IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LYKEH MUMFORD, by and through his next friend, Katherina Mach; JOSEPH YALE, by and through his next friend, Pamela Zotynia; and KAREN LYN BLAKELY, by and through her mother and next friend, Carol Blakely,	:	
Plaintiffs,	:	
v.	:	Civil Action No. 11-3312
DEPARTMENT OF PUBLIC WELFARE OF THE COMMONWEALTHOF PENNSYLVANIA; and GARY ALEXANDER, in his official capacity as Acting Secretary of Public Welfare of the Commonwealth of Pennsylvania,	:	
Defendants.	:	

PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Pursuant to Federal Rule of Civil Procedure 65, Plaintiffs, through their counsel, submit this Motion for a Temporary Restraining Order and Preliminary Injunction. Plaintiffs initially seek a temporary restraining order to require Defendants to take appropriate steps to prevent the commitment of Plaintiffs Yale and Blakely to state-operated institutions and not to terminate Plaintiffs from the Consolidated Waiver program. Plaintiffs then seek a preliminary injunction to enjoin Defendant to take immediate steps to assure that all Plaintiffs receive clinically appropriate community residential habilitation services to which they are entitled. In support of this Motion,

Plaintiffs submit the accom panying Memorandum of Law and Exhibits, whic h are incorporated by reference as if fully set forth herein.

Respectfully submitted,

Dated: June 9, 2011

By: /s/ Robert W. Meek

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MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Plaintiffs, through their counsel, submit this Memorandum of Law in support of their Motion for a Te mporary Restraining Order and Prelim inary Injunction to enjoin Defendant's violations of the Americans w ith Disabilities Act, Rehabilitation Act, and Title XIX of the Social Security Act. As described below, Plain tiffs satisfy all the prerequisites for issuance of such injunctive relief.

FACTUAL BACKGROUND

A. Defendants' Limitations on Access to Residential Habilitation Services Under the Medical Assistance Consolidated Waiver.

Pennsylvania participates in the joint federal-state Medical Assistance program under Title XIX of the Social Security Act (Title XIX), 42 U.S.C. § 1396 *et seq.* *See Pennsylvania v. United States*, No. 10-2840, 2011 WL 991402 at *1 (3d Cir. Mar. 22, 2011) (not for publication). The federal government pays more than 50 percent of the costs of services furnished by Pennsylvania under Title XIX. *See Pennsylvania Dep't of Public Welfare v. U.S. Dep't of Health & Human Services*, Civil Action No. 1:08-CV-791, 2010 WL 1390835 at *1 n.2 (M.D. Pa. Mar. 31, 2010).

Under Title XIX, certain delineated services are mandatory (*e.g.*, inpatient hospital services, physicians' services, and nursing facilities) while other delineated services are "optional" (*e.g.*, dental care and medications) so that the state may, but is not required, to provide them to Medical Assistance recipients. *See Pennsylvania Pharmacists Ass'n v. Houstoun*, 283 F.3d 531, 533 (3d Cir.) (en banc), *cert. denied*, 537 U.S. 821 (2002); *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1178 (10th Cir. 2003). Title XIX also permits a state to obtain a home and community-based services (HCBS) waiver from the federal Centers for Medicare and Medicaid Services (CMS). 42 U.S.C. § 1396n(c). HCBS waivers "'provide[] Medicaid reimbursement to States for the provision of community-based services to individuals who would otherwise require institutional care, upon a showing that the average annual cost of such services is not more than the annual cost of institutional services.'" *Pennsylvania Dep't of Public Welfare*, 2010 WL 1390835

at *1 (quoting *Olmstead v. L.C.*, 527 U.S. 581, 601 (1999)).[1] Through HCBS waivers, states can access federal Medical Assistance funds for services that could not otherwise be funded under Title XIX. *See Radaszewski*, 381 F.3d at 601; *McCarthy ex rel. Travis v. Hawkins*, 381 F.3d 407, 410 (5th Cir. 2004); 42 U.S.C. § 1396n(c)(4)(B); 42 C.F.R. §§ 440.180.

CMS has authorized Pennsylvania's Department of Public Welfare (DPW), administered by Defendant Alexander, to operate multiple HCBS waivers. *See* DPW, *Support Services Waivers*, *available at* http://www.dpw.state.pa.us/foradults/healthcare medicalassistance/ supportserviceswaivers/index.htm. DPW's Office of Developmental Programs (ODP) has responsibility to administer several of Pennsylvania's HCBS Waivers that provide services to people with intellectual disabilities (formerly called mental retardation), including the "Consolidated Waiver." *See* DPW, *Consolidated Waiver for Individuals with Mental Retardation, available at* http://www.dpw.state.pa.us/ learnaboutdpw/waiverinformation/consolidatedwaiverforindividualswithmentalretardation/indexhtm; Consolidated Waiver at 10 (published in Developmental Programs Bulletin # 00-09-04, Att. C (July 1, 2009), *available at* http://services.dpw.state.pa.us/olddpw/ bulletinsearch.aspx?AttachmentId=4486 (excerpts submitted as Exh. A).

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[1] HCBS waivers allow the federal government to waive certain Medical Assistance requirements, including limiting the number of eligible persons and changing financial eligibility criteria. *See Radaszewski ex rel. Radaszewski v. Maram*, 383 F.3d 599, 601 (7th Cir. 2004); 42 U.S.C. §§ 1396n(c)(3), (9).

The Consolidated Waiver authorizes DPW to provide an array of home and community-based services to individuals with intellectual disabilities over the age of 3. Consolidated Waiver at 15. These services include: licensed residential habilitation services (which provide up to 24-hour supervision and supports to people in group homes, family living arrangements, and other small, licensed programs to assist them with self-care, communication, therapeutic activities, personal adjustment, relationship development, socialization, and use of community resources); community habilitation (which assists participants to acquire, maintain, or improve self-help, domestic, socialization, and adaptive skills necessary to live successfully in the community); respite care (which provides relief to caregivers); various types of vocational programs and supports; nursing care and therapies; behavioral supports; home and vehicle accessibility modifications; assistive technology; and transportation. *Id.* at 30-31. The Consolidated Waiver can offer services to approximately 17,000 Pennsylvanians with intellectual disabilities. *Id.* at 18.

