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., STEVEN C., JASON A., by his guardian and next friend BRENDA A., and DIANE D. by her guardian and next friend THOMAS S.,

Plaintiffs,

vs.

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 the Piedmont Behavioral Healthcare Local Management Entity,

Defendants.

Civil Action No. 1:10-cv-123-JAB

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

Defendants Lanier Cansler ("Cansler") and Dan Coughlin ("Coughlin") (collectively, the "Defendants"), by and through their respective undersigned attorneys and pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure and Local Rule 7.3 (MDNC), respectfully submit this memorandum in support of their motion to dismiss Plaintiffs' case for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted [D.E. 44].

SUMMARY

Effective February 15, 2010, PBH reduced the rate at which it reimburses providers in its network of providers for certain Supervised Living services, referred to by the billing codes YM-811 and YM-812. At the time of the filing of the Complaint, Plaintiffs all received Supervised Living services that their providers billed to PBH as YM-811 or YM-812 services. Plaintiffs have asserted two claims in this case: (1) that Defendants' actions violate Title II of the Americans with Disabilities Act; and (2) that Defendants' actions violate Section 504 of the Rehabilitation Act of 1973. Common to both claims are two separate issues, which this Court has previously summarized:

> [T]wo 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.

[D.E. 36, p. 8] See also Second Am. Compl. ¶ 95-96.

Plaintiffs' claims should be dismissed pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction based on lack of standing and ripeness. To satisfy the Article III "case or controversy" requirement, Plaintiffs must show that they have suffered an injury in fact that is actual or imminent, not conjectural or hypothetical. Further, Plaintiffs' claim for relief is not ripe if it rests on contingent future events that may not occur as anticipated, or may not occur at all. Lack of standing and lack of ripeness each deprive

this Court of subject matter jurisdiction over Plaintiffs' claims. Because Plaintiffs do not face any imminent threat of institutionalization, they lack standing and their claims are not ripe.

Further, Plaintiffs' claims should be dismissed pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted. There is no federal right to be served in a particular placement or by a particular provider. There is no federal right to be served in a single-person placement. Plaintiffs' desire to avoid moving to a clinically-appropriate 2 to 6 person, community-based congregate placement does not present any cognizable federal claim.

STATEMENT OF FACTS

The Defendants

Defendant Cansler is the duly appointed Secretary of the North Carolina Department of Health and Human Services (the "Department"). The duties of the Department are to "provide the necessary management, development of policy, and establishment and enforcement of standards for the provisions of services in the fields of public and mental health and rehabilitation with the intent to assist all citizens – as individuals, families, and communities – to achieve and maintain an adequate level of health, social and economic well-being, and dignity." N.C. Gen. Stat. § 143B-137.

In addition to these general duties, Secretary Cansler also has specific duties assigned by the General Assembly in relation to the provision of Mental Health, Developmental Disability and Substance Abuse Services. Those duties are generally set out in N.C. Gen. Stat. §§ 122C-112.1 and 124.1.

Defendant Coughlin is the CEO and Area Director of PBH. PBH is a multi-county area mental health, developmental disabilities, and substance abuse authority ("area authority") established pursuant to N.C. Gen. Stat. § 122C-115(c) by the Boards of Commissioners of Cabarrus, Davidson, Rowan, Stanly, and Union Counties. As an area authority, PBH is a "local political subdivision of the State." N.C. Gen. Stat. § 122C-116. As an area authority, PBH is also referred to as a "local management entity" ("LME"). N.C. Gen. Stat. § 122C-3(20b).

LMEs are local political subdivisions that provide oversight of private mental healthcare providers by planning and coordinating certain behavioral health services in a defined area. See N.C. Gen. Stat. § 122C-115.4. PBH does not provide health care services itself; rather, PBH is a local manager of care provided by a network of providers who provide services to consumers.

Pursuant to an agreement between PBH, the Centers for Medicare and Medicaid Services ("CMS") and the Department, PBH operates under federal Medicaid waivers pursuant to Sections 1915(b) and 1915(c) of the Social Security Act (42 U.S.C. §§ 1396n(b) and (c)). The waiver under section (b) is PBH's managed care waiver (the "Cardinal Health Plan"), and the waiver under section (c) is PBH's community-based waiver (the "Innovations waiver"). The Cardinal Health Plan establishes PBH as a Prepaid Inpatient Health Plan ("PIHP"), and it also outlines the benefits for mental health and substance abuse consumers in PBH's catchment area. The Innovations waiver outlines the benefits for developmental disabilities consumers in PBH's five-county area.

