IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION
CIVIL CASE NO. 6-10-CV-767-RBH-BHH

Peter B., Karen W., Jimmy Chip E.,
and Michelle M.,
Plaintiffs,

vs.

Marshall C. Sanford, Emma Forkner,
Beverly Buscemi, Kelly Floyd, the South Carolina Department
of Health and Human Services and the South Carolina
Department of Disabilities and Special Needs,
Defendants.

Memorandum in Support of Motion for Injunctive Relief

Plaintiffs Peter B., Jimmy Chip E. and Michelle M. (hereinafter referred to as the Plaintiffs) seek a Preliminary Injunction pursuant to Fed.R.Civ.P 65(b) to enjoin Defendants from violating the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act. This lawsuit challenges major reductions in services which have been provided by the South Carolina Department of Disabilities and Special Needs (SCDDSN). These changes put Plaintiffs at imminent risk of entry into institutional settings in order to receive necessary care. These Plaintiffs have successfully resided in the community for many years and the actions taken by the Defendants to reduce home-based services will force them into more restrictive and segregated settings that are likely to harm them. Defendants have made reductions in services without regard to the individual needs of people whose medical histories demonstrate serious harm if they do not continue to receive the services SCDDSN has provided through the MR/RD Medicaid waiver for many years. These actions by

Defendants are in direct contravention of the requirement to integrate persons who have disabilities into the community, as mandated by the integration mandate of the ADA, Section 504 and *Olmstead v. L.C. ex re. Zimring*. 527 U.S. 581 (1999). Plaintiffs are entitled to a preliminary injunction because they can demonstrate a likelihood of success on the merits of their title II integration claim; placement in a congregate setting or an institutional setting will cause irreparable harm; the balance of hardships weighs in favor of Plaintiffs; and granting the injunction is in the public interest.

I. Jurisdiction and Venue.

Jurisdiction of this Court is proper because this case arises under the laws of the United States based upon federal rights granted to Plaintiffs under Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12132 and 12133 and Section 504 of the Rehabilitation Act of 1973 (Section 504). Plaintiffs have and will continue to suffer irreparable injury if rights guaranteed under the ADA and Section 504 continue to be violated. This Court has jurisdiction under 28 U.S.C. 1331 and 1343(a)(3) and (4). Declaratory and injunctive relief is authorized by 28 U.S.C. 2201 and 2202 and Fed. R. Civ. P. 65.

Venue is proper because the Defendants provide these services in this District and because the events, acts and omissions giving rise to the Plaintiffs claims have occurred in this District.

II. The Plaintiffs

The Plaintiffs are qualified individuals under the ADA and Section 504 who have mental retardation or related disabilities. They have been able to remain in their homes for many years with services provided under the South Carolina MR/RD Medicaid waiver

(Mental Retardation/Related Disabilities). Because Defendants have reduced services with no assessment of medical needs, Peter B., Chip E. and Michelle M. are at imminent risk of being forced from their homes into unnecessarily segregated settings in order to receive necessary services.

Peter B. has mental retardation, hydrocephalus, diabetes and coronary heart disease. Exhibits 1 and 3. Declarations of Carolyn Brown and Tod Reel, M.D. He has lived independently in an apartment for many years, a placement SCDDSN has repeatedly determined to be most appropriate to meet his needs. For many years after Peter moved from an ICF/MR facility, SCDDSN paid for Peter to receive at least twelve hours a week of services from a companion.[1] These services allowed him to function in this less restrictive setting. These limited services, which have been identified by various descriptions (enhanced waiver services, one-on-one services, enhanced staff support, etc.) allowed Peter to live a full and active life: he has held a job for more than 20 years and enjoys interacting with his friends and neighbors in the community. Exhibit 1. Declaration of Carolyn Brown. Peter desires to continue to live independently in his apartment, but since his companion services were terminated by SCDDSN in July 2009, Peter s mental and physical conditions have deteriorated. Exhibits 3 and 14. Declarations of Tod Reel, M.D. and Lennie Mullis. He is at risk of losing his job if his mental condition continues to decline and he would have to move

