UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF NORTH CAROLINA

CLINTON L., by his guardian and next friend CLINTON L., SR., TIMOTHY B. by his guardian and next friend ROSE B., VERNON W., by his guardian and next friend VERNON D. W., and STEVEN C., JASON A., by his guardian and next friend BRENDA A., DIANE D. by her guardian and next friend THOMAS S.,	)	CIVIL ACTION NO. 10-CV-00123
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	)	

PLAINTIFFS' THIRD AMENDED COMPLAINT

INTRODUCTION

1. Plaintiff Clinton L. is 46 years old. Among other diagnoses, he is dually diagnosed with a developmental disability and mental illness. He lives in Lexington, North Carolina.

2. Plaintiff Timothy B. is 44 years old. Among other diagnoses, he is dually diagnosed with a developmental disability and mental illness. Plaintiff Timothy B. is

also deaf. He currently lives in Raleigh, North Carolina, but he is from Lexington, North Carolina, where his guardian still resides.

3. Plaintiff Vernon W. is 47 years old. Among other diagnoses, he is dually diagnosed with a developmental disability and mental illness. He lives in Lexington, North Carolina.

4. Plaintiff Steven C. is 32 years old. Among other diagnoses, he is dually diagnosed with a developmental disability and mental illness. He lives in Lexington, North Carolina.

5. Plaintiff Jason A. is 35 years old. Among other diagnoses, he is dually diagnosed with mental retardation and mental illness. He lives in Salisbury, North Carolina

6. Plaintiff Diane D. is 36 years old. Among other diagnoses, she is dually diagnosed with mental retardation and mental illness. She lives in Lexington, North Carolina.

7. In North Carolina, adults dually diagnosed with mental retardation and mental illness are part of a target population that may be eligible to receive state mental health, developmental disability, and substance abuse services funds designated as MR/MI funds, formerly called *Thomas S.* funds. Plaintiffs are eligible for and have previously received MR/MI funds. *See Thomas S. v. Morrow*, 601 F. Supp. 1055, 1984 U.S. Dist. LEXIS 23537 (W.D.N.C. 1984), *aff'd in part and modified in part, remanded*, 781 F.2d 367, 1986 U.S. App. LEXIS 21712 (4th Cir. 1986), *cert. denied sub nom.*, *Kirk v. Thomas S.*, 476 U.S. 1124 (1986), *cert. denied sub nom.*, *Childress v. Thomas S.*, 479

U.S. 869 (1986); *later proceeding*, *Thomas S. v. Flaherty*, 699 F.Supp. 1178, 1988 U.S. Dist. LEXIS 13086 (W.D.N.C. 1988), *aff'd*, 902 F.2d 250, 1990 U.S. App. LEXIS 7044 (4th Cir. 1990), *rehearing, en banc, denied*, 1190 U.S. App. LEXIS 19875 (4th Cir. 1990), *cert denied*, 498 U.S. 951 (1990).

8. Plaintiffs have been successfully living in the community with a combination of federal Medicaid waiver funds (provided through the Innovations Waiver, as described infra, at Paragraphs 83-88) and supplemental state funds; Plaintiff Clinton L. for over eight years, Plaintiff Timothy B. for more than a decade, Plaintiff Vernon W. for over five years, Plaintiff Steven C. for over a decade, Plaintiff Jason A. for approximately a decade, and Plaintiff Diane D. for over a decade.

9. Plaintiffs reside within the geographical service area of the Piedmont Behavioral Healthcare Local Management Entity, also known as PBH. For each of these Plaintiffs, a clinical treatment team has determined that their current Individual Support Plans (ISPs) require independent, state-funded, Supervised Living services to assure adequate staffing and appropriate care to maintain these individuals in the community.

10. Defendant Dan Coughlin operates the Innovations Waiver program and also exercises discretion over allocation of supplemental state funds. The Innovations Waiver is a 42 U.S.C. § 1915(c) Home and Community Based Waiver, which offers services to individuals with developmental disabilities who would otherwise qualify for services in an Intermediate Care Facility for the Mentally Retarded (ICF-MR).

11. Recently, Defendant Coughlin drastically reduced the availability of state funds for Plaintiffs' care, as well as for all others similarly-situated, by reducing the

amounts that providers are reimbursed for this service by at least 30%. The practical effect of this reduction will be that either the provider will withdraw from the service or they will only offer a reduced level of support and supervision compared to that which has been successfully maintaining Plaintiffs in the community. Plaintiffs are at risk of institutionalization, a placement that would be more costly than Plaintiffs' care in the community. As a result of this arbitrary decision, Plaintiffs will be at risk of displacement from their long-term community placements.

12. Defendants' actions violate the Americans with Disabilities Act (ADA), Title II, 42 U.S.C. § 12132, and its implementing regulations, and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794a, and its implementing regulations. Among other things, these laws require Defendant to administer its services and programs in the most integrated setting appropriate to the needs of individuals with disabilities.

13. Plaintiffs seek declaratory and injunctive relief to preserve their receipt of care in the community until adequate Innovations Waiver and state-funded services are made available to them to ensure that they receive services in the most integrated setting appropriate to their needs and conditions, which has been demonstrated to be in their own homes.

JURISDICTION AND VENUE

14. This is an action for declaratory and injunctive relief for violation of Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12132; and Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794.

15. The Court has jurisdiction over Plaintiffs' claims under 28 U.S.C. §§ 1331, 1343(a)(3) & (4). Declaratory and injunctive relief is authorized by 28 U.S.C. §§ 2201 and 2202 and Fed. R. Civ. P. 65. Plaintiffs' causes of action for disability discrimination are authorized by 42 U.S.C. 12133 and 29 U.S.C. § 794a.

