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., and others similarly situated,	)	
Plaintiffs,	)	
v.	)	1:10CV123
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.	)	

ORDER

This matter is before the Court on Plaintiffs' Supplemental Motion for Preliminary Injunction [Doc. #22]. The Court previously denied the original Motion for Preliminary Injunction filed by Plaintiffs Clinton L. and Timothy B., but the Court set the matter on for a supplemental hearing to consider additional evidence from the parties. Prior to the supplemental hearing, Plaintiffs filed an Amended Complaint adding Vernon W. and Steven C. as Plaintiffs. Plaintiffs also filed the present Supplemental Motion for Preliminary Injunction, again asking the Court to prohibit Defendants from reducing the rates paid to non-party service providers for certain Supervised Living services provided to Plaintiffs. The Court held a hearing on the Supplemental Motion on April 14, 2010.

Plaintiffs Clinton L., Timothy B., Vernon W., and Steven C. suffer from a variety of

disabling conditions, including dual diagnoses of mental retardation and mental illness. They receive health care and other services through North Carolina's Department of Health and Human Services Division of Mental Health, Developmental Disabilities, and Substance Abuse Services. The health care and other services are administered and managed by Piedmont Behavioral Healthcare ("PBH"), which is the Local Management Entity for Cabarrus, Davidson, Rowan, Stanly and Union Counties. One type of service administered by PBH is the "Supervised Living" service, which is a residential service that includes room and support care for individuals who need 24-hour supervision and for whom care in a more intensive treatment setting is considered unnecessary on a daily basis. The Plaintiffs in this case currently receive Supervised Living services that allow them to live alone with 24-hour care and supervision. Thus, although Plaintiffs live alone, they have a staff person with them in their home 24 hours a day. However, as a result of recent state budget cuts, PBH announced on January 11, 2010 that it was changing the rates that it would pay to providers for Supervised Living services for 1-person and 2-person placements (that is, placements where individuals lived on their own or with one other person with 24-hour staff supervision). Under this change, PBH will reduce the rates for 1- or 2-person placements down to $116.15 per day, which is the current rate for 3-person placements (that is, placements in an apartment or residence where an individual lives with two other people with 24-hour staff supervision). This change only affects the state-funded portion of what PBH coordinates; it does not relate to the Medicaid funding for Supervised Living, which PBH administers as the "Innovations Waiver" program.

Plaintiffs bring the present suit against Defendant Dan Coughlin in his official capacity

as CEO and Area Director of PBH (referred to as "Defendant PBH" or "PBH" for ease of reference) and against Defendant Lanier Cansler in his official capacity as the Secretary of the North Carolina Department of Health and Human Services. Plaintiffs contend that due to the reduction in the reimbursement rates for the state funding, Plaintiffs will be "forced into congregate living environments", and "[i]f and when Plaintiffs' placement in a congregate setting are determined to have failed (as is expected), it is believed that Plaintiffs will face forced institutionalization because they would not have the level of support required to maintain their community placements." (Am. Compl. ¶ 71-72).

Under Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 119 S. Ct. 2176, 144 L. Ed. 2d 540 (1999), unnecessary institutionalization of individuals is a form of discrimination under the Americans with Disabilities Act ("ADA"), and persons must be served in the community when (1) the state determines that community-based treatment is appropriate; (2) the individual does not oppose community placement; and (3) community placement can be reasonably accommodated. Title II of the ADA provides that "no qualified individual with a disability shall, by reason of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity or be subject to discrimination by such entity." 42 U.S.C. § 12132. Regulations implementing Title II of the ADA require that a public entity administer its services, programs and activities in "the most integrated setting appropriate" to the needs of qualified individuals with disabilities. 28 C.F.R. § 35.130(d). The Rehabilitation Act imposes similar obligations on recipients of federal financial assistance. 29 U.S.C. § 794; 28 C.F.R. § 41.51(d). Plaintiffs bring claims in this case under both the ADA and the Rehabilitation

Act.[1]

In their present Supplemental Motion for Preliminary Injunction, Plaintiffs contend that their single-person community placements will change as a result of the proposed rate cuts, and that "Plaintiffs are faced with two equally discriminatory options after their planned discharge date: (1) transition to congregate placements that cannot meet Plaintiffs' need for constant care, support, and supervision or (2) enter institutions." (Supp. Mot. [Doc. #22] at 7). Plaintiffs therefore seek a preliminary injunction enjoining Defendant PBH[2] from implementing the rate reduction "to allow Plaintiffs to preserve their access to twenty-four hour care and supervision and to maintain their community placements in their own homes." (Supp. Motion [Doc. #22] at 8).