Once an individual is approved to participate in the Consolidated Waiver, he and his Support Team (including involved family members, guardian (if applicable), supports coordinator, and provider staff) work to develop an Individual Support Plan (ISP). *See* DPW, ODP Bulletin # 00-10-12, Att. 1 at 4 (July 1, 2010) (ISP Manual), *available at* http://services.dpw.state.pa.us/olddpw/bulletinsearch.aspx?AttachmentId=4638. The ISP identifies the specific types of services and supports the individual needs to live in the community based on the assessment of the individual's clinical and medical needs using

an assessment tool developed by ODP. *Id.* The ISP must be reviewed at least annually and more frequently if the individual's needs change during the year. *Id.* at 62.

For individuals who are enrolled in the Consolidated Waiver, there is no monetary cap on services. Consolidated Waiver at 16. The individual thus is entitled to receive any services he or she needs that are available under the Waiver and are necessary for their health and welfare.

Individuals who are enrolled in the Consolidated Waiver are at risk of termination from the Waiver if they do not receive any Waiver-funded services for a certain period of time. *See* Consolidated Waiver at 26-27. Once a person is terminated from the Waiver, he or she must re-apply for services. Currently, there are more than 5,000 Pennsylvanians with intellectual disabilities on the "emergency" waiting list for community services. *See* Pennsylvania Waiting List Campaign, *available at* http://www.pawaitinglistcampaign.org/. As a result, a person who is terminated from the Consolidated Waiver may have to wait years to be re-admitted for services.

Recently, DPW has implemented policies and proposed policies practices that impede the development of new residential habilitation programs, particularly those that serve one or two individuals who have complex medical or challenging behavioral health needs that may cost more to operate than other types of residential programs. *See* Mitchell Decl. ¶ 3 (Exh. B); McNelis Decl. ¶ 3 (Exh. I).

First, DPW has recently changed its policy that results in a decrease in payments to residential habilitation providers for "ineligible costs." Ineligible costs are costs for "room and board" that are not eligible for federal matching funds under Title XIX.

Mitchell Decl. ¶ 4; McNelis Decl. ¶ 4. These ineligible costs are paid by state funds plus a portion of the residents' Social Security disability or Supplemental Security Income benefits. *Id.* DPW recently expanded the definition of ineligible costs, excluding many costs previously eligible for federal matching funds, such as time spent by staff for meal preparation. Mitchell Decl. ¶ 4; McNelis Decl. ¶ 4. The end result is an increase in the ineligible costs for community residential programs. Mitchell Decl. ¶ 4; McNelis Decl. ¶ 4. However, ODP has not increased its payments to providers for the increased ineligible expenses while it has reduced payments for "eligible" expenses (that is expenses eligible for federal matching funds) to reflect the shift in expenses from eligible to ineligible. Mitchell Decl. ¶ 4; McNelis Decl. ¶ 4.

Second, DPW has proposed an overall reduction in current payments for ineligible expenses by $27 million annually based on an erroneous determination that community residential habilitation providers had been overcharging for those expenses. Mitchell Decl. ¶ 5; McNelis Decl. ¶ 5. According to a survey of 63 providers in May 2011, this reduction will cause the surveyed providers to be reimbursed $24 million less annually to cover their ineligible costs. Mitchell Decl. ¶ 5; McNelis Decl. ¶ 5; PAR Survey (Exh. C). ODP intends to implement this reduction by capping ineligible expenses paid to providers for residential habilitation services at $7,000 per person. Mitchell Decl. ¶ 5; McNelis Decl. ¶ 5. This sum, plus 72 percent of each resident's Supplemental Security Income or Social Security Disability benefits, will be the provider's only reimbursement for all room and board expenses listed on the ODP cost report. *See* Mitchell Decl. ¶ 5; McNelis Decl. ¶ 5. According to the provider survey, the proposed reduction will decrease by more

than 50 percent the amount of ineligible costs that ODP reimburses to operate one-person programs. Mitchell Decl. ¶ 5; McNelis Decl. ¶ 5; PAR Survey. [2] Providers simply will no longer be able to operate these programs. Mitchell Decl. ¶ 5; McNelis Decl. ¶ 5. As for new programs, ODP's proposed reduction in payments for ineligible expenses has made providers hesitant and, at worst, unwilling to develop those programs because their costs are not likely to be covered. Mitchell Decl. ¶ 5; McNelis Decl. ¶ 5.

Third, ODP has implemented a "high cost rate development" policy and an "outlier rate adjustment" policy. Mitchell Decl. ¶ 6; McNelis Decl. ¶ 6. These policies result in rates that are both inadequate and unstable for community residential rehabilitation programs that serve people with complex needs. Mitchell Decl. ¶ 6; McNelis Decl. ¶ 6. The "high cost" policy determines rates for new programs that have higher costs while the "outlier" policy has been used to reduce rates for existing high-cost programs after ODP has already negotiated the rates with providers. Mitchell Decl. ¶ 6; McNelis Decl. ¶ 6. Neither of these policies is written, and ODP has not informed providers or the public as to the standards that it uses to determine rates for these programs. Mitchell Decl. ¶ 6; McNelis Decl. ¶ 6. In practice, the policies have narrowed the rate ranges and resulted in extreme disincentives for providers to serve individuals with complex needs. Mitchell Decl. ¶ 6; McNelis Decl. ¶ 6.

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[2] The impact of the reduction is plainly evident in the case of Plaintiff Yale. Mr. Yale's prior provider, which served him in a one-person program, received $64.34 per day for "ineligible expenses" associated with that program, or $23,484 annually. *See* Yale ISP at 28 (Exh. D). DPW's proposal would require a provider to offer him similar services while being reimbursed for room and board expenses at less than one-third of the prior rate.

Finally, ODP is not increasing its rates for community residential habilitation services to keep pace with necessary cost increases. Mitchell Decl. ¶ 7; McNelis Decl. ¶ 7. As providers' costs increase, the rates do not. *Id.* The result is that providers have had to reduce their expenses. Mitchell Decl. ¶ 7; McNelis Decl. ¶ 7. Providers cannot reduce expenses for direct care staff that are mandated by their clients' ISPs nor can they reduce fixed costs. Mitchell Decl. ¶ 7; McNelis Decl. ¶ 7. Instead, providers have taken or plan to take serious measures, including reduction in clinical staff necessary to support people with complex needs, moving individuals, or not investing in necessary infrastructure or training. Mitchell Decl. ¶ 7; McNelis Decl. ¶ 7.