16. Venue is proper because Defendant Coughlin resides in this district. 28 U.S.C. § 1391(b)(1).

FACTUAL BACKGROUND

17. Defendant PBH operates under a Memorandum of Agreement with the North Carolina Department of Health and Human Services Division of Medical Assistance (DMA) under which, *inter alia*, DMA sets the reimbursement rates for PBH providers.

18. On January 11, 2010, Defendant PBH issued a memorandum to providers describing cuts to the state-funded "Supervised Living – 1 Resident" service and the state-funded "Supervised Living – 2 Resident" service (collectively, the "Supervised Living services"). These services are also identified by their procedure codes, which are YM811 and YM812, respectively. According to the memorandum, the cuts to the Supervised Living services were to take effect on February 15, 2010. The memorandum does not state whether PBH will permit any exception to these rate cuts.

19. All Plaintiffs except Timothy B. and Diane D. are currently authorized to receive the "Supervised Living – 2 Resident" service. Of the four Plaintiffs receiving the "Supervised Living – 2 Resident" service, three lived alone and one lived with one other

resident in a group home setting prior to February 15, 2010. Until February 15, 2010, providers of this service were reimbursed by PBH at a standard rate of $161.99 per day.

20. Effective February 15, 2010, the rate for "Supervised Living – 2 Resident" has been reduced by PBH to $116.15, a reduction of nearly 30%. As a result of the rate reduction, one Plaintiff currently lives with one other resident in a group home setting and another Plaintiff now lives with two other residents in a group home setting.

21. Plaintiffs Timothy B. and Diane D. are currently authorized to receive the "Supervised Living – 1 Resident" service. Providers of "Supervised Living – 1 Resident" services are reimbursed by PBH at a variable per diem rate. In both Timothy B.'s case and Diane D.'s case, the rate for the service was between $240.00 and $250.00 per day. This rate was designed to correspond with the service provider's costs in hiring, training, and retaining staff capable of the special needs of the Plaintiffs. These include communicating with Timothy B. through the use of specialized sign language and supervising Diane D. with two staff members twenty-four hours a day.

22. Effective February 15, 2010, the rate for "Supervised Living – 1 Resident" has been reduced by PBH to $116.15 per day. This represents a reduction of nearly 55% for this service in Timothy B.'s and Diane D.'s cases. However, PBH informally agreed to maintain Timothy B.'s current rate for "Supervised Living – 1 Resident" services, $250 per day, until April 15, 2010. The provider of Diane D.'s Supervised Living services attempted to maintain Diane's residential placement at the reduced rate, but Diane was ultimately moved into a 3-bed group home on May 1, 2010.

23. Defendant PBH did not notify Plaintiffs of the proposed rate cuts. Plaintiffs have not been provided with any right to appeal the rate cuts. The new rate structure for Supervised Living services will not permit the providers of this service to operate at a profit and still provide Plaintiffs with the level of service specified in their plans of care. Moreover, the new rate structure will either cause those providers currently offering the service to operate at a loss, or to change the nature of the service that they provide to Plaintiffs. Consequently, these providers will dilute the level of support provided by Supervised Living services for Plaintiffs and other recipients of this service in areas served by PBH.

24. Although Plaintiffs will still be eligible to continue receiving Innovations Waiver funding after the rate reduction on February 15, 2010, they will likely lose their Innovations Waiver funding if they cannot adjust to the lesser level of support and are admitted to an institution.

25. On January 29, 2010, Plaintiffs' counsel wrote to Defendants demanding a postponement of the implementation of the new Supervised Living rate structure. This delay was requested so that Defendants can reach an accord with Supervised Living providers as to an appropriate per diem rate for Supervised Living services to assure that Plaintiffs will be maintained in their community placements. Defendants did not respond to this letter and Plaintiffs replied by filing this action.

DEFENDANTS

26. Defendant Dan Coughlin is the CEO and Area Director of the PBH Local Management Entity (LME), with a geographic service area encompassing Cabarrus,

Davidson, Rowan, Stanly, and Union Counties. Within the Medicaid-funded system of mental health, developmental disabilities, and substance abuse services in North Carolina, the LMEs are the locus of coordination for services at the community level. *See* N.C.G.S. § 122C-101; N.C.G.S. § 122C-115.4(a).

27. Defendant Coughlin's responsibilities include financial management and accountability for the use of State and local funds and information management for the delivery of publicly-funded services. *See* N.C.G.S. § 122C-115.4(b)(7). Defendant Coughlin also bears responsibility for the implementation and management of PBH's Medicaid Home and Community-Based Services (HCBS) Community Alternatives Program Waivers (the Innovations Waiver), consistent with federal law. *See* Social Security Act § 1915, 42 U.S.C. § 1396n (b) and (c). Defendant Coughlin is sued in his official capacity.

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

PLAINTIFFS

29. All Plaintiffs are adults with dual diagnoses of mental retardation and mental illness (MR/MI).

Clinton L.

30. Plaintiff Clinton L.'s diagnoses include Schizoaffective Disorder, Bipolar Disorder, Intermittent Explosive Disorder, and Moderate Mental Retardation.

31. Prior to his current placement, Plaintiff Clinton L. lived in various group homes and institutions throughout North Carolina. Because of Clinton L.'s diagnoses, many of his previous facilities have been unable to provide the necessary level of staff to both address his condition and ensure a safe environment for other residents. Clinton L. has been discharged from both coed and all-male facilities because of his inappropriate and explosive behaviors that many times affect other residents. Clinton L. has often engaged in destructive outbursts that can only be effectively controlled with one-on-one assistance to provide verbal prompting and redirection when needed. In 2000, Clinton L. was discharged from his last group home placement because this group home could not accommodate his behaviors.