[1] An ICF/MR is a nursing facility for persons who have mental retardation or a related disability, like epilepsy, cerebral palsy or autism. It is the most restrictive setting in which SCDDSN provides services. These services are provided either in large Regional Centers operated by SCDDSN, or in 8 to 16 bed ICF/MR residences operated by local DSN boards. None of the ICF/MR facilities in South Carolina are operated by a private provider which is not treated by SCDDSN as a local DSN board.

to a group home or other congregate setting. Peter s anxiety and depression have increased since his companion were terminated by SCDDSN and SCDHHS. Exhibit 14. Declaration of Lennie Mullis.

Living in a group home would be more restrictive and would stigmatize and segregate Peter from nondisabled persons in the community. The companion services Peter requests are covered services under the MR/RD Medicaid waiver. Companion services can be provided, at less expense, than the congregate workshop services SCDDSN is willing to provide. Without the necessary companion services, Peter B. faces imminent risk of two distinct institutional placements: the congregate workshop or a congregate residential placement. Instead of forcing Peter B. to relinquish the benefits of community living, companion services can be provided to him in the community, as a less expensive and reasonable modification, without a fundamental alteration in the nature of SCDDSN s programs.

Chip E. has normal intelligence and severe cerebral palsy and a speech disorder. Exhibit 9. Affidavit of Chip E. He requires hands-on assistance with every activity of daily living because he cannot move his arms or his legs. Defendants have determined for years that the most appropriate and least restrictive setting for Chip is to live in his own home. Chip is very active in his community: he is a volunteer coach for the Clinton High School football team and he is a member of a car racing team, where he helps diagnose problems with the racing cars. Due to the recent cuts in Chip s services by Defendants, he will be forced to move against his will to an institutional setting, such as an ICF/MR, where he will be isolated from nondisabled persons and will be stigmatized. SCDDSN recently informed Chip that they intend to reduce his personal care attendant hours from eight hours a day to

four hours a day. To remain at home, Chip needs personal care attendant services and adult companion services which would cost significantly less than his care would cost in a group home or an ICF/MR. He also needs access to a speech and language specialist to assist him with obtaining communications equipment covered by the waiver. All speech and language services for adults were terminated under the MR/RD Medicaid waiver on January 1, 2010. Defendants limited waiver participants to receiving a maximum of 28 hours a week of personal care and/or adult companion services on January 1, 2010. Providing Chip with the services he needs to remain at home would not require a fundamental alteration in SCDDSN s programs.

Michelle M. has autism, profound mental retardation, cerebral palsy, a bipolar disorder and is unable to speak. Exhibit 4.Affidavit of Barbara Morgan. She has severe and frequent seizures and requires tube feeding. SCDDSN has repeatedly evaluated her needs and found that they can best be met living at home. Her physician of many years agrees that Michelle s needs are best met living in her own home. Exhibit 5. Affidavit and letter of Mel Patterson, MD. SCDDSN has for years determined that home placement is the most appropriate and least restrictive setting for Michelle. She would be at risk of infections in a congregate setting. *Id.* Michelle has difficulty swallowing when she becomes congested and a respiratory infection could be life threatening to her. Returning Michelle to a congregate residential setting would severely compromise her health and immune system. Michelle has lived for years in the home of her parents, where she has received around-the-clock care and has frequent contact with her extended family and caregivers, who are intimately familiar with her needs. This is especially important because Michelle cannot speak and caregivers unacquainted with her behavior could not recognize her needs. Michelle is at risk of having

to return to a Regional Center operated by SCDDSN, the most expensive services provided by the agency. She would be isolated from her family and would be at risk of serious harm, even death, if the services she needs are not continued at home. Providing Michelle with the services she requires to remain in the family home, services she has received for many years, would not result in a fundamental alteration in SCDDSN s programs.