PBH's operation as a PIHP means that it is prepaid by the State to provide care, and it accepts the financial risk for providing that care. This arrangement intentionally creates an incentive for PBH to provide the most efficient and cost-effective care. Any cost savings generated by PBH as a result of providing efficient and cost-effective care are required to be used to provide additional medical care for Medicaid beneficiaries enrolled in the plan. See 42 C.F.R. § 431.55(e).

PBH also has a contract with the Department's Division of Mental Health, Developmental Disabilities and Substance Abuse Services ("DMH") to serve as the LME for the five counties. Pursuant to this contract, PBH receives state funds (*i.e.*, non-Medicaid funds) to provide mental health, developmental disabilities, and substance abuse services to indigent consumers. PBH's agreement with DMH imposes a number of responsibilities on PBH, including that PBH will "[e]stablish rates for services." See DMH Contract, § 10.0(7) [D.E. 10-1]. See also, 42 C.F.R. § 438.12 (PIHPs are authorized to use "different reimbursement amounts" and to establish "measures that are designed to . . . control costs").

Secretary Cansler and Director Coughlin each play a role in the State's plan for provision of services: Secretary Cansler oversees the State operated facilities; Director Coughlin oversees the functions of PBH, which is a separate, distinct legal entity with its own statutory powers and duties. Secretary Cansler cannot interfere in the operation of PBH except as provided in N.C. Gen. Stat. § 122C-124.1.

PBH Reduced Certain Reimbursement Rates

In response to reductions in its funding (see Snipes Declaration, D.E. 10-4), PBH exercised its authority to establish rates for services and changed the rates for two particular services: Supervised Living – 1 resident (YM-811) and Supervised Living – 2 residents (YM-812). As a result of this rate change by PBH, effective February 15, 2010 PBH pays the same rate for Supervised Living services, regardless of whether the placement is in a facility with one, two, or three beds. The new rate is $116.15/day. PBH notified its providers of these services of this rate change in a Communication Bulletin dated January 11, 2010, a copy of which was attached to the Complaint as Exhibit 1. Further, PBH spoke with each of these providers to discuss the upcoming rate change to determine how, if ay all, it might impact the services that they were currently providing to PBH consumers.

The Plaintiffs

Plaintiffs Clinton L. and Timothy B. brought this action on February 11, 2010. Plaintiffs Vernon W. and Steven C. joined this action on March 30, 2010 with the filing of the First Amended Complaint. [D.E. 20]. Plaintiffs Jason A. and Diane D. were permitted to join this action on June 2, 2010 with the filing of the Second Amended Complaint. [D.E. 39].

Plaintiffs' respective current residential placements are detailed in the Declaration of Anna Yon, PBH's Developmental Disabilities Director, attached hereto as Exhibit A. To summarize:

- Clinton L. and Vernon W. both continue to receive Supervised Living services in the same single-person community placements in which they were living when the Complaint was filed. See Yon Decl., ¶¶ 4-7, 19-23. While the provider of Vernon W.'s services has changed, the services he receives and the location in which he receives them has remained constant and unbroken. Id., ¶¶ 21-23.

- Timothy B. was removed from the single-person apartment in Raleigh in which he was living when the Complaint was filed by his guardian, Rose B., on April 30, 2010, who brought Timothy B. back to her home in Lexington, NC. Timothy B. remained living with Rose B. until June 23, 2010, when he began living in a 2-person group home in Lexington, NC where he receives 24-hour supervision from staff that have been trained to communicate using American Sign Language. From April 26 until his placement on June 23, PBH offered numerous clinically-appropriate community placements for Timothy B., all of which Rose B. declined. From May 18 through June 22, PBH also provided periodic supports in Rose B.'s home through a provider in its network, while Rose B. and PBH worked to find a permanent residential placement for Timothy B. Id., ¶¶ 8-18.