32. Since then, Clinton L. has lived in his own apartment located in Lexington, North Carolina. Clinton L. is supervised by a rotating schedule of residential workers twenty-four hours a day. Plaintiff Clinton L.'s home has been substantially modified with a system of sensors and alarms because Clinton L. has a tendency to wander at night.

33. On August 27, 2009, PBH received an update to Clinton L.'s Individual Support Plan ("ISP"). Clinton L.'s Support Coordinator, Ms. Kristine Best, prepared the update and recommended an increase in Clinton L.'s services due to his behaviors and need for constant monitoring. With the exception of Ms. Best's recommendation

regarding the level of Home Supports hours, PBH otherwise approved the ISP update on September 21, 2009.

34. In response to the cut in Supervised Living rates, Clinton L.'s provider, Easter Seals UCP, originally stated that it would be unable to continue to provide Supervised Living services to Clinton L. However, since the original filing of this action, Easter Seals UCP has informally and temporarily agreed to maintain Clinton L.'s present living arrangement. This agreement is expressly contingent upon "continued approval of at least 40 hours of Home Supports." Even with PBH's authorization for this additional service, Easter Seals UCP will not maintain a profit on Clinton L.'s care. In addition, since this level of support is above PBH's own utilization review guidelines, PBH policies require titration, or a reduction of this level of service over time.

Timothy B.

35. Plaintiff Timothy B.'s diagnoses include Intermittent Explosive Disorder, Major Depressive Disorder, Epilepsy, and Severe Mental Retardation. Timothy B. is also deaf.

36. Plaintiff Timothy B., prior to his community placement, lived in various group homes and institutions throughout North Carolina. Very few of these facilities employed qualified personnel capable of communicating with Timothy B. through use of American Sign Language or other means. Because of his inability to communicate with facility staff, Timothy B. often engaged in destructive outbursts. In 1998, Timothy B. was discharged from his last group home placement because they could not accommodate his behaviors.

37. In 1999, Timothy B. was approved to receive MR/MI funds. Plaintiff Timothy B.'s current community placement is his own home in Raleigh, North Carolina, where he lives alone and independently with a rotating schedule of residential workers twenty-four hours a day.

38. On January 8, 2009, PBH performed a Supports Intensity Scale (SIS) assessment on Timothy B. This assessment measures the client's level of ability to function independently. The results of the assessment indicated that Timothy B. has a SIS score of 114, which places Timothy B. in the 82nd percentile of support needs. The SIS report also indicates that "it is highly likely that [Timothy B.] has greater support needs than others with a similar SIS [score]."

39. Dr. George Popper, a licensed psychologist in the PBH catchment area, conducted an assessment of Timothy B.'s needs and abilities on February 14, 2009. Dr. Popper's report recommended that "a caregiver who is proficient with sign language be made available to [Timothy B.]" Dr. Popper's report included a letter, dated March 10, 2009, to Timothy B.'s guardian. The letter concluded that "Timothy appears quite comfortable with his current living circumstance and I see no reason to change it at this time," with the proviso that "there should be a caregiver who knows sign language."

40. On November 2, 2009, PBH received Timothy B.'s proposed annual ISP. Timothy B.'s Support Coordinator, Ms. Paula Clements, prepared the update and concluded that Timothy B. needs the "continued support of his 24 hour awake staff and provider agency." PBH approved the annual ISP on November 9, 2009.

41. Community Alternatives of North Carolina (Community Alternatives) is Timothy B.'s current provider of Supervised Living services. On January 15, 2010, Community Alternatives notified Timothy B.'s guardian that, effective April 15, 2010, Community Alternatives will no longer be able to "provide services to Tim in his current service model." Community Alternatives specifically cited the cut to the Supervised Living reimbursement rate as the reason for discharging Timothy B.

42. Since the original filing of the present action, Defendants contended that Timothy B. should be a client of the Wake County LME and assured this Court that, so long as Timothy B. remains a Wake County resident, "this transition to Wake LME will be made shortly." .

43. In 2010, Plaintiff Timothy B. was discharged from his residential placement in Wake County, and he moved back to Davidson County. Timothy's plans of care at that time and until the present have all clearly indicated his need for staff who communicate with him by using American Sign Language (ASL) and his home signs.

44. Since Timothy B.'s move to Davidson County, he has received services in which providers fail to communicate adequately or effectively with him using ASL or other appropriate sign language, or to otherwise consistently make sign language (ASL) interpretation available to him.

45. Timothy B. is at increased risk of institutionalization due to receiving services that fail to adequately address his need for community based services with effective communication.

Steven C.

46. Plaintiff Steven C.'s diagnoses include Depressive Disorder and Mild Mental Retardation.

47. Steven C. has lived in his current residential setting for at least the last decade, following a failed group home placement. While at the group home, Steven would engage in explosive outbursts, often resulting in injuries to staff or other residents. On at least one occasion, Steven C. was criminally charged with assaulting another resident. A prior felony conviction has also thwarted many attempts to place Steven in a congregate living arrangement.

48. Today, Steven C. is his own guardian and has successfully lived in his community for a number of years. Nonetheless, many of Steven C.'s behaviors remain. On October 6, 2006, Steven was evaluated by George Popper. Dr. Popper's report concludes that "Steven's behavior and his lack of impulse control continue to be significant problems" and that Steven cannot "live independently without close supervision."

49. On September 1, 2009, PBH received Steven's proposed annual ISP. The annual plan concludes that "Steven requires highly trained staff for 1:1 habilitative training to…prevent injury to him or others, and especially to obey laws." The annual ISP recommended continued Supervised Living services. PBH approved this recommendation on September 11, 2009.