III. The Defendants

Defendant Marshall C. Sanford is the Governor of the State of South Carolina and he controls the South Carolina Department of Health and Human Services (SCDHHS), which is an agency in his cabinet. He has a duty to take care that the laws be faithfully executed. Defendant Sanford is responsible for directing, supervising and controlling all long term care programs for persons who have disabilities. 42 C.F.R. § 430.12. He is also responsible for appointing and removing members of the governing board of SCDDSN. He is responsible for assuring the federal government that the State Medicaid Plan will be in compliance with all laws and regulations related to the Medicaid program. 42 C.F.R. § 430.12.

Emma Forkner is the Director of the South Carolina Department of Health and Human Services, the cabinet level agency responsible for the administration of all Medicaid programs. Dr. Beverly Buscemi is the Director of the South Carolina Department of Disabilities and Special Needs and Kelly Floyd is the Chairman of the South Carolina Commission on Disabilities and Special Needs, the governing board for that agency.

SCDHHS is the agency that is responsible for the administration of all Medicaid programs in South Carolina. 42 C.F.R. §431.10. SCDHHS contracts with SCDDSN to operate the MR/RD Medicaid waiver program.

IV. Plaintiffs meet the criteria for a preliminary injunction established in *Winter v. Natural Resources Defense Council, Inc.*

This lawsuit challenges reductions in MR/RD Medicaid waiver services by Defendants which will have the effect of eliminating medically necessary services that have allowed Plaintiffs to live successfully in their homes and communities. Without these necessary services, Plaintiffs are at imminent risk of entry into a workshop, a group home or an institutional residential placement. Plaintiffs meet all four of the criteria established *in Winter v. Natural Resources Defense Council*, Inc.: (1) they are likely to succeed on the merits at trial, (2) they are likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of the equities tips in Plaintiffs favor, and (4) an injunction is in the public interest., 129 S.Ct. 365, 374 (2008). *See* also *The Real Truth About Obama, Inc. v. Federal Election Commission*, 575 F.3d 342, 347 (4th Cir. 2009), pet. for cert. filed, No. 09-724, 78 USLW 3375 (12/16/09).

1. The Plaintiffs are Likely to Succeed on the Merits of their Title II Claim.

a. The ADA and Community Integration

In Olmstead, the Supreme Court recognized the importance of the benefits of community integration for individuals with disabilities. In its analysis, the plurality pointed to the historic significance of the ADA: Congress enacted the ADA in order to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities. 42 U.S.C. § 12101(b)(1) cited in *Olmstead* at 589. The Court went on to examine the reasoning driving the enactment of the ADA and noted that in

passing the statute, Congress recognized that historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a pervasive social problem. 42 U.S.C. § 12101(a)(2) cited in *Olmstead* at 588-589. The integration of individuals with disabilities into the mainstream of society is thus fundamental to the purposes of the ADA.

Additional legislative history of the ADA supports the position adopted by the Court in *Olmstead*. For instance, during testimony before a Senate committee, Connecticut Senator Lowell P. Weicker, Jr., a sponsor of the ADA, urged his fellow Senators to recognize the discrimination faced by persons who have disabilities: For years this country has maintained a public policy of protectionism toward people with disabilities. We have created monoliths of isolated institutions and in segregated educational settings. It is that isolation and segregation that has become the basis of the discrimination faced by many disabled people today. *Separate is not equal*. (Emphasis added.) Americans with Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped, 101st Con., 1st Sess. 215 (1989). Despite this history of discrimination that spurred the enactment of the ADA, twenty years after its adoption by Congress, an audit of SCDDSN conducted by the South Carolina Legislative Audit Council and actions taken by SCDDSN since that time (providing funding to purchase/renovate more congregate workshops) have documented that Defendants continue to buy and build even more isolated monoliths, where persons who have disabilities are sequestered and isolated in large congregate settings, rather than providing services which are integrated into the

community. Exhibits 6 and 15. South Carolina Legislative Audit Council Audit of SCDDSN and minutes of the South Carolina Budget and Control Board, September 2009.