- Steven C. moved from the single-person apartment in Lexington, NC in which he was living when the First Amended Complaint was filed to a 3-person group home in Lexington, NC, where he continues to receive Supervised Living services. Id., ¶¶ 24-26.

- Jason A. continues to live in the same 3-person group home in which he has been living for several years, where he continues to receive Supervised Living services. On March 5, 2010, a third housemate – F. – moved into the home that Jason A. had shared for many years with his other housemate, A. On April 13, 2010, Jason A. was removed from the home and placed in a respite care facility due to an outburst that Jason A.'s provider indicates was unrelated to the presence of the third housemate. Since returning to the home on April 20, 2010, Jason A. has had minor issues related to his own disability, but continues to get along with the third housemate. Id., ¶¶ 27-35.

- Diane D. was moved by her guardian, Thomas S., from the single-person apartment in which she was living when the Complaint was filed to a 3-person group home in Lexington, NC on May 1, 2010, where she continues to receive Supervised Living services. Diane D.'s provider indicates that Diane D. has made a successful transition to the 3-bed group home, and

that she has lived there with no major incident since May 1, 2010. Id., ¶¶ 36-39.

Plaintiffs respective community-based residential placements are clinically appropriate for each of the Plaintiffs. See Hummel Decl. [D.E. 10-7]; Second Hummel Decl. [D.E. 24-1]; and Exhibit 1 to Coughlin's Verified Answer to Second Amended Complaint [D.E. 42-1].

STANDARDS OF REVIEW

Defendants bring this Motion to Dismiss pursuant to Rules 12(b)(1) and 12(b)(6).

A. Standard of Review for 12(b)(1) Motions.

"Standing, of course, is jurisdictional; its existence is a prerequisite to finding that a court has the power to adjudicate the cause. As such, standing is appropriately challenged via a motion pursuant to Rule 12(b)(1), Fed. R. Civ. P., and it is a plaintiff's burden to establish standing." Management Ass'n for Private Photogrammetric Surveyors v. U.S., 467 F.Supp.2d 596, 600 (E.D. Va. 2006). Similarly, "[r]ipeness is jurisdictional in nature and therefore properly considered on a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules." Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co., 261 F.Supp.2d 293, 294 (S.D.N.Y. 2003).

A question of subject matter jurisdiction can be raised at any time during a case, and the burden is on the Plaintiffs to show that the Court has subject matter jurisdiction over the case. McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178, 189 (1936) (under Rule 12(b)(1), the plaintiff bears the burden of showing that federal jurisdiction

exists when that is challenged by the de fendant). Furt her, the Court m ay consider affidavits in connection with a motion to dismiss for lack of subject matter jurisdiction.

> Subject matter jurisdiction is, as we know, an issue that should be resolved early but must be considered at any stage of the litigation. . . . [I]f the co mplaint is formally sufficient but the contention is that there is in fact no subject matter jurisdiction, the movant may use affidavits and other material to support the motion. The bu rden of proof on a 12(b)(1) issue is on the party asserting ju risdiction. Mortensen v. First Fed. Sav. & Loa n Ass'n, 549 F.2d 884 (3d Cir.1977). And the court is free to weigh the evidence to determine w hether jurisdiction has been established.

United Phosphorus, Ltd. v. Angus Chemical Co., 322 F.3d 942 (7th Cir. 2003). See also, Thigpen v. U.S., 800 F.2d 393, 401 n. 15 (4th Cir. 19 86) (district court may consider extrinsic information beyond the complaint to determ ine whether subject matter jurisdiction exists.); Materson v. Stokes , 166 F.R.D. 368, 371 (E. D. Va. 1996) (because the court's "very power to hear the case" is at issue, the trial court is free to weigh the evidence to determine the existence of its jurisdiction).

The analysis of standing and ripeness are similar. "Although the phrasing makes the questions of w ho may sue and when they sue seem distin ct, in practice there is an obvious overlap betw een the doctrines of st anding and ripeness." Erwin Chemerinsky, Federal Jurisdiction § 2.4 (4th ed. 2003).