B. Defendants' Actions and Inactions Have Resulted in the Unnecessary Institutionalization of Plaintiffs.

Plaintiff Lykeh Mumford is a 32-year-old Philadelphian who has an intellectual disability and been diagnosed with pervasive developmental disorder (a diagnosis on the autism spectrum), and impulse control disorder. Beilharz Decl. ¶ 2 (Exh. E). Enrolled in the Consolidated Waiver in 2008, Mr. Mumford lived in the homes of his mother or grandmother until January 2011. *Id.* ¶¶ 3-4. During that period, Mr. Mumford received 14.5 hours daily of home and community habilitation services (non-residential) during weekdays and 12 hours daily on weekends. *Id.* ¶ 4. While living in the community, Mr. Mumford enjoyed taking walks, swimming, bike riding, playing basketball, having morning coffee in the park, and going to the community center and library. *Id.* ¶ 5.

Mr. Mumford's grandmother, due to her advancing age, became unable to support him in her home, particularly due to instances of aggressiveness to others and self-

injurious behaviors. Beilharz Decl. ¶ 6. His mother also was unable to handle his behavioral issues. *Id.* ¶ 7.

In January 2011, Mr. Mumford was admitted to a private psychiatric hospital in Philadelphia. Beilharz Decl. ¶ 8. Mr. Mumford's treating physicians at that facility eventually determined that he no longer needs inpatient psychiatric care, but his family is unwilling and unable to take him back home. *Id.* ¶¶ 9, 10. The hospital, therefore, threatened to file a petition to involuntarily commit Mr. Mumford to a state mental retardation institution pursuant to 50 P.S. § 4406. *Id.* ¶ 11.

According to treating professionals, Mr. Mumford can live in the community if he receives residential habilitation services in a structured setting. *See* Beilharz Decl. ¶ 12. DPW, however, has been unable to identify a provider who is willing to offer those services to Mr. Mumford. *See id.* ¶ 13. Mr. Mumford's Administrative Entity (AE), with which DPW contracts to arrange for Consolidated Waiver services, had only sought to place Mr. Mumford in an existing residential habilitation program. *Id.* ¶ 14. Those efforts were unsuccessful as the providers either were unable to meet Mr. Mumford's needs or had no appropriate vacancies. *Id.*[3] As a result, Mr. Mumford remains unnecessarily institutionalized in the psychiatric hospital where he is segregated from

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[3] On June 7, 2011, Plaintiffs' counsel was advised that DPW had identified a provider willing to provide residential habilitation services to Mr. Mumford, and it was expected he would be discharged to that program by the end of June. Given these assurances, Plaintiffs do not seek a temporary restraining order on be half of Mr. Mumford. However, Plaintiffs continue to pursue preliminary injunctive relief on his behalf given that DPW's arrangements with providers have sometimes fallen apart. Meek Decl. ¶ 8 (Exh. G). If Mr. Mumford is discharged as expected, Plaintiffs will so advise the Court.

society. *Id.* ¶ 15. Moreover, Mr. Mumford is at risk of continued unnecessary segregation and institutionalization if he is committed to a state mental retardation institution. *Id.* ¶ 16. Mr. Mumford's continued institutionalization also jeopardizes his ability to maintain his enrollment in the Consolidated Waiver. *Id.* ¶ 17.

Plaintiff Joseph Yale is a 26-year-old Luzerne County resident who has an intellectual disability and a diagnosis of schizoaffective disorder. Pasqualicchio Decl. ¶ 2 (Exh. F). Mr. Yale's inability to secure appropriate treatment has resulted in his admissions to private and state psychiatric hospitals nearly 20 times. *Id.* ¶ 3. Between institutionalizations, Mr. Yale lived with his family. *Id.* ¶ 4. Mr. Yale enjoyed going to the movies, playing sports, and shopping when he lived in the community. *Id.* ¶ 5.

Mr. Yale was enrolled in the Consolidated Waiver in May 2010, giving him access to a wide array of services that the Waiver offers. Pasqualicchio Decl. ¶ 6. In or around August 2010, after enrolling in the Consolidated Waiver, Mr. Yale lived in a residential habilitation program in an apartment with 1:1 staffing. *Id.* ¶ 7. Mr. Yale was involuntarily committed to a private psychiatric hospital in or around October 2010 due to incidents of self-injurious behavior, aggression, and property damage. *Id.* ¶ 8.

Mr. Yale's treating professionals have recommended his placement in a community residential habilitation program with 2:1 staffing between 8:30 a.m. and 10:00 p.m. Pasqualicchio Decl. ¶ 9. It is anticipated that this staffing level will be able to be decreased to 1:1 within a few months after he adjusts to a new environment. *Id.*

In March 2011, Resources for Human Development (RHD), a provider, submitted to ODP a budget to serve Mr. Yale in such a program. *See* Pasqualicchio Decl. ¶ 10.

ODP rejected that budget. *Id.* At a meeting between ODP and RHD on March 23, 2011, ODP requested additional information, which RHD submitted on April 8. *Id.* RHD made several attempts since then to schedule another meeting with ODP to review the budget for Mr. Yale, but ODP did not respond to those submissions. *Id.* ¶ 11. Instead, ODP asked RHD to submit new budget forms. *Id.*

On or around June 2, 2011, the negotiations between RHD and ODP reached an impasse. Pasqualicchio Decl. ¶ 12. The private psychiatric hospital then referred Mr. Yale for involuntary commitment to Clarks Summit State Hospital, a state-operated psychiatric hospital, and a commitment hearing now is scheduled for June 14, 2011. *See id.* ¶ 13; Meek Decl. ¶ 6 (Exh. G). Mr. Yale is being referred for commitment proceedings solely due to the breakdown in negotiations between ODP and RHD, and not because Mr. Yale is experiencing psychiatric symptoms that require involuntary commitment to a state psychiatric hospital. *See* Pasqualicchio Decl. ¶ 13. RHD remains willing to provide community residential rehabilitation services to Mr. Yale, presumably if it can successfully negotiate a rate with ODP. *See id.* ¶ 12.

Mr. Yale has been institutionalized and segregated from society for more than eight months as he awaits the development of an appropriate residential habilitation program. *See* Pasqualicchio Decl. ¶ 14. Mr. Yale does not appear to be receiving any habilitation services for his intellectual disability in the psychiatric hospital. *Id.* ¶ 15. Mr. Yale's continued eligibility for Consolidated Waiver services is at risk if he does not return to the community. *Id.* ¶ 17.

