at a substantial loss. Defendant Coughlin's constructive termination of all Supervised Living services substantially increases Plaintiffs' risk of institutionalization or other placement in a segregated setting. Year after year, by its approval of Plaintiffs' plans of care, PBH determined that the state-funded services used to augment the core Medicaid services were medically necessary for Plaintiffs' care. Plaintiffs' ISPs and additional clinical documentation demonstrate the continued need for this service for each Plaintiff. Now, owing to budgetary pressures alone, PBH proposes to effectively abolish a service that is essential for Plaintiffs' continued community placement – an action that constitutes unlawful discrimination in violation of Section 504 of the Rehabilitation Act. 29 U.S.C. § 794.

In sum, plaintiffs are likely to prevail on their claim that the planned elimination of Supervised Living services, forcing Plaintiffs from their longstanding community placements and into eventual institutional settings, is a violation of the ADA and the Rehabilitation Act. As made clear by the Court in *Olmstead*, a State is required to provide community-based services for eligible persons with disabilities based upon professional assessments. *Olmstead*, 527 U.S. at 602. To ignore this "integration

mandate," the Court found, constituted "unjustified institutional isolation of persons with disabilities," and thus prohibited discrimination under the ADA. *Id.*

C. Plaintiffs will Suffer Immediate and Irreparable Injury without Injunctive Relief.

A preliminary injunction is necessary to prevent Plaintiffs from being institutionalized due to the drastic reduction in state-funded services, scheduled to become effective on February 15, 2010. Plaintiffs seeking preliminary relief must demonstrate that they are likely to suffer irreparable injury in the absence of an injunction. *Winter v. Natural Res. Def. Council, Inc*., 555 U.S. __ , 129 S.Ct. 365, 374 (2008); *Los Angeles* v. *Lyons*, 461 U.S. 95, 103, 103 S.Ct. 1660 (1983). Irreparable injuries are those that cannot be adequately compensated by money damages, such as emotional, psychological, and physical damage. *L.J. v. Massinga*, 838 F.2d 118, 121-22 (4th Cir. 1988) (finding that monetary costs and administrative inconvenience to city from grant of preliminary injunction was outweighed by preventing continuing harm to plaintiffs caused by defendants' mismanagement of foster care system); *see also LaForest v. Former Clean Air Holding Co., Inc.*, 376 F.3d 48, 55 (2d Cir. 2004) (stating that reduction of medical benefits and consequent negative impacts on an individual's health is an irreparable injury).

Plaintiffs are likely to suffer irreparable injury if this Court does not grant them injunctive relief preventing the termination or reduction of their Supervised Living services. If Plaintiffs lose residential staffing services, Plaintiffs will imminently face the prospect of institutionalization or forced transition to congregate placements. Absent

further intervention by this court, the transition to institutional or congregate settings must take place one day after the next scheduled hearing before this court on April 14, 2010, for Plaintiffs Timothy B. and Vernon W. For Plaintiff Steven C., his transition to a larger group home is scheduled to occur on April 13, 2010. For Plaintiff Diane D., she must find a new placement by May 1. For Plaintiff Jason A., he has already been placed in a situation where harm is imminent and the injunction is necessary to restore the level of service he was receiving in his previous 2-person placement.

Defendants' assurances to this Court, as described in Anna Yon's declaration, are called into question by the facts of the new Plaintiffs' cases and by DRNC's monitoring efforts. The monitoring efforts have revealed that several transfers of former Supervised Living clients to more congregate placements are not operating in the successful manner that PBH claims. *See* Declaration of Cas Shearin, attached. For example, several providers plan to request an additional service, supervised employment, as a substitute for the one-on-one supervision consumers no longer receive during portions of each day. However, this additional service, if granted, does not address the situation of some of the consumers we encountered in our monitoring visits, such as "J.B." and "L.," who cannot find employment or whose prior employment efforts have failed even with the presence of one-on-one supervision on the job. *Id.*, ¶12 and ¶20.

These congregate or institutional placements will cause Plaintiffs emotional, psychological, and physical harm that cannot be compensated by an award of monetary damages. Plaintiffs would face a substantial risk of institutionalization without

immediate injunctive relief. Plaintiffs will lose their homes, their staff and an entire system of care that was crafted to meet their unique clinical needs. As a result, Plaintiffs will suffer irreparable injury should they be removed from their current placements.

D. The Balancing of Hardships Tips in Favor of the Plaintiffs.

The balance of hardships tips decidedly in Plaintiffs' favor. As discussed, Plaintiffs face a substantial risk of institutional placement if the injunction is denied. In contrast, the harm that may accrue to Defendants if the injunction is granted is slight. PBH will be required only to maintain funding Plaintiffs' services at a rate and in an amount that PBH has authorized and paid for years. Little harm, if any, will accrue to DHHS – no preliminary relief is requested of Secretary Cansler.