The ongoing commitment of the federal government to ensure that these goals are realized was clearly set forth on the tenth anniversary of the *Olmstead* decision, when the President of the United States joined the Secretary of the United States Department of Health and Human Services to declare that 2009 would be the Year of Community Living for people who have disabilities. Exhibit 7. White House Press Release re Year of Community Living. This commitment has been further recognized in remarks by Thomas E. Perez, Assistant Attorney General in charge of the United States Department of Justice Civil Rights Division, who noted that:

> As the Supreme Court determined in the landmark *Olmstead v. L.C.* case, unjustified institutionalization stigmatizes individuals with disabilities as unworthy of participation in community life. New York and Connecticut can successfully provide community-based housing, such as scattered site apartments with supportive services, and the law requires them to do so to prevent unnecessary institutionalization.

Department of Justice website: http://blogs.usdoj.gov/blog/archives/category/crd. Exhibit 8. Briefs Filed in Three States to Enforce Supreme Court s Olmstead Decision.

Congress directed the Attorney General of the United States to issue regulations to implement the ADA, based on regulations issued under Section 504 of the Rehabilitation Act. See 42 U.S.C. § 12134; 28 C.F.R. § 35.190(a); Executive Order 12250, 45 Fed. Reg. 72995 (1980), reprinted in 42 U.S.C. § 2000d-1. These regulations require public entities to administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities. 28 C.F.R. § 35.130(d). The preamble of this

integration mandate explains that the most integrated setting is the one that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible. 28 C.F.R. § 35.130(d), App. A, at 571 (2009). The United States Supreme Court recognized that it must give respect to the interpretation of DOJ in interpreting the ADA. *Olmstead* at 583.

Nine years after Congress enacted the ADA, in *Olmstead*, the United States Supreme Court relied upon the interpretation of that statute by the Attorney General, declaring that the integration mandate of the ADA forbids unnecessary segregation and unjustified isolation of persons with disabilities and that such segregation and that isolation is a form of prohibited discrimination. 527 U.S. 581, 582, 600-601 (1999). In that case, the Supreme Court clearly defined the most integrated setting as the setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible. 527 U.S. at 592. When Defendants administer services in a way that puts individuals who have disabilities at risk of involuntary institutionalization, as the Defendants have done in this case, they violate Title II of the ADA and the mandates of the Supreme Court in *Olmstead.*

Separating Plaintiffs in this case from their friends and family in their chosen communities, isolating them in large congregate segregated workshops where they are warehoused with other persons who have disabilities, requiring them to spend hours each day riding on vans full of disabled persons and requiring them to live in congregate facilities with other people who have disabilities constitutes discrimination. Likewise, forcing these Plaintiffs in 2010 into more restrictive, congregate settings, where they will be forced to spend their days isolated from nondisabled persons, will generate the same feelings of

inferiority that black children experienced attending segregated schools in the 1950's. This discrimination may affect their hearts and minds in a way unlikely to ever be undone. *Brown v. Board of Education of Topeka* , 347 U.S. 483, 494 (1954). If Plaintiffs are involuntarily forced into congregate programs, they will experience this same kind of stigmatic harm every time they are forced to ride on segregated vans, to attend segregated workshops, and to live in segregated residential settings, where they will be isolated from their families and their nondisabled friends.[2] Exhibits 1, 4 and 9. Affidavits/Declarations of Carolyn Brown, Barbara Morgan and Chip E.