1. The Standing Doctrine Requires a Showing of "Injury In Fact".

The United States Supreme Court has explained:

> [T[hose who seek to invoke th e jurisdiction of the federal courts must satisfy the threshol d requirement imposed by Article III of the Constitution by alleging an actual case or controversy. . . . **The plaintiff must show that h e** has

> sustained or **is immediately in danger of sustaining some direct injury** as the result of the challenged official conduct and the injury or **threat of injury must be both real and immediate, not conjectural or hypothetical**.

City of Los Angeles v. Lyons, 461 U.S. 95, 101-102 (1983) (emphasis added). "[P]ast wrongs do not in themselves amount to that real and immediate threat of injury necessary to make out a case or controversy." Id. at 103. "It is the *reality* of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions." Id. at 107 n.8 (emphasis in original). See also Lujan v. Defenders of Wildlife, 5034 U.S. 555, 560-561 (1992) (plaintiff bears burden of showing injury in fact that is "actual or imminent, not conjectural or hypothetical").

"Allegations of possible future injury do not satisfy the requirement of Art. III. A threatened injury must be 'certainly impending' to constitute injury in fact." Whitmore v. Arkansas, 495 U.S. 149, 158 (1990) (quoting Babbit v. Farm Workers, 442 U.S. 289, 298 (1979)).

The Fourth Circuit Court of Appeals has likewise explained:

> Doctrines like standing, mootness, and ripeness are simply subsets of Article III's command that the courts resolve disputes, rather than emit random advice. The courts should be especially mindful of this limited role when they are asked to award prospective relief instead of damages for a concrete past harm. . . .
>
> . . . The plaintiff must show that he has "has sustained or is immediately in danger of sustaining some direct injury" as a result of the challenged official conduct and the injury or threat of injury must be both "real and immediate," not "conjectural" or "hypothetical."

Bryant v. Cheney, 924 F.2d 525, 529 (4th Cir. 1991) (quoting City of Los Angeles v. Lyons, 461 U.S. 95, 101-102 (1983)). "The purpose of the imminence requirement is 'to ensure that the alleged injury is not too speculative for Article III purposes.'" Friends for Ferrell Parkway v. Stasko, 282 F.3d 315, 322 (4th Cir. 2002) (quoting Lujan v. Defenders of Wildlife, 5034 U.S. 555, 564-565 n.2 (1992)).

The Fourth Circuit Court of Appeals has further instructed:

> The standing requirement . . . "tends to assure that the legal questions presented to the court will be resolved, not in the rarefied atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action."
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> . . . [The standing] requirements . . . ensure that the judiciary, and not another branch of government, is the appropriate forum in which to address a plaintiff's complaint.

Friends of the Earth v. Gaston Copper Recycling Corp., 204 F.3d 149, 153-154 (4th Cir. 2000) (quoting Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 472 (1982)).

2. For a Claim to Be Ripe, It Must Not Rely on Contingent Future Events.

The ripeness doctrine likewise turns on whether the claimed injury is real, immediate, and certain to occur. "A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" Texas v. United States, 523 U.S. 296, 300 (1998). See also, Retail Industry Leaders Assoc. v. Fielder, 475 F.3d 180, 188 (4th Cir. 2007) ("An issue is not fit for

review if 'it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.'"); Educ. Credit Mgmt. Corp. v. Coleman, 560 F.3d 1000, 1005 (9th Cir. 2009) ("Where a dispute hangs on future contingencies that may or may not occur, it may be too impermissibly speculative to present a justiciable controversy.").

The Fourth Circuit has explained:

> Abbott set forth the two-prong test now used by courts for determining ripeness: (1) whether the issues are fit for judicial decision and (2) whether hardship will fall to the petitioning party on withholding court consideration. 387 U.S. at 149, 87 S.Ct. at 1515. Although there is no precise list of factors a court should entertain in applying this test, the Court in Abbott listed several for consideration. A case is fit for judicial decision where the issues to be considered are purely legal ones and where **the . . . action giving rise to the controversy is final and not dependent upon future uncertainties** . . . . Id. at 149, 87 S.Ct. at 1515. The hardship prong is measured by **the immediacy of the threat** and the burden imposed on the petitioner who would be compelled to act under threat of enforcement of the challenged law. Id. at 153, 87 S.Ct. at 1517.