Plaintiff Karen Lyn Blakely is a nearly 43-year-old Philadelphian who has an intellectual disability and has been diagnosed with bipolar disorder. Blakely Decl. ¶ 1 (Exh. H). Ms. Blakely, who is enrolled in the Consolidated Waiver, received residential habilitation services in a one-person program between 2005 and November 2009. *Id.* ¶¶ 4, 12. Ms. Blakely is an energetic, talkative, engaging person who enjoys living in the community. *Id.* ¶ 17.

In November 2009, Ms. Blakely's mother removed her from the community residential habilitation program, and took her into her own home after Ms. Blakely sustained second-degree burns when staff in the program threw hot water on her in response to a behavioral incident. Blakely Decl. ¶¶ 4-5. Ms. Blakely received only limited community services and supports when she lived with her mother. *Id.* ¶ 6. Beginning in February 2010, Ms. Blakely's behavioral issues became worse and she became physically assaultive toward her mother. *Id.* ¶ 7. Ms. Blakely was admitted in private psychiatric hospitals twice for brief periods. *Id.* ¶ 8. Ms. Blakely again was admitted to the psychiatric hospital on June 29, 2010, and she has remained there since that time. *Id.* ¶ 9.

After she was admitted to the psychiatric hospital in June 2010, her treating physicians took her off all medications to detoxify her system. Blakely Decl. ¶ 10. This resulted in marked improvement in her behavior and functional abilities. *Id.* Ms. Blakely's treatment team at the psychiatric hospital has concluded that she no longer needs inpatient psychiatric treatment. *Id.* ¶ 11. Ms. Blakely's AE,, the organization that contracts with DPW to arrange for Consolidated Waiver services for Philadelphians with

intellectual disabilities, identified a community residential habilitation provider in 2010 who was able and willing to provider her with services. *Id.* ¶ 13. In May 2011, however, that provider withdrew its proposal to provide community residential habilitation services to Ms. Blakely due to a rate issue. *Id.* ¶ 14. Efforts by the AE to resolve that issue with DPW proved unavailing. *Id.* Ms. Blakely cannot return to live with her mother because her mother cannot physically meet her needs. *Id.* ¶ 16.

Ms. Blakely remains unnecessarily institutionalized in the psychiatric hospital where she does not have opportunities to engage in community life. Blakely Decl. ¶ 17. The psychiatric hospital has threatened to file a petition to commit Ms. Blakely to a state-operated mental retardation institution. *Id.* ¶ 18. Ms. Blakely does not need to be institutionalized in such a facility and, if she were, it would be difficult for her mother to visit her. *Id.* Ms. Blakely's continued institutionalization also threatens her continued eligibility for services under the Consolidated Waiver. *See id.* ¶ 19.

ARGUMENT

PLAINTIFFS SATISFY THE STANDARDS FOR ISSUANCE OF A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION.

"'A temporary restraining order is a 'stay put' equitable remedy that has its essential purpose the preservation of the status quo while the merits of the cause are explored through litigation.'" *EXL Laboratories, LLC v. Egolf*, Civil Action No. 10-6282, 2010 WL 5000835 at *3 (E.D. Pa. Dec. 27, 2010) (quoting *J.O. v. Orange Twp., Bd. of Educ.*, 287 F.3d 267, 273 (3d Cir. 2002)). The standards for issuance of a temporary restraining order are the same as those for issuance of a preliminary injunction.

Id.; *accord Ball v. Famiglio* , Civil Action No. 1:cv- 08-0700, 2011 WL 1304614 at *3 (M.D. Pa. Mar. 31, 2011).[4] The standard for assessing whether a preliminary injunction should be granted is well-settled. The court must consider whether: (1) the moving party has a likelihood of s uccess on the merits; (2) the moving party will suffer irreparable harm if the injunction is denied; (3) granting relief will result in even greater harm to the non-moving party; and (4) the public interest favors issuance of a preliminary injunction. *Bimbo Bakeries USA, Inc. v. Botticella* , 613 F.3d 102, 109 (3d Cir. 2010). An examination of each of these factors demons trates that the issuance of injunctive relief is warranted and appropriate in this case.

A. Plaintiffs Are Likely to Succeed on the Merits.

Plaintiffs allege that Defenda nts Alexander and D PW have vi olated their right s under, respectively, the Americans wit h Disabilities Act (ADA) and Re habilitation Act (RA) by failing to provide them with services in the commun ity. Plaintiffs also allege that Defendant Alexander' s failure to af ford them prompt access to appropriate community residential habilitation services to which they are entitled violates various provisions of Title XIX of the Social Security Act, the federal Medical Assistance statute. Plaintiffs are likely to prevail on these claims.

[4] Although the Court may issue a tempor ary restraining order without written or oral notice to the opposing party, Fed. R. Civ. P. 65(b)(1), Plaintiffs in this ca se provided advance notice of Defendants' counsel. Meek Decl. ¶¶ 2-6 (Exh. G).

1. Defendants Have Violated the Integration Mandates of the ADA and RA.

Title II of the ADA prohibits public entities, such as DPW, from excluding persons with disabilities from participating in or denying the benefits of services, programs, or activities, or otherwise discriminating against such individuals. 42 U.S.C. § 12132. This provision "largely mirrors Section 504 of the [Rehabilitation Act (RA)]," 29 U.S.C. § 794(a), which applies to federally-funded programs, and thus the Third Circuit has "construed the provisions of the RA and the ADA similarly in light of their close similarity of language and purpose." *Frederick L. v. Dep't of Public Welfare*, 364 F.3d 487, 491 (3d Cir. 2004) (*Frederick L. I*).[5]

"The ADA['s] and RA's anti-discrimination principles culminate in their integration mandates [28 C.F.R. §§ 35.130(d), 41.51(d), respectively], which direct states to administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." *Frederick L. I*, 364 F.3d at 491. The integration mandate requires the provision of services to persons with disabilities in "'a setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible.'" *Id.* (quoting 28 C.F.R. pt. 35, App. A, p. 450 (1998)). "In short, where appropriate for the patient, both the ADA and RA favor integrated, community-based treatment over institutionalization." *Id.* at 492.

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[5] Since the ADA and RA are construed similarly, Plaintiffs' subsequent references to the "ADA" will mean both the ADA and RA.

