

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA  
No. 10-CV-00123

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CLINTON L., by his guardian and next )  
friend CLINTON L., SR., TIMOTHY B., )  
by his guardian and next friend ROSE B., )  
VERNON D.W., STEVEN C., JASON )  
A., by his guardian and next friend )  
BRENDA A., DIANE D., by her )  
guardian and next friend THOMAS S., )

Plaintiffs,

v.

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

Defendants.

**MEMORANDUM IN SUPPORT  
OF PLAINTIFF'S MOTION TO  
APPOINT A SPECIAL MASTER**

Introduction

Plaintiffs seek relief from the Court because, despite this Court's Order requiring Defendants to ensure adequate services are provided to retain Plaintiffs in community placements, Defendants have failed to appropriately coordinate Plaintiffs' care to avoid their institutionalization. As detailed in Plaintiff's Motion for a Status Conference, one Plaintiff is currently confined in a psychiatric hospital after having been jailed for three nights, and the police have been called to the scene of many of the other Plaintiff's residences. An emergency hospitalization was necessary for a Plaintiff who is deaf

because of the staff's failure to effectively communicate with him. Five out of six Plaintiffs have seriously regressed and have been either victims or aggressors in violent confrontations with housemates and staff. Stability in community placements has been upended for all of the Plaintiffs, who each now bear a substantial risk of institutionalization. Defendant PBH is currently in violation of this Court's Order. Pursuant to Fed.R.Civ.P. 53(a)(C), Plaintiffs hereby request the appointment of a Special Master to review Plaintiffs' plans of care and ensure their continued right to live in the community and to prevent further harm by Defendants' arbitrary actions.

### **Appointment of a Special Master**

Defendants' initial decision to reduce state funds available to Plaintiffs' plans of care endangered their continued community-based placements, thus placing them at risk of institutionalization. This Court entered a Preliminary Injunction requiring Defendants 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." Docket Entry # 36, Order dated May 5, 2010 at p. 12. Despite this Order, PBH has moved five of six Plaintiffs to more congregate, less integrated settings. This action has detrimentally affected their care and substantially increased their risk of failure. As 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. Their clinical profiles are complicated and require specialized knowledge and attention. Rather than affording individualized assessments and necessary resources, Defendant PBH has

marched blithely ahead, reducing funding for all Plaintiffs' Plans of Care. The results were predictable, and two Plaintiffs have already experienced institutionalizations.

In circumstances such as this, the Federal Rules of Civil Procedure provide a remedy: Fed.R.Civ.P. 53(a)(C) states, "...a court may appoint a master... to... address pretrial... matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district." Each of the six Plaintiffs live in different homes, with different residential providers, roommates, activities, medical needs, and schedules. Their moves to more congregate settings have negatively affected their daily lives and increased the violent incidents and lack of appropriate, medically-necessary services they receive.

PBH has failed to demonstrate that it is taking steps to comply with its obligations under the ADA, *Olmstead*, and this Court's Order. *See, e.g., Jamie S. v. Milwaukee*, 519 F.Supp.2d 870(E.D. Wis. 2007). "There is considerable room for appointing special masters when the purpose of the master is to enforce a judicial decree." *Crowin v. Browner*, 90 F.Supp.2d 364, 377 (S.D.N.Y. 2000); *see also, Trull v. Dayco*, 178 Fed. Appx. 247, 251, 2006 U.S.App. LEXIS 10640, at \*\*9 (4<sup>th</sup> Cir. 2006). As the Fourth Circuit Court of Appeals recognized in *Thomas S. v. Flaherty*, 902 F.2d 250, 255 (4<sup>th</sup> Cir. 1990), each Plaintiff "requires individual consideration." This statement remains pertinent for these Plaintiffs (all of whom were *Thomas S.* class members). Exceptional cases such as this warrant the appointment of a master. As in *Thomas S.*, the general responsibility of a master in this case would be to hear and report on "the adequacy of treatment" of the individual Plaintiffs. PBH has already reduced the levels of support so

as to cause at least two Plaintiffs' moves to institutions, *i.e.*, brief stays in a jail and a hospital, and to endanger and jeopardize the remaining Plaintiffs' stability, subjecting them to a substantial risk of institutionalization, including imprisonment, hospitalization, or other more restrictive interventions.

At every turn, including the filing of their Motion to Dismiss, Defendant PBH has claimed it is abiding by its legal obligations to provide appropriate services to each client; however, discovery has not yet commenced and Plaintiffs have had minimal opportunity to probe the assertions and to investigate the circumstances surrounding Plaintiffs' care. Nevertheless, the facts now speak for themselves, and the Court's Order has clearly been violated with Diane D.'s moves to jail and then a psychiatric hospital and Timothy B.'s temporary hospital stay caused by his staff's inability to communicate with him. A Special Master could evaluate and determine whether a particular Individual Service Plan of care, or proposed changes thereto, would be sufficient to avoid placing each Plaintiff into jeopardy of institutional placement. This is a specialized role at a more detailed level of involvement than would be expected of a District Court Judge; however, it is necessary to ensure compliance with this Court's Order.

In weighing the appointment of a Special Master, the Court should consider factors including fairness and likely expense on the parties. In this case, Defendant PBH appears to be following a path that would inexorably lead to the Plaintiffs' institutional placement, which cannot be countenanced under the ADA. Even if it is unintentional, the impact of PBH's funding reductions is leading to improper and avoidable institutionalizations, which is unfair to the Plaintiffs and prohibited by *Olmstead*.

## **CONCLUSION**

At the outset of this case, Plaintiffs requested injunctive relief in order to prevent the constructive elimination of the state-funded services that allow Plaintiffs to remain in the community. Despite the Court's clear Order that Plaintiff's were to remain in the community during the pendency of the case, Defendant has systematically chipped away at their plans of care, moved Plaintiffs to more congregate settings, and risked their decompensation and continued community placement. The results we are currently seeing were predictable: increased violence, the involvement of law enforcement, referral to the criminal justice system, and failed community integration. Plaintiffs therefore seek an Order appointing a Special Master to ensure compliance with the Court's Injunctive Order.

Plaintiffs have met their burden of showing (1) each Plaintiff requires individual consideration and specialized clinical knowledge is required to assess each Plaintiff's differing circumstances and risk of institutionalization, (2) PBH has failed to take steps to comply with its obligations under the ADA and this Court's Order, and (3) an independent monitor is necessary to supervise and ensure compliance with the court-ordered injunction. As such, the Court should grant Plaintiffs' Motion to Appoint a Special Master, who will enforce the Court's Injunction by ensuring appropriate community supports that will prohibit Plaintiffs' institutionalizations.

Dated: March 15<sup>th</sup> 2011.

Respectfully submitted,

/s/ John R. Rittelmeyer

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 15<sup>th</sup> 2011, I electronically filed the foregoing Memorandum in Support of Plaintiff's Motion to Appoint a Special Master with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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Respectfully submitted,

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