Charter Federal Sav. Bank v. Office of Thrift Supervision, 976 F.2d 203, 208-209 (4th Cir. 1992) (emphasis added) (citing Abbott Laboratories v. Gardner, 387 U.S. 136 (1967)).

B. Standard of Review for 12(b)(6) Motions.

A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the legal sufficiency of the complaint. See Randall v. U.S., 30 F.3d 518, 522 (4th Cir. 1994). A plaintiff may survive a motion to dismiss only if he has pleaded facts with enough specificity to "raise a right to relief above the speculative level." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 1974 (2007). The Complaint

must be dismissed if it does not allege "enough facts to state a claim to relief that is plausible on its face." Id. The court is not bound by plaintiffs' unsupported legal conclusions. Thomas v. Northern Telecom, Inc., 157 F. Supp. 2d 627, 632 (M.D.N.C. 2000). If the Court can not infer that the required elements of a cause of action are present, then the motion to dismiss should be granted. Garrison v. R. H. Barringer Distrib. Co., 152 F. Supp. 2d 856, 859 (M.D.N.C. 2001) (citing Wolman v. Tose, 467 F.2d 29 (4th Cir. 1972)). "The heavy costs of modern federal litigation . . . counsel against launching the parties into pretrial discovery if there is no reasonable prospect that the plaintiff can make out a cause of action from the events narrated in the complaint." Nixon v. Individual Head of the St. Joseph Mortgage Co., 615 F. Supp. 898, 899 (N.D. Ind. 1985).

ARGUMENT

Plaintiffs allege that the Defendants' actions with respect to PBH's reduction of the rate at which it reimburses providers in its network for certain Supervised Living services will ultimately result in each of them being forced out of placements in the community and into institutions where they will be segregated from society and discriminated against on the basis of their respective disabilities. Plaintiffs assert that this *prospect* of forced institutionalization violates Title II of the ADA and § 504 of the Rehabilitation Act[1]. Plaintiffs claims should be dismissed pursuant to Rule 12(b)(1)

[1] Although for purposes of this Motion pursuant to Rule 12(b)(6) the Court may take Plaintiffs' allegations as true, the Court should take note that Plaintiffs' allegations that the Supervised Living services PBH provides implicate § 504 of the Rehabilitation Act are false. As explained more fully in the Declarations of Dan Coughlin and Renee Snipes submitted to the

because their alleged harm is speculative in nature, and fails to satisfy the standing requirements of an actual "case or controversy" pursuant to Article III. Further, Plaintiffs' claims should be dismissed pursuant to Rule 12(b)(6) because the only actual "harm" that is alleged to have affected any of the Plaintiffs – that as a result of Defendants' actions some of the Plaintiffs now live in clinically-appropriate, community-based, congregate placements with between 1 and 5 other people – fails to state a claim under either the ADA or the Rehabilitation Act upon which relief can be granted.

"The elements of a cause of action under Title II of the ADA or § 504 of the Rehabilitation Act are: the plaintiff has a disability; the plaintiff is otherwise qualified for the employment or benefit in question; and the plaintiff was excluded from the employment or benefit because of discrimination based solely on her disability." Doe v. Univ. of Md. Med. Sys. Corp., 50 F.3d 1261, 1264-5 (4th Cir. 1995). The leading case on the construction of the anti-discrimination provision of Title II of the ADA at issue in this case is Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581 (1999), in which the Supreme Court confronted the question of "whether the proscription of discrimination may require placement of persons with mental disabilities in community setting rather than in

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Court on February 16, 2010, PBH operates a federal Medicaid waiver pursuant to Section 1905(b) of the Social Security Act, known as the Innovations Waiver. The Innovations Waiver is funded through federal and state tax dollars, and would therefore come within the scope of Section 504. PBH has not changed the reimbursement rate for residential living services provided to Plaintiffs through the Innovations Waiver.

PBH also receives state non-Medicaid funds through a contract between PBH and the Department of Health and Human Services, Division of Mental Health. These state non-Medicaid funds are the funds that PBH uses to provide the Supervised Living YM-811 and YM-812 services at issue in this case. The reduction in reimbursement rates for these specific services is a reduction in *state funding only*, and therefore facially falls outside the scope of Section 504.

institutions." Id. at 587. "The answer, we hold, is a qualified yes." Id. In Olmstead, institutionalized mentally disabled persons brought an action claiming that Title II of the ADA required the State of Georgia to provide them with a community placement to integrate them into the community rather than placement in an institution. The Olmstead Court held that under Title II of the ADA:

> States are required to provide community-based treatment for persons with mental disabilities when the States treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.