In *Briggs v. Elliott,* the district court erroneously determined that the rights of black children would be protected simply by building new segregated schools that were just as nice as the schools white children attended. 103 F.Supp. 920, 921-922 (S.C.D.C. 1952). The United States Supreme Court dispelled that idea, clearly declaring that separate is not equal. *Brown v. Board of Education*, 394 U.S. 294 (1954). It is the lack of opportunity to be integrated into community affairs and the stigma of segregation that is discriminatory, not the condition of the physical facilities in which persons with disabilities spend their days. Because of the Supreme Court s holding in *Brown* and its progeny, persons of all races are now accepted as full citizens in the workplace, in schools and political affairs, only because

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[2] Plaintiffs do not challenge in this lawsuit the right of other persons with disabilities and their families to choose to receive services in a segregated, congregate setting along with other disabled persons. Just as some students may legally choose to attend a segregated school, some persons who have disabilities choose to attend a congregate program where interaction with nondisabled persons is limited. The United States Supreme Court clearly recognized in *Olmstead* that the integration mandate applies only where affected persons do not oppose such treatment. *Id.* at 607. Nothing in the ADA or its implementing regulations requires termination of institutional settings for persons not able to benefit from community settings. *Id.* at 601-602.

federal courts recognized the harm that comes from social stigma and segregation. The right of persons who have mental retardation and related disabilities to live, work and play alongside their non-disabled neighbors, friends and family is no less important a civil right than the right of children of all races to attend integrated public schools. The United States Supreme Court declared in *Brown* that separate is not equal in segregated classrooms. *Id.* Likewise, the Supreme Court declared in *Olmstead* that separate is not equal when persons who have disabilities are involuntarily isolated and stigmatized because of their disabilities. Plaintiffs are likely to succeed on their claim that involuntarily forcing them out of their homes and into group settings with other disabled persons, where they will be stigmatized, violates the ADA and the integration mandate in *Olmstead.*

b. *Plaintiffs are Likely to Succeed on the Merits of their Title II Claim* .

Plaintiffs are likely to succeed on the merits because they are qualified persons with disabilities who can be served in the community, they desire community placement instead of services in an institution, and the requested reasonable modification to provide such services in the community can be accomplished at less cost than the cost of providing the services they would need in segregated, institutional settings. *Olmstead*, 527 U.S. at 591-592. For many years, SCDDSN has provided the services Plaintiffs needed to avoid institutionalization. However, on January 1, 2010, SCDDSN adopted new service limitations for the MR/RD Medicaid waiver program that reduce home-based services. These changes will drive these individuals into more expensive institutional placements. This plan, on its face, violates *Olmstead* and the ADA. While Defendants claim that the cuts to community services are necessary in light of budget constraints, the reductions in home-based services

will actually result in significant increases in costs to the state due to the high cost of institutional placements and forcing waiver participants into ICF/MR facilities in order to receive respite services. Exhibits 10 and 11. Comparison of MR/RD Medicaid waiver services and costs for 2004-2009 (Year 5) and 2010-2015 (Year 1). There is no evidence that Defendants performed a cost analysis to consider the costs of services that would be required in the place of home based services being reduced before they approved amendments to the MR/RD Medicaid waiver. Further, the Defendants claims of these changes being required by budget shortages are inconsistent with their decision to increase the reimbursement rates for services provided in institutional settings (for instance, the rate paid to SCDDSN for institutional respite services increased by 70%, from $157 a day to $270 a day, while defendants refuse to fund more integrated and significantly less costly services can be provided in the community). *Id.* The increase in more costly institutional services is demonstrated in the estimates Defendants themselves provided to CMS (the federal Medicaid agency) in the MR/RD Medicaid waiver application showing the expected use of institutional respite services. *Id.* In the final year under the waiver that expired in 2009, Defendants informed CMS that only 30 waiver participants would require institutional respite services. Each of these persons would spend, according to SCDDSN, an average of 22 days of an ICF/MR. Exhibit 10. (Chart showing Year 5 use of each waiver service.) In the renewed waiver that took effect on January 1, 2010, however, Defendants reported to CMS that 126 waiver participants would require respite services in ICF/MR facilities and that each of these waiver participants would spend, on average, 33 days a year in these institutions. Exhibit 11. Chart showing List of Services, MR/RD Waiver 2010-2015, Waiver Year 1. This change represented a more than four fold increase in the number of waiver participants having to