50. Monarch, Inc. (Monarch) is Steven C.'s current provider of Supervised Living services. On January 21, 2010, Monarch notified Steven that they could "no longer

support [Steven's] need for 24 hour supervision" as of March 21, 2010. Monarch cited the recent reduction in Steven's services as its reason for discharging Steven.

51. Because Steven did not have any alternate housing options available to him, at the behest of PBH, Steven applied to several local group homes. Ms. Lori Fuller, a case manager at PBH, has threatened Steven that PBH would seek to involuntarily place him under guardianship if he did not comply with PBH's demand to accept a group home placement.

52. One group home, operated by Youth and Adult Care Management (YACM), provisionally accepted Steven, pending YACM's receipt of a license to operate a group home from the Division of Health Service Regulation (DHSR).

53. DHSR has since issued a license to this group home, which has now offered a placement to Steven. YACM indicated to Steven that it would hold this placement open for an indefinite period of time; however, Steven understands from his current staff members that his current placement will end on April 14, 2010.

54. Steven does not want to move into a group home and remains fearful that he will revert to his earlier behaviors once he moves into a group home. Steven's current staff members have noted that Steven has "talked about walking out of the group home and being homeless." Additionally, Steven risks losing contact with his current staff members, whom Steven trusts because he has known them for several years.

Vernon W.

55. Plaintiff Vernon W.'s diagnoses include Depressive Disorder, Severe Mental Retardation, and Epilepsy.

56. In 1984, Vernon W. moved to his first group home. While at the group home, Vernon engaged in various violent outbursts, resulting in injuries to staff and other residents, as well as damage to property. In 1991, Vernon was discharged from this group home due to his behaviors. From 1984 to 1991, Vernon was institutionalized on three occasions—twice at the Thomasville General Hospital psychiatric unit and once at Dorothea Dix Hospital in Raleigh, N.C.

57. Following a two-month institutionalization at Dorothea Dix Hospital in 1991, Vernon was transferred to the O'Berry Center in Goldsboro, NC. Vernon remained there for approximately five years. During this time, Vernon became a class member of the original *Thomas S.* litigation.

58. Upon Vernon's release from the O'Berry Center in 1996, Vernon began to receive *Thomas S.* services. Between 1996 and 2000, Vernon lived in two congregate living arrangements. Vernon's behaviors, which at that time included assaulting staff members and residents, throwing objects at staff and residents, and kicking holes in the house walls, continued to pose a threat Vernon's own safety and to the safety of others.

59. In 2000, Vernon began to live in his own apartment, supervised by staff members on a twenty-four hour basis. In 2004, Vernon moved into a house that his father purchased for him. Vernon's Supervised Living services have been provided by YACM for approximately the past three years. Since he began to live in his own home, the intensity of Vernon's behaviors has declined.

60. Without supervision, Vernon continues to pose a hazard to himself and others. When agitated, Vernon will often hit walls and windows, as well as yell and curse at staff

members. Vernon also has difficulty sleeping at night; he rarely sleeps more than three hours at a time. When awake at night, Vernon will often roam around the house. If unsupervised, Vernon will unwittingly place himself in dangerous situations, such as using the stove, tampering with light fixtures, and walking out the front door of the house.

61. On October 13, 2009, PBH referred Vernon for a psychological evaluation conducted by Jane Kelman, L.P.A. The evaluation concluded that "Vernon's current staffing pattern should be maintained if at all possible" due to the safety concerns and the rapport he has built with his staff members over several years. Ms. Kelman opined that this rapport has "greatly contributed to his current stability."

62. On January 21, 2010, Vernon's father was notified that, due to the Supervised Living rate cuts, YACM could not support his need for one-on-one, 24-hour supervision. On April 15, 2010, YACM will no longer be able to offer Vernon's current level of support. Vernon's father has attempted to locate other providers who may provide the Supervised Living services at the reduced rate, but none are available.

63. Vernon's current ISP, dated March 1, 2010, states that Vernon will receive "Supervised Living – 2 Resident" services until April 15, 2010; according to the ISP, a team decision will be made at that time because the "Supervised Living – 2 Resident" rate will end.

Jason A.

64. Plaintiff Jason A.'s diagnoses include Mood Disorder with Aggression, Obsessive-Compulsive Disorder, Attention Deficit Hyperactivity Disorder, Autistic Tendencies, and Moderate Mental Retardation.

65. Although Jason communicates verbally, he has difficulty expressing his needs and frustrations. Jason has a history of violent, severe physical aggression resulting in property damage and physical harm to himself and others. Jason's behaviors are very volatile because Jason has little to no impulse control.

66. Jason's guardian and caregivers cannot always identify what causes his behaviors, as his precise behavioral triggers often change. However, group settings frequently agitate Jason, leading to an increased risk that Jason will engage in violent and destructive behaviors.

67. Jason was first placed in a group home at age 12 and failed in that placement because of his severe behaviors. On several occasions throughout his lifetime, Jason has been hospitalized in psychiatric hospitals.

68. For approximately 10 years, Jason has lived in a two-person group home operated by RHA Howell with one other resident, A. Jason receives a combination of Innovations Waiver services and state-funded "Supervised Living- 2 Resident" services.

69. Clinical evaluations of Jason have consistently determined that he should not live with more than one roommate, and that one-on-one staffing 24 hours a day is medically necessary for Jason's care.

70. As a result of PBH's rate cut to Supervised Living funds, it was no longer financially feasible for the provider, RHA, to house only two people in Jason's home. In order to afford Jason's care, RHA moved a third resident, F., into the home, which has resulted in reduced supervision for Jason. F.'s presence in the home is likely to exacerbate an already volatile situation with Jason's existing roommate.