Id. at 607.

I. Plaintiffs' Claims That They Are at Risk of Forced Institutionalization Are Speculative, Thus, Plaintiffs Have Not Suffered Any Injury In Fact, They Lack Standing, and Their Claims Are Not Ripe.

A. Plaintiffs' Cannot Show that There is Any Imminent Risk that They Will Be Institutionalized.

In their Second Amended Complaint, Plaintiffs allege each of the Plaintiffs "will be forcibly isolated and segregated" and that each of the Plaintiffs "are facing the risk of forced institutionalization *as a direct result of Defendants' actions.*" [D.E. 39, ¶ 109] (emphasis added). An examination of Plaintiffs' legal theory, and a review of what has actually transpired since the Plaintiffs first made these allegations of forced institutionalization in February 2010, show that these allegations are nothing more than rank speculation.

First, the theory on which Plaintiffs' allegations of imminent, forced institutionalization is set out in paragraphs 94-96 of the Second Amended Complaint is grossly speculative, and should be dismissed pursuant to Rule 12(b)(1). In essence, Plaintiffs argue that as a result of PBH's reduction in the rate at which it reimburses providers in its network for YM811 and YM812 services, each of the following *will* occur:

1. All providers of YM811 and YM812 services will operate at a loss; causing
2. All providers in PBH's network to cease providing YM811 and YM812 services; meaning that
3. Each of the Plaintiffs will be forced to live in congregate community placements with 1 to 5 other people;
4. That each of the Plaintiffs will fail in their first, and each subsequent, congregate community placement available in PBH's network; resulting in
5. The forced institutionalization of each of the Plaintiffs.

Facially, the speculative nature of Plaintiffs' the alleged harm is too great to withstand the rigors of the standing doctrine as set forth in Lyons, Whitmore, and Bryant. Plaintiffs do not, and cannot, show that any of them "has sustained or is immediately in danger of sustaining some direct injury" as a result of Defendants' actions, or that their injury is "real and immediate," not "conjectural" or "hypothetical." Bryant, 924 F.2d at 529. Indeed, Plaintiffs' own allegations tacitly acknowledge the speculative nature of their alleged harm. See, e.g., D.E. 39, ¶ 96 ("*If 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 . . . ")(emphases added).

Second, an examination of what has actually transpired with each of the Plaintiffs since PBH's rate reduction took effect on February 15, 2010 further highlights the grossly speculative and unfounded nature of Plaintiffs' allegations, and compels the Court to dismiss Plaintiffs' case pursuant to Rule 12(b)(1). Two of the Plaintiffs – Clinton L. and Vernon W. – both continue to receive Supervised Living services in the same 1-person community placements in which they were living when the Complaint was filed. While the provider of Vernon W.'s services has changed, the services he receives and the location in which he receives them has remained constant and unbroken. See Yon Decl., ¶¶ 4-7, 19-23.

Three of the Plaintiffs – Timothy B., Steven C., and Diane D. – have all moved from single-person placements to community-based, 2 or 3 person group home placements. Timothy B. and Steven C. each live in 2-person group homes with one other roommate where they receive 24-hour supervision. Diane D. lives in a 3-person group home with two other roommates, where she and her roommate all receive 24-hour supervision. See Yon Decl., ¶¶ 8-18, 24-26, 36-39. The last Plaintiff – Jason A. – has at all times relevant to this litigation lived in a community-based, 3-person group home. The only change has been that, where Jason A. and one other person had lived in this group home and received 24-hour supervision, Jason A. now lives with two other persons -and receives 24-hour supervision. See Yon Decl., ¶¶ 27-35.