In *Olmstead v. L.C.*, 527 U.S. 581 (1999), the Supreme Court interpreted the ADA's integration mandate. It unequivocally held that unnecessary institutionalization and isolation of individuals with disabilities constitutes discrimination under the ADA. *Id.* at 600; *accord Helen L. v. DiDario*, 46 F.3d 325, 333 (3d Cir.), *cert. denied*, 516 U.S. 813 (1995). The Court concluded that the ADA's prohibition on discrimination may require that states provide services to persons with disabilities in community settings rather than in institutions. *Olmstead*, 527 U.S. at 587. The Court recognized, however, that the public entity's obligations are "not boundless." *Id.* at 603. Writing for a plurality, Justice Ginsburg noted that the integration mandate is qualified by the ADA's "reasonable modification" and "fundamental alteration" provisions, 28 C.F.R. § 35.130(b)(7), which provide that a public entity need not make modifications that would fundamentally alter the nature of the service, program, or activity. *Id.* at 603.

Olmstead identified three elements in an integration mandate case: (1) that community placement is appropriate for the individual; (2) that the transfer to a more integrated setting is not opposed by the individual; and (3) that the placement in a more integrated setting can be reasonably accommodated. *Olmstead*, 527 U.S. at 587, 607; *accord Frederick L. I*, 364 F.3d at 492; *Benjamin v. Dep't of Public Welfare*, Civil Action No. 09-cv-1182, 2011 WL 1261542 at *5 (M.D. Pa. Jan. 27, 2011). Plaintiffs can readily establish each of the elements on which they have the burden of proof.

The treatment professionals have determined that Plaintiffs can, with appropriate services and supports, live in the community, which is more integrated than the inpatient psychiatric hospitals where they now reside or state-operated institutions to which

Plaintiffs may be committed. *See* discussion, *supra*, at 9-13; *see also Benjamin*, 2011 WL 1261542 at *6 ("There is no dispute that community placement would be appropriate for an individual [residing in a state mental retardation institution] with appropriate supports and services ...."). In addition, Plaintiffs through their participation in this litigation evidence that they are not opposed to receiving community services. Finally, Plaintiffs' need for community services can be reasonably accommodated. Plaintiffs are enrolled in the Consolidated Waiver, which entitles them to appropriate community residential habilitation services. Defendants need only provide Plaintiffs with the community services they already are authorized to receive and which have been determined by Defendants' agents to be clinically necessary and appropriate.

Courts have granted preliminary injunctions in similar recent ADA cases. In *Peter B. v. Sanford*, Civil Action No. 6:10-767-JMC-BHH, 2010 WL 5912259 (D.S.C. Nov. 24, 2010) (Report and Recommendation), *adopted*, 2011 WL 824584 (D.S.C. Mar. 7, 2011), three individuals with intellectual or developmental disabilities received services under an HCBS waiver. The state amended its waiver in 2009 due to budget constraints, reducing the number of hours that eligible persons, including the plaintiffs, could receive for certain covered services. *Id.* at *2. The court held that plaintiffs were likely to succeed on the merits of their claim that the state's service caps violated the ADA's integration mandate since the plaintiffs had been living in the community, wanted to continue to do so, and their needs could be reasonably accommodated by reinstating their full services. *Id.* at *6.

In *Marlo M. ex rel. Parris v. Cansler*, 679 F. Supp. 2d 635 (E.D.N.C. Jan. 17, 2010), two adults with intellectual disabilities had been receiving services in one-person homes. They were notified that the funding for those programs would be terminated, forcing them into group homes or institutions. *Id.* at 637. The court granted a preliminary injunction to enjoin the termination of those programs, finding that the termination of the plaintiffs' programs would likely violate the ADA's integration mandate. *Id.* at 638.

Similarly, in *Cota v. Maxwell-Jolly*, 688 F. Supp. 2d 980 (N.D. Cal. 2010), the court granted a preliminary injunction to prevent the state from implementing budget-motivated changes to the eligibility standards for its Adult Day Health Care Program. The court held that the eligibility changes were likely to violate the ADA's integration mandate because the plaintiffs needed the services to avoid institutionalization and wanted to remain in their own homes and communities. *Id.* at 994. The court rejected the state's argument that the state's budget crisis justified the program changes, noting that the mere fact that alterations in a program or service required financial outlays does not constitute a fundamental alteration. *Id.* at 995; *see also Pennsylvania Protection and Advocacy, Inc. v. Pa. Dep't of Public Welfare*, 402 F.3d 374, 380 (3d Cir. 2005) (increased expenditures alone are not sufficient to establish a fundamental alteration defense); *Frederick L. I*, 364 F.3d at 495-96 (same).

Ball v. Rodgers, Civil Action No. 00-67-TUC-EHC, 2009 WL 1395423 (D. Ariz. Apr. 24, 2009), likewise determined that a state's failure to assure the provision of HCBS waiver services to which the plaintiffs were entitled likely violated the plaintiffs' rights

under the ADA. *Id.* at *5. In that case, a shortage of attendant care workers to provide the plaintiffs with personal care services prevented them from receiving all of the services that they needed and which had been authorized by their care plans. *Id.* As a result, the plaintiffs were threatened with institutionalization or forced into institutions to receive necessary care. *Id.* The court concluded that the state's "failure to prevent unnecessary gaps in service and properly monitor the HCBS program improperly discriminated against persons with disabilities by limiting their ability to maintain their social and economic independence and depriving them of a real choice between home and institutional care." *Id.*

Finally, the court in *Cruz v. Dudek*, Civil Action No. 10-23048-CIV, 2010 WL 4284955 (S.D. Fla. Oct. 12, 2010), granted a preliminary injunction to require the state to provide services to two individuals with spinal cord injuries who had been wait-listed for services in an HCBS waiver. The court held that the plaintiffs were at risk of institutionalization if they did not receive HCBS waiver services. *Id.* at *12-*13. "Requiring institutionalization of persons before they can receive assistance which will enable them to reside in the community runs counter to the express provisions of the integration mandate ...." *Id.* at *14.

Like the courts in *Peter B.*, *Marlo M.*, *Cota*, *Ball*, and *Cruz*, this Court should conclude that Plaintiffs are likely to succeed on the merits of their claims under the ADA and RA. Indeed, they are much more than likely to succeed. Messrs. Mumford and Yale and Ms. Blakely are not merely at risk of unnecessary institutionalization. They *are* unnecessarily institutionalized in psychiatric hospitals where they have been confined for

months without appropriate services to meet their habilitation needs. Moreover, Defendants would not have to create new types of programs for Plaintiffs, take Plaintiffs off the waiting list ahead of others, or change their eligibility standards to provide appropriate and necessary community residential habilitation services to Plaintiffs. Plaintiffs, as enrollees in the Consolidated Waiver currently are eligible for and entitled to such services.[6] Defendants' failure to provide Plaintiffs Mumford, Yale, and Blakely with the community residential habilitation services to which they are entitled, resulting in their institutionalization, plainly violates the ADA's integration mandate.