resort to institutional respite services. Under the amended waiver program, the number of days each participant is expected to use this institutional service is expected to increase by 50% during the year which began on January 1, 2010. *Id.* (Chart showing year 1 use of services for waiver application covering 2010 to 2015). In addition, under the amended waiver, SCDDSN reports that 38 additional waiver participants will require institutional respite services in nursing homes, spending an average of 22 days a year in these institutional facilities, instead of receiving respite services at home. Exhibit 11. Chart showing List of Services, MR/RD Waiver2010-2015,Waiver Year 1.

In *Olmstead,* the United States Supreme Court held that States are required to provide community-based treatment for persons who have disabilities when the State s treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with disabilities. 527 U.S. at 607. The integration mandate is violated where the state chooses to administer services by allocating resources to more restrictive settings. *Disability Advocates, Inc. v. Paterson*, 598 F.Supp. 289, 318 (E.D.N.Y. 2009) and *Disability Advocates, Inc. and the United States of America v. Paterson*, Case No. 1:03-cv-3209 (E.D.N.Y. March 1, 2010).

It is undeniable that the State s professionals have determined that Plaintiffs can be served in their communities. Indeed, for years, SCDDSN and SCDHHS certified to the federal government that the Plaintiffs needs could be safely met outside of an institutional setting. Defendants certified that Plaintiffs needed the services which are the subject of this lawsuit to protect their heath and safety. Plaintiffs do not object to receiving services in the

community. Plaintiffs Chip E. and Michelle M. have lived in their homes with their families, and Peter B. in his own apartment, for years with services provided through the Medicaid waiver. The services Plaintiffs request have been provided for many years, at less cost than institutional care.

Congress enacted the ADA to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities. 42 U.S.C. § 12101(b)(1). Title II of the ADA provides that unnecessary segregation and unjustified isolation of persons who have disabilities constitutes discrimination. *Olmstead* at 582, 600-601. The integration mandate requires States to provide services in the setting appropriate to their needs. 28 C.F.R. § 35.130(d). The most integrated setting is defined as a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible. 28 C.F.R. pt. 35 app. A at page 571 (2009). *Olmstead* at 592. Ending the isolation and segregation of persons who have disabilities is one of the principal purposes of Title II of the ADA. *Arc of Wash. State Inc. v. Braddock*, 427 F.3d 615, 618 (9th Cir. 2005).

Persons, like Plaintiffs, do not need to wait until they are segregated into an institutional setting and isolated from nondisabled persons to protect their rights under the ADA and Section 504: the risk of institutionalization, in and of itself, is sufficient to demonstrate a violation of Title II. *Fisher v. Oklahoma Health Care Authority*, 335 F.3d 1175 (10th 2003). In *Fisher*, the court reasoned that the protections of Title II would be meaningless if plaintiffs were required to segregate themselves by entering an institution before they could challenge an allegedly discriminatory law or policy that threatens to force them into segregated isolation...nothing in the *Olmstead* decision supports a conclusion that

institutionalization is a prerequisite for enforcement of the ADA s integration requirements. *Id*. at 1181.