At all times from before this litigation was initiated to the present, each of the Plaintiffs has had available to him or her a community-based residential placement with 24-hour supervision that is appropriate to their individual clinical needs. At all times

from before this litigation was initiated to the present, five of the six Plaintiffs have lived continuously in community-based residential placements with 24-hour supervision appropriate to his or her individual clinical needs. The one exception is Timothy B. who, from April 30 through June 23, 2010, lived with his guardian, Rose B. at her choice, although there were community-based residential placements available to Timothy B. at all times.[2] Simply put, there is no credible showing that Plaintiffs have been, or are now, in any sort of imminent danger of forced institutionalization as a result of Defendants' actions, and thus, there is no "case or controversy" under Title II of the ADA or § 504 of the Rehabilitation Act sufficient to meet the requirements of Article III.[3] The Court should therefore dismiss Plaintiffs' claims pursuant to Rule 12(b)(1).

II. Plaintiffs' Claim for Declaratory and Injunctive Relief Regarding Their Transitions to More Congregate Placements Fail to State a Claim Upon Which Relief Can Be Granted.

Of the two issues in this case identified by this Court in its Order on Plaintiffs' Motion for Preliminary Injunction, only one – the allegation that Plaintiffs will be forced

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[2] At all times during this period, PBH offered several available community-based placements for Timothy B. to his guardian, Rose B. PBH also authorized 300 hours of respite care services for Timothy B. during this period at his guardian's home. On June 23, 2010, Rose B. placed Timothy B. in a 2-person group home operated by Ambleside, Inc., where he once again began receiving 24-hour supervision, and where the staff has been and continues to be trained in American Sign Language and in Timothy B.'s own unique signs in order to communicate with him. As of August 16, 2010, Timothy B. continues to live in the 2-person group home operated by Ambleside, Inc. See, Yon Decl., ¶¶ 8-18.

[3] To the extent the Court finds that, at the time the Complaint was filed, there existed the possibility that Plaintiffs may have been institutionalized, the events of the past six months have rendered such a possibility moot. "[A]n actual controversy must exist during all stages of review, not merely at the time the complaint is filed." White Tail Park, Inc. v. Stroube, 413 F.3d 451, 457 (4th Cir. 2005) (quoting Arizonans for Official English v. Arizona, 520 U.S. 43, 67 (1997)). To the extent the Court believes that Plaintiffs initially met their Article III standing requirements, the Court should now dismiss Plaintiffs' suit as moot.

into institutions – states a cognizable claim pursuant to Title II of the ADA or § 504 of the Rehabilitation Act. As discussed above, however, this issue fails for lack of subject matter jurisdiction, as Plaintiffs' claims are entirely speculative and therefore the Plaintiffs lack standing and their claims are not ripe. The other issue – the allegation that the Defendants' actions will cause the Plaintiffs to leave their single-person community placements and live in community-based congregate placements with between 1 and 5 other people – fails to state a cognizable claim pursuant to Title II of the ADA or § 504 of the Rehabilitation act. As such, this Court should deny Plaintiffs claims pursuant to Rule 12(b)(6).

A. Plaintiffs' Fail to Assert Any Cognizable Right that Would Entitle Them to Relief Under Federal Law.

The leading case on the construction of the anti-discrimination provision of Title II of the ADA is Olmstead. Even under an expansive reading of Olmstead, states are not required to provide *any and all* community-based placements that may be desired by persons with mental disabilities. Nor does Olmstead require that community-based services be provided by any particular provider. "We do not in this opinion hold . . . that the ADA requires States to 'provide a certain level of benefits to individuals with disabilities.'" Olmstead, 527 U.S. at 603, n.14.

Plaintiffs allege that Defendants' actions violate the implementing regulations for Title II of the ADA, 28 C.F.R. § 35.130(d), which provide that "[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to

the needs of the qualified individuals with disabilities."[4] Plaintiffs argue that the "most integrated setting" for five of the Plaintiffs[5] is a single-person placement with 24-hour supervision, and that placement in 2-6 person community-based, congregate placements with 24-hour supervision fails to comport with the regulation.

The focus of Olmstead, and the regulations it was interpreting, was to address a specific type of discrimination against persons with disabilities – "segregation" in institutions. 527 U.S. at 588-89. As explained by the Court: "In the ADA, Congress for the first time referred expressly to 'segregation' of persons with disabilities as a 'for[m] of discrimination,' and to discrimination that persists in the area of 'institutionalization.'" 527 U.S. at 589, n.1. The Court explained: "Unjustified isolation, we hold, is properly regarded as discrimination based on disability." 527 U.S. at 588-89, 597.