In response, Defendant PBH contends that clinically-appropriate community-based residential treatment options remain available to each of the Plaintiffs, and that therefore Plaintiffs are not at risk of institutionalization. To the extent that Plaintiffs contend that the rate reduction will result in the elimination of Supervised Living services, Defendant PBH notes that 9 out of the 10 providers of these services in PBH's network are continuing to provide the services. Defendant PBH has also conducted and presented clinical reviews as to each of the four Plaintiffs. As to Plaintiff Clinton L., Clinton L. is diagnosed with Schizoaffective Disorder, Bipolar Disorder, Intermittent Explosive Disorder, and Moderate Mental Retardation. Clinton L. lives in a home that he rents, with 24-hour care and supervision. As noted in this Court's

[1] Plaintiffs do not assert any Constitutional claims in this case, and instead assert only statutory claims under the ADA and the Rehabilitation Act.

[2] Plaintiffs seek a preliminary injunction only as to Defendant PBH.

previous Order, Clinton L.'s provider has determined that it will continue providing services to Clinton L. even after the rates are reduced, with supplementation of other services as necessary to maintain coverage. Therefore, Clinton L. will be able to remain in his current living situation with 24-hour care even after the rates are reduced. At the supplemental preliminary injunction hearing before this Court, Plaintiffs did not present any additional information or concerns with respect to Plaintiff Clinton L., and Defendant PBH noted that Clinton L. has experienced no changes in his services and continues to reside in his single-person placement.

With respect to Plaintiff Vernon W., Vernon W. is diagnosed with Depressive Disorder, Severe Mental Retardation, and Epilepsy. Vernon W. lives in a mobile home purchased for him by his family and has been receiving 24-hour-per-day staffing, although previous assessments have noted a goal of reducing reliance on staff and utilizing other community programs and "assistive technologies." Plaintiffs contend that due to the rate cut, Vernon W.'s guardian has been given a choice between 12-hour-per-day staffing or a move to a 3-person home. However, at the hearing before this Court, Defendant PBH indicated that it had located a provider who was willing to provide 24-hour-per-day supervision to Vernon W. in his current residence at the reduced rate. Therefore, like Clinton L., Vernon W. will continue to receive services in a single person placement even at the reduced rates.

With respect to Plaintiff Stephen C., Stephen C. has been diagnosed with Depressive Disorder, Impulse Control Disorder, and Mild Mental Retardation. Plaintiffs note that Stephen C. is his own guardian and had been living in an apartment with 24-hour supervision, but has agreed to move to a 3-person home. PBH conducted a clinical assessment of Stephen C. and

concluded that it was clinically appropriate and safe to move him to a 3-person home as long as certain conditions were followed, including 1:1 supervision initially to see if any less intense supervision would be appropriate. All of these conditions will be included as part of the new placement. Plaintiffs nevertheless note that Stephen C. has a history of group home failures, and therefore contend that Stephen C. is at greater risk of institutionalization or arrest in a 3-person home.

Finally, with respect to Plaintiff Timothy B., Timothy B. is diagnosed with Intermittent Explosive Disorder, Epilepsy, Deafness, and Moderate Mental Retardation. Timothy B. has been living in an apartment in Wake County with 24-hour staff services. Timothy B. was previously considered to be within PBH's jurisdiction, but due to an amendment to the relevant regulations, it now appears that as of May 1, 2010, his Medicaid county of residence will change to Wake County, which is outside PBH's coverage area. Thus, if Timothy B. continues to reside in Wake County, he may ultimately become the responsibility of the Local Management Entity for Wake County, and PBH will no longer have funding jurisdiction over him. Plaintiffs have raised concerns that Timothy B. is at risk because neither PBH nor the Wake County LME will "take ownership" of him. However, during the hearing before this Court, PBH indicated that it will take responsibility for Timothy B. and will provide a community placement for him in a county within PBH's jurisdiction. PBH has conducted a clinical review and determined that a 3- to 6-person home would be a clinically appropriate placement for Timothy B. and would provide potential social benefits. In particular, prior evaluations have concluded that Timothy B. "would like to have a more structured day" and "needs more interaction with peers in his

community" [Doc. #23-1], and a recent third party evaluation noted that "Timothy's major problem is that of extreme daily boredom." Because Timothy B. is deaf, PBH's proposed placement for Timothy B. would be in a 3- to 6-person home with staff trained in sign language. At the hearing before this Court, PBH noted that it currently has three potential placement options for Timothy B. with staff who communicate in sign language, and one of those placement options is in a home with another deaf individual close in age to Timothy B. In response, Plaintiffs contend that Timothy B.'s treatment plan calls for placement in a single-person residence, and that a psychologist who conducted a recent evaluation of Timothy B. concluded that Timothy B.'s "level of intellectual, emotional, and interpersonal functioning make it exceptionally unlikely that he will be able to successfully share a residence with another individual, especially another individual with special needs." (Morganstein Aff. [Doc. #23-11] at ¶ 9). As noted during the hearing in this matter, Plaintiffs primary concern is that Timothy B. has a history of placements in group homes that have failed, resulting in his institutionalization. Thus, the concern is that his placement in a 3-person home will fail and that he will ultimately be institutionalized. Therefore, Plaintiffs seek an injunction to require PBH to continue funding single-resident services at the previous rate.