71. After Jason's behavioral incidents, Jason becomes upset and agitated to the point that he must be removed from the home and taken to a crisis respite center. Jason's temporary placement in the crisis respite center ensures his own safety as well as the safety of his roommates.

72. Following the addition of a third roommate, staff called 9-1-1 in response to a crisis in which Jason chased his one-on-one worker to the house next door, where he damaged the screen door. After Jason observed the staff calling 9-1-1, he calmed down to the point where emergency response personnel did not have to intervene.

73. As recently as April 13, 2010, Jason's behaviors increased so drastically that he necessitated placement in a crisis respite center where he stayed for one week before returning to the group home.

74. Jason also has a history of self-injurious behavior, which has cycled over the years and increased in recent months, likely related to the new roommate. Jason's provider recently approved "body checks" to be administered on Jason A. twice daily in order to prevent the self-injurious behavior.

75. With the reduced staffing support for Jason, he is not being served in a clinically appropriate or the most integrated community placement. Due to Jason's

history of violent and inappropriate behaviors, his previous group home failure, his pre-existing conflict with his existing roommate, and his frequent hospitalization, Jason is at risk of institutionalization.

Diane D.

76. Plaintiff Diane D.'s diagnoses include Mild Mental Retardation, Intermittent Explosive Disorder, Scoliosis and Cohen Syndrome. Cohen Syndrome is a rare genetic disorder that is characterized by low muscle tone.

77. When agitated, Diane engages in destructive behaviors; the cause of these behaviors is often unknown. These behaviors have included destroying furniture, hitting and kicking others, and cursing at staff members. Additionally, Diane has attempted to leave the home when agitated. When Diane elopes from 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.

78. Diane also frequently exhibits symptoms of depression, which most frequently includes a refusal to eat, take medications, or get out of bed. When left unsupervised, Diane will often isolate herself in her room and engage in self-injurious behaviors, such as digging at her skin until it bleeds or pulling off fingernails and toenails.

79. At age 16, Diane was approved to receive *Willie M.* services; at age 18 she began to receive *Thomas S.* services. For the past 10 to 12 years, Diane has received "Supervised Living – 1 Resident" services which have allowed Diane to live in her own home under close supervision 24 hours per day.

80. As a teenager, Diane lived in various group homes, but was often discharged from these homes due to her behaviors. On several occasions, Diane was institutionalized at Dorothea Dix Hospital in Raleigh, NC and John Umstead Hospital in Butner, NC.

81. As an adult, Diane attempted to live in two group homes. However, due to her behaviors, Diane was discharged from both group homes. Upon her last group home discharge, Diane was arrested and spent time in prison for assaulting a police officer that responded to a 911 call at the group home.

82. The frequency of Diane's more intense behaviors have declined since Diane moved into her own home. Nonetheless, Diane continues to exhibit difficulties with managing verbal aggression towards others, managing her depressive symptoms, and controlling her self-injurious behaviors. In May 2008, Diane was hospitalized in the psychiatric unit at Frye Regional Medical Center in Hickory, N.C. This institutionalization followed a brief stay in jail for assaulting a staff member.

83. Prior to February 15, 2010, the rate for Diane's services was approximately $240 per day. Before this date, Diane had two staff members monitoring her during the day and two monitoring her during the night. On February 15, 2010, the rate for Diane's services was reduced to $116.15 per day. After this point, Diane's staffing level was reduced to two staff members during the day and only one staff member during the night.

84. On or about May 1, 2010, Diane was placed in a group home with two roommates. One roommate, Jane Doe, has lived with Diane in the past, and Diane has had previous conflicts with Jane at a different group home. The provider of Diane's

Supervised Living services attributed the change in residential placement to both the Supervised Living rate cuts and the total elimination by PBH of a related service called "Personal Assistance."

85. Due to the history of Diane's violent and self-injurious behaviors, her previous group home failures and hospitalizations, her previous arrests and incarcerations, and her need for constant supervision, she is at risk of institutionalization due to the disruption of her residential placement.

THE INNOVATIONS WAIVER PROGRAM

86. The North Carolina Department of Health and Human Services (DHHS) is designated as the state Medicaid agency responsible for the administration and supervision of North Carolina's Medicaid Program under Title XIX of the Social Security Act. DHHS delegated chief responsibility for administering the federal Medicaid program to its Division of Medical Assistance (DMA).

87. The Medicaid Act authorizes states to obtain Home and Community Based Services waivers (HCBS waivers) upon approval from the Centers for Medicare and Medicaid Services (CMS). *See* 42 U.S.C. § 1396n(c) (also known as Section 1915(c) of the Social Security Act). These programs allow the State to provide home-based habilitative services to persons who would otherwise require care in an Intermediate Care Facility for Persons with Mental Retardation (ICF-MR). *Id.* The CAP-MR/DD waiver is one such program. Pursuant to a Memorandum of Understanding (MOU) with the Division of Medical Assistance (DMA), the Division of Mental Health, Developmental

Disabilities, and Substance Abuse Services (DMHDDSAS) is the lead agency for operation of the CAP-MR/DD waiver program.

88. Until 2005, Medicaid-eligible individuals residing in Piedmont Behavioral Healthcare's catchment area were eligible to participate in the CAP-MR/DD waiver program. In July 2004, the State of North Carolina applied for PBH to operate its own Medicaid health plan and HCBS waiver program, as a pilot project for the State. The Centers for Medicare and Medicaid Services approved PBH's managed care Medicaid plan and HCBS waiver in October 2004. Both the PBH Medicaid plan (now called the "Cardinal Health Plan") and its HCBS waiver (now called the "Innovations" Waiver) became effective on April 1, 2005.