Interpreting 28 C.F.R. § 35.130(d) in light of Olmstead, persons with disabilities need to be served in the most integrated – or least segregated – setting that is clinically appropriate in order to avoid discrimination in the form of "unjustified institutional isolation." 527 U.S. at 600. When this particular rule was published in final form in the Federal Register, the Department of Justice explained that "the most integrated setting" means "a setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible." 56 Fed. Reg. 35694 (July 26, 1991). See also,

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[4] Likewise, Plaintiffs argue that Defendants' actions violate the implementing regulations for § 504 of the Rehabilitation Act, 28 C.F.R. § 41.51(d), which provide that recipients of federal funds pursuant to § 504 "shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons."

[5] Plaintiffs, apparently, do not contend that a single-person placement is the "most integrated setting" for Jason A. Rather, Plaintiffs appear to argue that a 2-person placement, as opposed to a 3-person placement, is the most integrated setting appropriate for Jason A.

Disability Advocates, Inc. v. Paterson, 598 F.Supp. 289, 320 (E.D.N.Y. 2009) ("[T]he proper interpretation of 'most integrated setting' is . . . whether a particular setting 'enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible.'")

During the preliminary injunction phase of this case, this Court noted that Plaintiffs were unable to identify any case in which a court had found that a "community placement in a home or apartment with two housemates is 'segregated' or 'isolated,'" and thus violates Title II of the ADA or § 504 of the Rehabilitation Act. [D.E. 36, p. 9]. This is not surprising; after extensive research on the implementing regulations for the ADA, and of cases following the Olmstead decision, counsel for Defendants have not found any case in which any court in the country has recognized a violation of Title II of the ADA (or of § 504 of the Rehabilitation Act) where, as here, the disabled parties live in clinically-appropriate, community-based congregate placements of between 2 and 6 persons.

Indeed, as this Court has already noted, "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." [D.E. 36, p. 9, n. 3]. A single-person placement can be one of the most segregated living situations imaginable. Further, there is no reason to assume that a disabled person who is receiving community-based treatment in a two-to-three person group home would have any less opportunity to interact with nondisabled persons than would an individual in a single-person placement. A person in a two-to-three person group home is not segregated from nondisabled

persons to any greater extent than is a person in a single-person placement; if anything, the opposite is true in practice: persons are more integrated in the community in group home placements given the meaningful community activities that group home residents participate in with people other than those paid to be with them. As a result, to the extent that Plaintiffs are arguing that, by definition, a single-person placement is a "more integrated" form of community treatment, this simply is not so.

If this were the case, it would prove far too much. If the Court were to deem single-person placement to *always* be the "most integrated" type of community treatment, then presumably *all* disabled persons would have a federal right to be treated in a single-person placement. If it was clinically appropriate to provide these services to a particular disabled person in a group home setting, then presumably there would be no clinical reason why that person could not be served in a single-person placement. Thus, by deeming a single-person placement to be "the most integrated setting" for purposes of the ADA, the Court would, in effect, be mandating that *all* individuals who are served in the community be served in this setting, which is, by far, the most expensive setting to provide these services. To Defendants' knowledge, no court has ever interpreted the ADA to mandate that all community-based treatment be provided only in a single-person placement setting; this Court should dismiss Plaintiff's request that it be the first to so hold.

CONCLUSION

For the reasons stated above, this Court should dismiss Plaintiffs' claims pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction, as Plaintiffs have failed to show

that any of them face an actual and imminent threat of forced institutionalization in violation of Title II of the ADA or § 504 of the Rehabilitation Act. Further, the Court should dismiss Plaintiffs' claims pursuant to Rule 12(b)(6) for failure to state a claim upon which relief may be granted, as the move of some of the Plaintiffs from single-person placements to community-based two-to-three person group home placements does not state a cognizable claim under either Title II of the ADA or § 504 of the Rehabilitation Act.

Respectfully submitted, this the 16th day of August, 2010.

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CERTIFICATE OF SERVICE

I, the undersigned attorney of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Defendant Dan Coughlin do hereby certify that on August 16, 2010, I electronically filed the foregoing DEFENDANT COUGHLIN'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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