A preliminary injunction is an extraordinary and drastic remedy. A movant must establish four elements before a preliminary injunction may issue: (1) he is likely to succeed on the merits; (2) he is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his favor; and (4) and injunction is in the public interest. Winter v. Natural Resources Defense Council, Inc., 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). In

considering the Motion for Preliminary Injunction in the present case, the Court notes that two separate issues have been raised: (1) a challenge to rate cuts that will purportedly lead to "congregate placements that cannot meet Plaintiffs' need for constant care, support, and supervision," and (2) a challenge that as a result of the rate cuts and change in services, Plaintiffs will ultimately be forced to "enter institutions." (Am. Compl. ¶ 71-72). Thus, the first issue relates to Plaintiffs' opposition to a reduction in services and opposition to moving into a different type of community-based placement, while the second issue relates to the allegation that PBH's actions will ultimately result in institutionalization of Plaintiffs.

On the first issue, Plaintiffs contend that the rate cuts should be enjoined because the rate cuts will result in a reduction in services, requiring Plaintiffs to move to 3-person community placements rather than the single-person placements where Plaintiffs have previously lived. On this point, the Court notes that Plaintiffs Clinton L. and Vernon W. will remain in their present homes, and the only Plaintiffs who are changing community placements are Stephen C., who is moving to a new home that he will share with two other individuals, and Timothy B., who needs to move back into a county within PBH's jurisdiction and who has several potential placements in homes that he would share with two to five other people. PBH has conducted medical reviews to ensure that these proposed placements are clinically appropriate, and Supervised Living services will still be provided in the new placements. Although Stephen C. and Timothy B. contend that they should be allowed to maintain their current placements with their current providers, Plaintiffs have pointed to no case or authority that would support the conclusion that they are entitled to a particular provider or type of

community-based placement under the ADA. Plaintiffs do note that the ADA requires placement in "the most integrated setting appropriate" in order to prevent isolation or segregation of individuals with disabilities. However, Plaintiffs have not established that for individuals such as Plaintiffs who require 24-hour care and supervision, a community placement in a home or apartment with two housemates is "segregated" or "isolated". Instead, based on the information presently before the Court, it appears that a 3- to 6-person home in the community would actually be "more integrated" because it would provide more opportunities for involvement in community activities and social interaction for Plaintiffs.[3] Therefore, Plaintiffs have failed to make a clear showing of likelihood of success on their contention that being offered community placement in a residence with two housemates in order to meet their needs for 24-hour supervision would violate the ADA or Rehabilitation Act.

Moreover, the balance of equities and public interest would not support this Court intervening to set the rates paid to non-party service providers. On this issue, the Court notes that most of PBH's local service providers have agreed to continue to provide the same services at the reduced rate, with some restructuring or supplementation with other services to maintain

[3] Indeed, based on the information presently before the Court, it appears that individuals may be more likely to experience isolation if they are living alone with 24-hour supervision, since their only daily interaction is often with their care staff. For example, prior Individual Support Plans for Vernon W. noted that "[h]e currently only receives home supports, with very limited interaction with the community." Similarly, prior evaluations have concluded that Timothy B. "would like to have a more structured day" and "needs more interaction with peers in his community." In addition, it appears that as a general matter, a 3- to 6-person home is a commonly-used community placement for individuals requiring 24-hour care and supervision, and single-person placements are only utilized for individuals who cannot successfully live with other housemates. Plaintiffs have not attempted to establish that this general use of 3- to 6-person homes violates the ADA.

sufficient coverage. As a result, almost all of the individuals who were receiving Supervised Living Services at the 1- or 2-person level will stay in their current living situation, even after the rate cuts take effect. The public interest would not be served by requiring PBH to pay higher rates for these services, where most of the providers of these services have been able to continue providing services at the reduced rates, thus saving money that can be used for other mental health services in the PBH area. Therefore, Plaintiffs have failed to establish a likelihood of success and have failed to establish that the balance of equities and public interest support issuance of an injunction that would set the rates of reimbursement for third party service providers. Therefore, the preliminary relief requested by Plaintiffs seeking to enjoin the reimbursement rate reduction will not be granted.