89. The Innovations Waiver program is substantially similar to the CAP-MR/DD waiver program. Like the CAP-MR/DD waiver, periodic utilization reviews are conducted to continually determine an individual's level of support under the waiver and eligibility for services offered under the waiver. Unlike the CAP-MR/DD waiver programs, where DHHS contracts with an outside agency to conduct periodic utilization reviews for CAP-MR/DD waiver clients, PBH conducts its own internal utilization management for recipients of the Innovations Waiver.

90. The Innovations Waiver does not impose a maximum budget or cost limit upon any Innovations Waiver participant.

91. Residential staffing services available through the Innovations Waiver cannot be combined in any way to achieve twenty-four hour staffing and supervision without reasonable modification of the service definitions. Consequently, an Individual Support

Plan under the Innovations Waiver must be supplemented with additional state-funded services if twenty-four hour staffing is required.

MENTAL RETARDATION/MENTAL ILLNESS (MR/MI) – STATE FUNDED SERVICES

92. In addition to operating the Innovations Waiver, Defendant Coughlin bears responsibility for the coordination of MR/MI and other state-funded services. *See* N.C.G.S. § 122C-101; N.C.G.S. § 122C-115.4(a) & (b)(7). All of the named Plaintiffs are eligible for services paid through MR/MI funds.

93. MR/MI funding is provided to eligible State residents who have applied for mental health, developmental disabilities, and substance abuse services through their Local Management Entity (LME). MR/MI funds are made available to promote successful community living, and are used to extend the services and supports provided through Medicaid and other public and private funding. Accordingly, Plaintiffs and others similarly situated rely upon these MR/MI funds to access necessary supplemental residential staffing services for the hours that are not covered by the Innovations Waiver. Two such state-funded supplemental staffing services are called "Supervised Living – 1 Resident" and "Supervised Living – 2 Resident."

94. 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." Division of Mental Health/Developmental Disabilities/Substance Abuse Services, MH/DD/SA Service Definitions 164 (January 1, 2003). Medical necessity for this service is satisfied

when a recipient has an Axis I or II diagnosis or the person has a developmental disability, meets certain Level of Care Criteria, is at risk for placement outside the natural home setting, and has intensive verbal and limited physical aggression due to symptoms associated with a diagnosis, which are sufficient to create functional problems in a community setting. MH/DD/SA Service Definitions at 165.

95. In 2009, the General Assembly eliminated the availability of state-funded services for clients already receiving CAP MR/DD services. *See* Session Law 2009-451 § 10.21B. However, the General Assembly legislation explicitly provided that "former Thomas S. recipients currently living in community placements may continue to receive State-funded services." *See supra* paragraph 7 (equating the terms "Thomas S." funds and "MR/MI" funds).

96. All Plaintiffs are currently authorized to receive Supervised Living services. Plaintiffs will continue to meet medical necessity criteria for these services after their current authorizations expire.

97. Upon information and belief, the costs incurred by the providers of residential services for Supervised Living consumers will exceed PBH's proposed per diem rate of $116.15. Because providers would only be able to provide Supervised Living services at a loss, they will no longer offer that level of support in the five counties served by PBH. Either providers will offer a reduced level of services for these clients, or they will withdraw from offering the Supervised Living services altogether.

98. Plaintiffs and other similarly situated individuals would be effectively denied access to the Supervised Living services currently authorized in their plans of care.

Instead, they will be forced into congregate living environments that have already been found to be inappropriate for their care. If, as expected, Plaintiffs decompensate in a congregate living environment and again require a higher level of community support, the level of support provided by Supervised Living services will no longer be available to Plaintiffs because of the inadequate Supervised Living rates currently in effect.

99. It is not expected that the congregate placements will be successful for any Plaintiff. Plaintiffs require constant one-on-one supervision and attention, which congregate placements do not provide. If and when Plaintiffs' placement in a congregate setting—or, in Plaintiff Jason A.'s case, a *more* 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.

100. Individuals such as Timothy B. and Diane D. require certain supplemental services because of their unique medical or support needs, such as a specialized sign language interpreter or additional supervisory staffing. If Timothy B. or Diane D. were institutionalized, these services must be provided in the institutional setting, at an additional cost to the State.

FIRST CLAIM FOR RELIEF
(Title II of the Americans with Disabilities Act)

101. Plaintiffs adopt and restate the allegations set forth in paragraphs 1 – 100 of this complaint.

102. Title II of the Americans with Disabilities Act (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.

103. A "public entity" is defined as any State or local government or other instrumentality of a State or local government. *See* 42 U.S.C. § 12131 (1)(A)&(C).

104. 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).

105. Regulations implementing Title II provide that

> "a public entity may not, directly through contractual or other arrangements, utilize criteria or other methods of administration: (i) that have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability; [or] (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the entity's program with respect to individuals with disabilities…" 28 C.F.R. § 35.130(b)(3).

106. Regulations implementing Title II further provide:

> "(b)(1) A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability: (iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;
> (iv) Provide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others;
> (v) Aid or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or

> person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity's program. 28 C.F.R. § 35.130(b)(1).

107. The United States Supreme Court in *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999), held that unnecessary institutionalization of individuals with disabilities is a form of discrimination under Title II of the ADA. In doing so, the high Court interpreted the ADA's "integration mandate" as requiring persons with disabilities to 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. 527 U.S. at 607.