Defendants' apparent plan to group Plaintiffs with other individuals with disabilities in a group home or other congregate living arrangement does not satisfy the State's obligation to provide services "in the most integrated setting appropriate to [Plaintiffs'] needs." Forcing Plaintiffs to move to a congregate living arrangement, such as a group home, will result in the loss of independence, self-direction, and safety they have accumulated over the course of several years. Instead, Plaintiffs' daily schedules and routines would be inevitably tied to the schedules and routines of other individuals residing at the group home.

Additionally, as demonstrated in the case of Jason A., the particular combination of certain consumers' behaviors may prove dangerous when those consumers are placed together in the same home. Plaintiffs' histories of failed group home placements also

demonstrate a clear risk of their eventual placement in an even more restrictive environment, such as a psychiatric hospital or developmental disability center. In sum, Defendants' actions would rob Plaintiffs of their current residential settings that "enables [them] to interact with non-disabled persons to the fullest extent possible." *Olmstead*, 527 U.S. at 592.

E. The Public Interest Demands that the Injunction be Granted.

Enforcement of laws passed by Congress is in the public interest, even when that means enjoining allegedly illegal actions by another government body. *Glenwood Bridge, Inc. v. City of Minneapolis*, 940 F.2d 367, 372 (8th Cir. 1991). The public interest is served when laws passed by Congress are enforced and the rights of persons with disabilities are vindicated. "While achieving budgetary savings is also in the public interest of state and federal taxpayers, that interest must give way if it is in conflict with federal substantive law." *Kansas Hosp. Assn, v. Whiteman*, 835 F. Supp. 1548,1553 (D. Kan. 1993); *see also Haskins v. Stanton*, 794 F.2d 1273, 1277 (7th Cir. 1986) (where an injunction requires defendants to comply with existing law, the injunction imposes no burden but "merely seeks to prevent the defendants from shirking their responsibilities") *and Independent Living Center v. Maxwell-Jolly*, 572 F.3d 644, 659 (concluding that financial considerations due to the state's fiscal crisis were outweighed by the "robust public interest" in safeguarding access to healthcare).

The interest of the citizens of North Carolina are best served by enjoining Defendants from enforcing arbitrary cuts and denials of necessary services for Plaintiffs.

The ADA requires that persons with disabilities be cared for in the most integrated settings possible, a requirement that is being undermined by Defendants' actions.

F. The Court Should not Require a Bond.

In the exercise of their discretion under FRCP 65(c), federal courts frequently waive bond requirements in suits brought by citizens to enforce their important federal rights. *See, e.g., Barahona-Gomez v. Reno*, 167 F.3d 1228, 1237 (9th Cir. 1999) (noting that "[t]he district court is in a far better position to determine the amount and appropriateness of the security required under Rule 65"); *Doctor's Associates, Inc. v. Stuart*, 85 F.3d 975, 985 (2d Cir. 1996) (affirming the district court's decision not to require bond); *Moltan Co. v. Eagle-Picher Industries, Inc*., 55 F.3d 1171, 1176 (6th Cir. 1995) (a district court has discretion to require posting of security).

Important federal rights are at stake in this litigation. *See, e.g., Temple Univ. v. White*, 941 F.2d 201, 220 n.27 (3d Cir. 1991) ("Public policy under [federal law governing state modification of Medicaid programs] mandates that parties in fact adversely affected by improper administration of programs pursuant thereto be strongly encouraged to correct such errors"). Given the likelihood that Plaintiffs will succeed on the merits, Plaintiffs' status as public assistance recipients, as well as the fact that the injunction seeks merely to require PBH to comply with federal law, no bond should issue.

CONCLUSION

Plaintiffs have met their burden of showing (1) a strong likelihood of success on the merits, (2) a substantial likelihood of immediate and irreparable harm, (3) that the

balance of hardships tips in Plaintiffs favor, and (4) that the public interests demands that the injunction be granted. As such, the Court should grant Plaintiffs' Motion for a Preliminary Injunction, prohibiting Defendant Coughlin from implementing the reduced reimbursement rates for the Supervised Living services on which Plaintiffs rely.

Dated: April 7, 2010

Respectfully submitted,

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Certificate of Service

The undersigned hereby certifies that on April 7, 2010, I electronically filed the foregoing Memorandum in Support of Plaintiffs' Renewed Motion for Preliminary Injunction with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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