However, as to the second issue, the Court notes that Plaintiffs contend that they are ultimately at risk of being institutionalized. On this issue, based on the information that has been presented, it appears that institutionalization of Plaintiffs would violate the ADA. As noted above, under Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 119 S. Ct. 2176, 144 L. Ed. 2d 540 (1999), unnecessary institutionalization of individuals is a form of discrimination, and persons must be served in the community when (1) the state determines that community-based treatment is appropriate; (2) the individual does not oppose community placement; and (3) community placement can be reasonably accommodated. In the present case, Plaintiffs have been successfully living in community-based placements for many years. The state has determined that community-based treatment is appropriate for Plaintiffs, and Plaintiffs want to remain in a community placement. In addition, the community placement can be reasonably

accommodated, particularly in light of the fact that community placement of the Plaintiffs has been accommodated for many years. Therefore, Plaintiffs have established a likelihood of success on their ultimate claim that Defendants must provide appropriate community-based placements rather than institutionalizing Plaintiffs. Plaintiffs have also established that they will suffer irreparable harm if they are placed into institutions during the pendency of this suit, and the balance of equities and public interest weighs in favor of ensuring that clinically-appropriate community-based placements are available for Plaintiffs. Defendants contend that there is no risk of institutionalization to any of the Plaintiffs as a result of these rate cuts, and at the first hearing before this Court, PBH represented to the Court that if a 3- to 6-person community placement is not suitable or fails for any of the Plaintiffs, PBH will arrange for a suitable alternative placement. However, during the supplemental hearing, Plaintiffs argued that there is no guarantee that PBH would provide an alternative placement if a 3- to 6-person placement fails. In addition, Plaintiffs note that with respect to Timothy B., the placement options are unsettled because of the potential change in Timothy B.'s county of residence. Plaintiffs contend that the risk of institutionalization is high for both Timothy B. and Stephen C., particularly in light of the prior group home failures that led to their institutionalization in the past. Plaintiffs therefore argued at the supplemental hearing before this Court that PBH should be held responsible for ensuring that community-based placements are available for all of the Plaintiffs during the pendency of this suit. This Court agrees that a limited injunction is appropriate to ensure that Plaintiffs are not institutionalized during the pendency of this lawsuit as a result of PBH's actions. Therefore, although this Court will not set reimbursement rates

for particular types of services, the Court will nevertheless require Defendant Coughlin, as CEO of PBH, to continue to ensure that a clinically-appropriate community-based placement alternative is available for each of the Plaintiffs during the pendency of this suit, as an alternative to institutionalization. Thus, if a change in any of the Plaintiffs' community-based placements is unsuccessful, Defendant Coughlin must arrange for and ensure that that Plaintiff is provided with an alternative community-based placement that is clinically appropriate based on professional recommendations. This could include a single person placement, another 3- to 6-person placement, or some other alternative community-based placement that is consistent with Defendants' obligation to provide clinically-appropriate community-based care and treatment.

Finally, the Court notes that Plaintiffs Counsel has also filed a separate Motion to Intervene [Doc. #21] on behalf of two additional individuals, Jason A. and Diane D. Because these individuals were not previously identified, the Court did not address any claims related to these potential Intervenors at the hearing on the preliminary injunction. Therefore, the Court enters the present Order related to the Plaintiffs presently in this case. The Court will separately consider the Motion to Intervene when it has been fully briefed.[4]

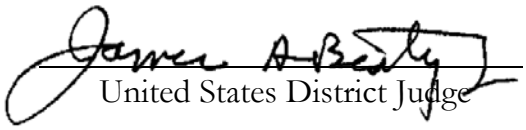
IT IS THEREFORE ORDERED that Plaintiffs' Supplemental Motion for a Preliminary Injunction [Doc. #22] is DENIED to the extent that Plaintiffs ask this Court to set reimbursement rates for certain types of Supervised Living services. However, IT IS ORDERED that Plaintiffs' Supplemental Motion for a Preliminary Injunction [Doc. #22] is

[4] The Court notes that it may be more appropriate to add these parties by way of a Second Amended Complaint rather than by Intervention, but the Court need not reach that issue in the present Order.

GRANTED to the extent that Plaintiffs request that Defendant Coughlin be required to ensure that Plaintiffs are provided with community-based treatment as an alternative to institutionalization during the pendency of this suit.

IT IS THEREFORE ORDERED that Defendant Coughlin, as CEO and Area Director of the PBH Local Management Entity, ensure that each Plaintiff is provided with a clinically-appropriate community-based placement option during the pendency of this suit.

This, the 12th day of May, 2010.



United States District Judge