108. The North Carolina General Assembly designated LMEs such as PBH as "local political subdivisions" of the State. *See* N.C.G.S. § 112C-116(a). The Legislature further vested the Secretary of DHHS with responsibility for ensuring LMEs' compliance with applicable laws. *See* N.C.G.S. § 112C-111. Through contractual, licensing, or other arrangement with the State, PBH is responsible for providing a public aid and benefit through its management of the public mental health, developmental disabilities, and substance abuse system in its catchment area. The Piedmont Behavioral Healthcare Local Management Entity is an instrumentality and contractor of the State, and a public entity covered by Title II of the ADA and its implementing regulations. *See* 28 C.F.R. § 35.130 (b)(1).

109. Plaintiffs are individuals with disabilities in that they have physical and other impairments that substantially limit one or more of their major life activities, including

but not limited to, thinking, communicating, learning, working, caring for themselves, and concentrating. *See* 42 U.S.C. § 12102.

110. Plaintiffs are qualified individuals with disabilities in that they are capable of safely living at home with necessary services and they meet the essential eligibility requirements for the receipt of services from the State Medicaid program, the Innovations Waiver program, and State-funded mental health, developmental disabilities, and substance abuse services programs with or without reasonable modifications to the rules, polices, and practices of those programs. *See* 42 U.S.C. § 12131(2).

111. Plaintiffs' community placements were the result of, *inter alia*, PBH's determination that community-based treatment was appropriate for them. Plaintiffs do not oppose community placement. Plaintiffs' community placement can be reasonably accommodated, as demonstrated by their continuous care in the community for many years; Plaintiff Clinton L. for over eight years, Plaintiff Timothy B. for more than a decade, Plaintiff Vernon W. for over five years, Plaintiff Steven C. for over a decade, Plaintiff Jason A. for approximately a decade, and Plaintiff Diane D. for more than a decade.

112. Without reasonable modification of the rules, policies, and procedures governing the Innovations Waiver program, Plaintiffs will be forcibly isolated and segregated. Plaintiffs are facing the risk of forced institutionalization as a direct result of Defendants' actions.

113. Defendant Coughlin's failure to make reasonable modifications to the service definitions applicable to the Innovations Waiver program denies Plaintiffs the full

twenty-four hour per day residential staffing they need to remain in their homes. The failure to make reasonable modifications to the Innovations Waiver service definitions to allow Plaintiffs to remain in their integrated home settings constitutes unlawful discrimination in violation of Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132 and its implementing regulation, 28 C.F.R. § 35.130(d).

114. Defendant Cansler is the Secretary of the North Carolina DHHS, the "single state agency" responsible for the administration and supervision of North Carolina's Medicaid program under Title XIX of the Social Security Act. 42 C.F.R. § 431.10 (2009). Additionally, Defendant Cansler is responsible for the ultimate oversight of the LMEs to make sure that they provide publicly funded services in accordance with the law. *See* N.C.G.S. § 122C-111, *et seq*.

115. Defendant Cansler's failure to make reasonable modifications to the service definitions applicable to the Innovations Waiver service definitions to allow Plaintiffs to remain in their integrated home settings constitutes unlawful discrimination in violation of Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132 and its implementing regulation, 28 C.F.R. § 35.130(d).

116. Defendant Coughlin has also failed to exercise his discretion in a non-discriminatory manner by drastically reducing the rate for Supervised Living services, denying Plaintiffs the services necessary to make up the staffing shortfall under the Innovations Waiver.

117. PBH's proposed rate cuts would result in the partial elimination or dilution of Supervised Living services to clients served by PBH. Plaintiffs would no longer have access to services that were originally created for their use.

118. Defendant Coughlin failed properly to exercise his discretion and authority in reducing rates and, thereby, diminished adequate state funds for Plaintiffs' residential staffing services. Defendant Coughlin's failure to make sufficient funds available to allow Plaintiffs to remain in their integrated home settings constitutes unlawful discrimination in violation of Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132 and its implementing regulation, 28 C.F.R. § 35.130(d).

119. Defendant Cansler's failure to adequately supervise the actions of PBH and to make these funds available to allow Plaintiffs to remain in their integrated home settings constitutes unlawful discrimination in violation of Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132 and its implementing regulation, 28 C.F.R. § 35.130(d).

SECOND CLAIM FOR RELIEF
(Section 504 of the Rehabilitation Act)

120. Plaintiffs adopt and restate the allegations set forth in paragraphs 1 – 119 of this complaint.

121. Section 504 of the Rehabilitation Act of 1973 provides, "no otherwise qualified individual with a disability in the United States...shall, solely by reason of her or his disability, be excluded from 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).

122. "Individual with a disability" is one who has a disability as defined by the Americans with Disabilities Act. 29 U.S.C. § 705(20)(B), *referencing* 42 U.S.C. 12102.

123. "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).

124. "Recipient" of federal financial assistance also includes any public or private agency or other entity to which federal financial assistances is extended directly or through another recipient. 28 C.F.R. § 41.3(d).

125. Regulations implementing Section 504 require a recipient of federal financial assistance to administer its services, programs, and activities in the "most integrated setting appropriate" the needs of qualified individuals with disabilities. 28 C.F.R. § 41.51(d).

126. The State of North Carolina has delegated to LMEs such as PBH the function of administering programs and services to clients in its geographical area in need of Mental Health, Developmental Disabilities, or Substance Abuse services. PBH receives appropriations of money from the North Carolina state legislature, including a substantial portion of federal Medicaid funds and State funds.