2. Defendant Alexander Has Violated the Federal Medical Assistance Statute and 42 U.S.C. § 1983.

States, like Pennsylvania, that choose to participate in the Medical Assistance program must comply with the requirements of Title XIX and its implementing regulations. *Pennsylvania v. United States*, 2011 WL 991402 at *1; *Pennsylvania Pharmacists Ass'n*, 283 F.3d at 533. Defendant Alexander has failed to comply with three requirements of Title XIX: (1) the requirement to provide eligible recipients with services to which they are entitled; (2) the requirement to provide eligible recipients with Medical Assistance services with reasonable promptness; and (3) the requirement to protect the health and welfare of persons receiving HCBS waiver services, to provide

[6] Decisions that suggest that Pennsylvania need only develop and implement a viable integration plan to offer community services in the future to persons who are unnecessarily institutionalized, *see Frederick L. v. Dep't of Public Welfare*, 422 F.3d 151, 160 (3d Cir. 2005); *Benjamin*, 2011 WL 1261542 at *6, *8-*9, are not relevant in this case given that the Plaintiffs have a current statutory entitlement to community services under the Consolidated Waiver and are not on a waiting list.

them with a choice of feasible alternatives, and to provide them with a choice between institutional and HCBS waiver services.

a. Defendant Alexander Has Failed to Provide Plaintiffs with Community Residential Habilitation Services to Which They Are Entitled.

As the Supreme Court recognized more than two decades ago: "An individual is *entitled* to Medicaid if he fulfills the criteria established by the state in which he lives." *Schweiker v. Gray Panthers*, 453 U.S. 34, 36-37 (1981) (emphasis added). Title XIX unequivocally provides: "A State plan for medical assistance must -- ... provide -- for making medical assistance available to -- ... all individuals" who fall within specified eligibility categories. 42 U.S.C. § 1396a(a)(10)(A). This creates an entitlement to Medical Assistance services. *See Sabree ex rel. Sabree v. Richman*, 367 F.3d 180, 190 (3d Cir. 2004).

"Medical assistance" includes HCBS waivers, such as the Consolidated Waiver, for persons like the Plaintiffs who are enrolled in those waivers. 42 U.S.C. § 1396n(c); *Boulet v. Celluci*, 107 F. Supp. 2d 61, 76-77 (D. Mass. 2000). As the court explained in *Boulet*: "[O]nce a state opts to implement a waiver program and sets out eligibility requirements for that program, *eligible individuals are entitled to those services* and to the associated protections of the Medicaid Act." *Boulet*, 107 F. Supp. 2d at 76 (emphasis added).

In *Kerr v. Holsinger*, Civil Action No. 03-68-H, 2004 WL 882203 (E.D. Ky. Mar. 25, 2004), for instance, the plaintiffs challenged Kentucky's revised standard for eligibility for nursing facility and HCBS waiver services in response to a budget crisis.

As a result, plaintiffs lost their eligibility for those services despite no change in their medical needs. The court held that the state's actions violated 42 U.S.C. § 1396a(a)(10)(A) by denying the plaintiffs medically necessary services. *Id.* at *8-*9. Reducing benefits based only on budget concerns violates Title XIX by "exposing recipients to 'whimsical and arbitrary' decisions which the Act seeks to avoid." *Id.* at *9.

It is undisputed that Messrs. Mumford and Yale and Ms. Blakely are enrolled in and, therefore, eligible for and entitled to Medical Assistance services available under the Consolidated Waiver. They have been determined to need community residential habilitation services. Yet, DPW has failed to assure that Plaintiffs receive those services to which they are entitled in violation of 42 U.S.C. §§ 1396a(a)(10)(A) and 1983.[7]

b. Defendant Alexander Has Violated Title XIX's Reasonable Promptness Mandate by Failing to Timely Provide Plaintiffs with Community Residential Habilitation Services.

Title XIX requires that states must "provide that all individuals wishing to make application for medical assistance under the plan shall have the opportunity to do so, and that such assistance shall be furnished with reasonable promptness to all eligible individuals." 42 U.S.C. § 1396a(a)(8). Title XIX 's reasonable promptness mandate

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[7] Defendant cannot contend that it has no obligation to pay for residential habilitation services simply because Medical Assistance does not provide federal matching funds for room and board services. As the *Boulet* Court observed, such an argument "is distracting at best and misleading at worst." *Boulet*, 107 F. Supp. 2d at 75. The fact that room and board for residential habilitation services must be paid by non-Medical Assistance sources, does not mean that Plaintiffs are not entitled to those services. *Id.* So, too, inadequate state appropriations do not excuse non-compliance with Title XIX. *Id.* at 77 (citing *Doe 1-13 ex rel. Doe, Sr. 1-13 v. Chiles*, 136 F.3d at 709, 720 (11th Cir. 1998)).

applies to HCBS Waiver services. *See Susan J. v. Riley*, 254 F.R.D. 439, 451-52 (M.D. Ala. 2008); *Lewis v. New Mexico Dep't of Health*, 275 F. Supp. 2d 1319, 1343-44 (D.N.M. 2003); *Boulet*, 107 F. Supp. 2d at 78; *McMillan v. McCrimon*, 807 F. Supp. 475, 480-82 (C.D. Ill. 1992).

Title XIX's reasonable promptness mandate requires DPW to adopt time standards for the provision of services to avoid unreasonable delays. *See Kirk T. v. Houstoun*, Civil Action No. 99-3253, 2000 WL 830731 at *3 (E.D. Pa. June 27, 2000). Moreover, states may not delay furnishing Medical Assistance due to its administrative procedures. 42 C.F.R. § 435.930(a); *Lewis*, 275 F. Supp. 2d at 1345. States likewise cannot excuse their failure to provide a specific type of available and necessary HCBS waiver services simply on the basis that other types of waiver services have been furnished to the individuals. *Boulet*, 100 F. Supp. 2d at 79; *see also Doe v. Kidd*, No. 10-1191, 2011 WL 1058542 at *6-*7 (4th Cir. Mar. 24, 2011) (holding that state violated reasonable promptness mandate by failing to timely offer plaintiff options to enable her to receive the type of service deemed to be appropriate and, instead, provided her with an entirely different service). Nor is inadequate funding an excuse to avoid compliance with the reasonable promptness mandate. *Boulet*, 107 F. Supp. 2d at 79-80.

Community residential habilitation services are Medical Assistance services for individuals enrolled in the Consolidated Waiver, such as Plaintiffs. As such, they are entitled to receive such services with reasonable promptness. Yet, Mr. Mumford has been without appropriate community residential habilitation services since at least January 2011 when he was admitted to a psychiatric hospital. Even before that, he was

living at home without sufficient supports and services, ultimately resulting in his psychiatric hospitalization. Mr. Yale has been in a psychiatric hospital -- without appropriate community residential habilitation services -- for eight months. Ms. Blakely has been institutionalized in a psychiatric hospital without access to appropriate community residential habilitation services for nearly a year. Like Mr. Mumford, Ms. Blakely's lack of access to community residential habilitation services predates her institutionalization since she was living at home with her mother without appropriate services before she was admitted to the psychiatric hospital.

Plaintiffs' lack of timely access to appropriate community residential habilitation services is not surprising since DPW has adopted no time standards by which it must assure that individuals receive such services. Moreover, it appears that the delay in furnishing Plaintiffs with necessary residential habilitation services is due to DPW's administrative policies and practices that have made it more burdensome for providers to promptly develop, receive approval for, and implement community residential habilitation services for individuals, like Plaintiffs, who have challenging behavioral health needs. While DPW certainly is entitled to assure that services are not unduly costly, it cannot use its efforts to impose cost controls to justify its utter failure to timely provide Plaintiffs with essential services they need, particularly when the alternative has been months of institutionalization. Defendants' failure to promptly afford Plaintiffs community residential habilitation services violates 42 U.S.C. §§ 1396a(a)(8) and 1983.

c. Defendant Alexander Has Failed to Protect Plaintiffs' Health and Welfare and to Afford Them a Real Choice Among Services.

Title XIX requires that each HCBS waiver include "necessary safeguards ... to protect the health and welfare of individuals provided services under the waiver ...." 42 U.S.C. § 1396n(c)(2)(A). As the Health Care Financing Administration (the predecessor of CMS) explained, this requires a state

> to provide all people enrolled in the waiver with the opportunity for access to all needed services covered by the waiver and under the Medicaid State plan. ... The opportunity for access pertains to all services available under the waiver that an enrollee is determined to need on the basis of an assessment and a written plan of care/support.
>
> * * *
>
> Once in the waiver, an enrolled individual enjoys protection against arbitrary or inappropriate restrictions, and the State assumes an obligation to assure the individual's health and welfare.

HCFA, *Olmstead Update No. 4* at 5, 6 (Jan. 10, 2001), *available at* http://www.cms.gov/smdl/downloads/smd011001a.pdf.

Plaintiffs' health and welfare has been jeopardized by Defendant Alexander's implementation of the Consolidated Waiver. Community residential habilitation services are available under the Consolidated Waiver. Plaintiffs Mumford, Yale, and Blakely, who are enrolled in the Consolidated Waiver, have been assessed by professionals and determined to need community residential rehabilitation services. Yet, Plaintiffs have been institutionalized in psychiatric hospitals unnecessarily for months as they await access to community residential rehabilitation services appropriate to meet their complex

needs. Plaintiffs appear to be hostage to DPW's inappropriate policies and practices that have effectively restricted the prompt development of higher-cost community residential rehabilitation programs required to serve individuals with challenging needs in the community. In the end, whatever the cause of the delays in the development of community residential rehabilitation services for Messrs. Mumford and Yale and Ms. Blakely, the bottom line is that Defendant Alexander's failure to provide them with those services has actively undermined their health and welfare by causing their unnecessary institutionalization in psychiatric hospitals where they do not receive appropriate habilitation services necessary for their intellectual disabilities. Defendant's actions and inactions thus violate 42 U.S.C. §§ 1396n(c)(2)(A) and 1983.

Title XIX also requires that states inform individuals eligible for an HCBS waiver of their feasible service alternatives available under the waiver so that they can choose both among such available services and between HCBS waiver services and institutionalization. 42 U.S.C. § 1396n(c)(2)(C). In *Cramer v. Chiles*, 33 F. Supp. 2d 1342 (S.D. Fla. 1999), the court held that Florida violated this provision through the enactment of legislation that reduced funding for services, effectively eliminating any choice between institutional and waiver services. *Id.* at 1352-53.

Defendant Alexander has violated Title XIX's choice requirements for HCBS waiver services. Plaintiffs Mumford, Yale, and Blakely have not been informed of feasible alternatives for community residential habilitation services under the Consolidated Waiver. Indeed, it appears that DPW has not identified any community residential habilitation provider to serve Ms. Blakely. The lack of feasible waiver options

for Plaintiffs has forced them to be institu tionalized, essentially stripping them of their right to choose Cons olidated Waiver services rather than institutional services and of their right to choose among qu alified providers of community r esidential habilitation services in violation of 42 U.S.C. §§ 1396n(c)(2)(C).

B. Plaintiffs Are Suffering and Will Continue to Suffer Irreparable Harm Absent Injunctive Relief.

Plaintiffs seek a temporary restraining order to require Defendants to tak e appropriate steps necessary to prevent the commitment of Plai ntiffs Yale and Blakely t o, respectively, to a state psychiatric hospital and state mental reta rdation institution. Plaintiff Yale has a commitment hearing sche duled for June 14, 20 11, Meek Decl. ¶ 6, solely because DPW was unable to reach ag reement on the rate to pay a community residential habilitation provider that wa s ready and willing to provide community services to him. Plaintiff Blakely has been threatened with invo luntary commitment to state mental retardation centers if she do es not shortly receive necessary community residential habilitation services. Such commitments are not c linically necessary and will cause further irreparable harm to Plaintiffs by moving them to yet another setting t hat cannot provide them with the services they need. Defenda nts can intercede with the state courts to assure them that commitment is neither necessary nor appropriate and that Defendants are working t o secure prom pt alternative commun ity placements for Plaintiffs. Plaintiffs also ask that the te mporary restraining or der bar Defendants from terminating them from the Cons olidated Waiver. This relief w ill preserve the status quo pending disposition of the prel iminary injunction motion by not transferrin g Plaintiffs

from one inappropriate institution to another. Plaintiffs seek a preliminary injunction to enjoin Defendants to provide appropriate community residential habilitation services to Plaintiffs -- services which are clinically necessary and to which they have an entitlement.