127. PBH is a recipient of federal financial assistance under Section 504 and its implementing regulations.

128. Plaintiffs are "qualified person[s] with disabilities" within the meaning of Section 504 because they have physical and/or mental impairments that substantially

limit one or more major life activities, and they meet the essential eligibility requirements for the Innovations Waiver program. *See* 29 U.S.C. § 705(9)

129. Defendant Coughlin's failure to reasonably modify the Innovations Waiver service definitions to allow Plaintiffs to combine residential staffing services to achieve a full twenty-four hours of continuous staffing constitutes unlawful discrimination in violation of Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 and its implementing regulation, 28 C.F.R. 41.51(d). Without a reasonable accommodation of the rules, policies, and procedures governing the Innovations Waiver program, Plaintiffs will be forcibly isolated and segregated. Plaintiffs are also at risk of forced institutionalization. Plaintiffs are entitled to reside in the most integrated setting appropriate to their needs. Plaintiffs, with reasonable modifications to the Innovations Waiver service definitions that allow them to combine residential staffing services, can successfully maintain their community placement in their own homes, each of which is the most integrated setting appropriate to their needs.

130. Defendant Coughlin has also failed to exercise his discretion in a non-discriminatory manner by drastically reducing the rate for Supervised Living services, denying Plaintiffs the level of care necessary to make up the staffing shortfall under the Innovations Waiver.

131. PBH's proposed rate cuts would eliminate the high level of care contemplated by Supervised Living services for consumers served by PBH. Plaintiffs would no longer have access to services that were originally created for their use.

132. Defendant Coughlin failed to properly exercise his discretion and authority in reducing rates and, thereby, diminished adequate state funds for Plaintiffs' residential staffing services. Defendant Coughlin's failure to make sufficient funds available to allow Plaintiffs to remain in their integrated home settings constitutes unlawful discrimination in violation of Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 and its implementing regulation, 28 C.F.R. 41.51(d).

133. Defendant Cansler's failure to adequately supervise PBH's actions and instruct PBH to reasonably modify the Innovations Waiver service definitions to allow Plaintiffs to combine residential staffing services to achieve a full twenty-four hours of continuous staffing constitutes unlawful discrimination in violation of Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 and its implementing regulation, 28 C.F.R. 41.51(d). Additionally, Defendant Cansler's failure to adequately supervise PBH's actions and instruct PBH to exercise its discretion to make available non-Medicaid state funds for the residential staffing services that Plaintiffs require to avoid segregation and institutionalization, and to remain in their integrated home settings that are appropriate to their needs constitutes unlawful discrimination in violation of Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 and its implementing regulation, 28 C.F.R. 41.51(d).

THIRD CLAIM FOR RELIEF

(Violation of ADA regulation 28 C.F.R. § 35 requiring effective communications)

134. Plaintiffs adopt and restate the allegations set forth in paragraphs 1 – 133 of this complaint.

135. 28 C.F.R. § 35.160(a)(1) provides, " A public entity shall take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others."

136. 28 C.F.R. § 35.160(b)(1) provides "A public entity shall furnish appropriate auxiliary aids and services where necessary to afford individuals with disabilities, including applicants, participants, companions, and members of the public, an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity."

137. 28 C.F.R. § 35.160 (b)(2) defines:

> The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place. In determining what types of auxiliary aids and services are necessary, a public entity shall give primary consideration to the requests of individuals with disabilities. In order to be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability.

138. By their failure to ensure effective, accessible communication in the delivery of behavioral health services and their failure to provide appropriate auxiliary aids and services to Plaintiff Timothy B., Defendants have violated 28 C.F.R. § 35.160.

139. 28 C.F.R. § 35.130 (a) provides "No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the

benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity."

140. 28 C.F.R. § 35.130(b)(1) prohibits states from providing some individuals with disabilities "an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others" because of their disability, and requires, inter alia, that mental health services must be equally available to people who are deaf.

141. 28 C.F.R. § 35.130 (b)(1)(iii) states: "A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability… [p]rovide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others"

142. By their failure to take into account Plaintiff Timothy B.'s deafness in the provision of aids and services, Defendants have provided a "service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others" who are not deaf or hard of hearing.

143. Defendants have excluded Plaintiff Timothy B. from participation and or denied him the benefits of the services, programs, or activities of a public entity, on the basis of his disability, deafness.

RELIEF REQUESTED

WHEREFORE, Plaintiffs respectfully request that the Court grant the following relief:

1. Declare Defendant Coughlin's failure to offer a reasonable per diem rate for Supervised Living services to be unlawful discrimination in violation of Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.

2. Declare Defendant Coughlin's and Defendant Cansler's failure to make reasonable modifications to the service definitions in the Innovations Waiver to be unlawful discrimination in violation of Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.

3. Grant preliminary and permanent injunctions enjoining Defendant Coughlin Defendant Cansler and their officers, agents, employees, attorneys, and all persons who are in active concert or participation with him from implementing the proposed rate reduction to Supervised Living Services, and requiring Defendant Coughlin and Defendant Cansler and their officers, agents, employees, attorneys, and all persons who are in active concert or participation with him to continue the provision of coverage of Plaintiffs' service needs in the least restrictive, most integrated setting.

4. Ensure any benefits and services are delivered to Plaintiff Timothy B. in an effective and accessible manner, so as to afford him the opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others who are not deaf or hard of hearing (*i.e.*, ensure Defendants do not discriminate against Plaintiff Timothy B. based on his disability of deafness).

5. Ensure effective, accessible communication, including if necessary auxiliary aids and services, in the delivery of behavioral health services to Plaintiff Timothy B.

6. Waive the requirement for the posting of a bond as security for the entry of preliminary relief.

7. Award the Plaintiffs the costs of this action and reasonable attorney's fees pursuant to 29 U.S.C. § 794a and 42 U.S.C. § 12133 and any other applicable provision of law.

8. All such other and further relief as the Court deems to be just and equitable.

Dated: June 28, 2013

Respectfully submitted,

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Certificate of Service

The undersigned hereby certifies that on June 28th, 2013, I electronically filed the foregoing Plaintiffs' Third Amended Complaint 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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