"An injunction is appropriate only where there exists a threat of irreparable harm such that legal remedies are rendered inadequate." *Anderson v. Davila*, 125 F.3d 148, 163 (3d Cir. 1997); *accord West Virginia University Hospitals, Inc. v. Rendell*, Civil Action No. 1:CV-09-1684, 2009 WL 3241849 at *13 (M.D. Pa. Oct. 2, 2009). Irreparable harm is plainly established in this case.

In enacting the ADA, Congress made a determination that as between two appropriate settings -- an institution or the community -- the community is the better choice *per se* because people with disabilities should live in integrated settings just as do non-disabled people. As the *Olmstead* Court explained:

> Recognition that unjustified institutional isolation of persons with disabilities is discrimination reflects two evident judgments. First, institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life. [citations omitted]. Second, *confinement in an institution severely diminishes the everyday life activities of individuals*, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.

Olmstead, 527 U.S. at 600-01 (emphasis added). Plaintiffs' unnecessary institutionalization in psychiatric hospitals thus is sufficient to create irreparable harm. Moreover, the mere risk of unnecessary institutionalization is sufficient to create irreparable harm.

See Marlo M., 679 F. Supp. 2d 635 at 638; *Cruz*, 2010 WL 4284955 at *15. Accordingly, the threat to pursue proceedings against Plaintiffs to commit them to state-operated institutions also constitutes irreparable harm.

Moreover, courts have specifically held that inability to access necessary Medical Assistance benefits and concomitant potential health problems create irreparable harm. *See Todd ex rel. Todd v. Sorrell*, 841 F.2d 87, 88 (4th Cir. 1988); *Caldwell v. Blum*, 621 F.2d 491, 498 (2d Cir. 1980), *cert. denied*, 452 U.S. 909 (1981); *Peter B.*, 2010 WL 5922259 at *9; *Crawley v. Ahmed*, Civil Action No. 08-14040, 2009 WL 1384147 at*27-*28 (E.D. Mich. May 14, 2009); *Kerr*, 2004 WL 882203 at *9. Plaintiffs have not only been denied community residential habilitation services that are clinically necessary, but they are at risk of losing their entitlement to the Consolidated Waiver entirely if they remain unnecessarily institutionalized. Accordingly, Plaintiffs' and class members' inability to access vital Medical Assistance benefits and potential loss of their entitlement to Consolidated Waiver services is sufficient to establish irreparable harm for a preliminary injunction.[8]

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[8] Even if the harm to Plaintiffs and class members could somehow be compensated by money damages, the Eleventh Amendment bars an award of monetary damages against the Defendant for most of Plaintiffs' claims. This is sufficient to establish irreparable harm. *See Temple University v. White*, 941 F.2d 201, 215 (3d Cir. 1991), *cert. denied*, 502 U.S. 1032 (1992); *Crawley*, 2009 WL 1384147 at *28; *West Virginia University Hospitals, Inc.*, 2009 WL 3241849 at *13-*14.

C. Any Harm to Defendant Due to Issuance of the Injunction Does Not Outweigh the Harm to Plaintiffs Absent Such Relief.

Issuance of a temporary restraining order to prevent the commitment or transfer of Plaintiffs Yale and Blakely to inappropriate state institutions will not impose any harm on Defendants. It will merely preserve the status quo.

Issuance of a preliminary injunction to require Defendants to provide Plaintiffs with appropriate community residential habilitation services will not harm Defendants, either. The Commonwealth, in choosing to participate in the Medical Assistance program, has willingly agreed to comply with the requirements of that program. Defendants' interest, therefore, is to assure that they provide eligible persons with the services to which they are entitled under the Medical Assistance program in accordance with federal law. *See Libbie Rehabilitation Center v. Shalala*, 26 F. Supp. 2d 128, 132 (D.D.C. 1998); *Hill v. O'Bannon*, 554 F. Supp. 190, 198 (E.D. Pa. 1982).

Even assuming *arguendo* that the Defendants must spend resources to remedy the violations of Plaintiffs' rights, such costs are not sufficient to justify a denial of otherwise appropriate injunctive relief. *See Eder v. Beal*, 609 F.2d 695, 701 n. 12 (3d Cir. 1979). Defendants' failure to comply with the ADA, RA, and Title XIX has resulted in Plaintiffs' inability to access essential services they need to live in the community and resulted in their unnecessary institutionalization. As one court wrote in similar circumstances: "The harm to the Commonwealth if [a preliminary injunction were] granted, while it may not have been negligible, was measured only in money and was inconsequential by

comparison" to the harm suffered by the Plaintiffs. *Todd*, 841 F.2d at 88; *see also Marlo M.*, 679 F. Supp. 2d at 638; *Kerr*, 2004 WL 882203 at *10.

D. Injunctive Relief Is In the Public Interest.

The public interest will be served by the issuance of injunctive relief that upholds the integration mandates of the ADA and RA. *Peter B.*, 2010 WL 5912259 at *12; *Cruz*, 2010 WL 4284955 at *16; *Marlo M.*, 679 F. Supp. 2d at 638. So, too, the public will benefit if Defendant Alexander complies with his obligations under Title XIX and affords prompt services to Plaintiffs. *See Crawley*, 2009 WL 1384147 at *29; *Olson v. Wing*, 281 F. Supp. 2d 476, 489 (E.D.N.Y.), *aff'd*, 66 Fed. Appx. 275 (2d Cir. 2003); *Westenfelder v. Ferguson*, 998 F. Supp. 146, 159 (D.R.I. 1998).

CONCLUSION

For all the reasons set forth above, Plaintiffs respectfully request that the Court: (1) issue a temporary restraining order to preserve the status quo by requiring Defendants to take appropriate steps to prevent the commitment of Plaintiffs Yale and Blakely to state institutions and by barring Defendants from terminating Plaintiffs from the Consolidated Waiver, and (2) granting a preliminary injunction to enjoin Defendants to immediately assure that Plaintiffs promptly receive the community residential habilitation services that are clinically necessary.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert W. Meek, hereby certify that true and correct copies of Plaintiffs' Motion for a Preliminary Injunction, Memorandum of Law and Exhibits in Support of that Motion, and proposed Order were served as follows on the following on June 9, 2011:

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