In North Carolina, a federal district court judge granted emergency injunctive relief, prohibiting the state from reducing home-based services to persons who have a dual diagnosis of mental retardation and mental illness, just three days after the plaintiffs in that case filed their complaint alleging violation of the ADA where the plaintiffs were at risk of having to move from independent apartments to group home or ICF/MR facilities. *Marlo M. v. Cansler*, *supra*. That court subsequently found that all four criteria for a preliminary injunction were met entitling them to the extraordinary remedy of a preliminary injunction. It is noteworthy that the United States Department of Justice filed an amicus in that case. The district court concluded that the plaintiffs had shown a likelihood of success on the merits of their ADA claims because they showed that the State s termination of funding will force Plaintiffs from their present living situations, in which they are well integrated into the community, into group homes or institutional settings. *Marlo M. v. Cansler*, No. 5:09-cv-535, 2010 WL 148849 (E.D.N.C. Jan. 17, 2010). *See also Ball v. Rogers*, No. 00-67 (D. Ariz. April 24, 2009) (holding that failure to provide plaintiffs with needed services threatened Plaintiffs with institutionalization, prevented them from leaving institutions, and in some instances forced them into institutions in order to receive their necessary care in violation of the ADA and Rehabilitation Act); *Mental Disability Law Clinic v. Hogan*, No. 06-6320 (E.D.N.Y. Aug. 28, 2008) (even the risk of unjustified segregation may be sufficient under *Olmstead*) ; *M.A.C. v. Betit*, 284 F.Supp. 2d 1298, 1309 (D. Utah 2003) (adopting *Fisher* s position that a plaintiff need not currently be institutionalized to bring

integration regulation claim).

Previously, Michelle M. received respite services at home, at a cost of $70 per day. This option was eliminated on January 1, 2010, and a cap of 68 hours a month of home-based respite services was imposed on waiver participants. However, under the amendments which went into effect in January, MR/RD waiver participants can receive an *unlimited* number of days of respite care in ICF/MR facilities operated by SCDDSN and its local DSN boards. Because of her complex medical needs and behavioral challenges, Michelle would require services in a SCDDSN Regional Center, which would cost at least $320 per day, if her home placement fails. Exhibits 4, 5 and 23. Affidavits of Barbara Morgan and Mel Patterson, M.D. and Annual Report of SCDDSN.

As in *Marlo M.*, There is no question Plaintiffs, who have been successfully living in their own homes for numerous years, are deemed eligible for community-based living by the State s experts. *Marlo M. v. Cansler,* Case 5:09cv00535, Order filed January 15, 2010 at 3 of 5 (Document 35). Also, as in that case [t]ermination of funding by Defendants will force Plaintiffs from their present living situation, in which they are well integrated into the community, into group homes or institutional settings. *Id.* at 4 of 5. Like the Plaintiffs in *Marlo*, the services Plaintiffs request can be provided at overall costs savings per year (compared) to alternative placements. Id. at 5 of 5.

Peter B. seeks a very reasonable modification that would restore the minimal hours of adult companion services which he had been receiving under his service plan until July 2009. Exhibit 1, Declaration of Carolyn Brown (Declaration Exhibit 2). These companion services, costing less than $200/week, were terminated by Defendants without regard to Peter

B. s medical needs or the orders of his treating physicians. Instead, the state has offered to enroll Peter. B. in the segregated Workability Center workshop. Peter does not want to attend the workshop and losing his job would be detrimental to his mental health. Exhibits 1 and 14. Declarations of Carolyn Brown and Lennie Mullis. In the Workshop, Peter B. would be isolated from nondisabled persons and segregated with other individuals with disabilities. He would be denied the opportunities of interacting in his community and he is now, because his companion services have been terminated. He is at risk of losing the job he has worked in for twenty years. Exhibits 1 and 14. Declarations of Carolyn Brown and Lennie Mullis. The cost for Peter attending the congregate Workability Center would be more than $220 per week, ten percent more than the cost of the services he is requesting. Peter B. is also at imminent risk of institutionalization, i.e. placement in a group home or ICF/MR, at significantly greater costs to the State. Exhibits 3 and 14. Declarations of Tod Reel, M.D. and Lennie Mullis.

It would likewise not result in a fundamental alteration in the State s programs to continue the services Chip E. and Michelle M. have received for years in their homes in Clinton, South Carolina. These services have allowed Peter B., Chip E. and Michelle M. to remain in the least restrictive setting at significant savings to the State. Exhibits 1, 4, 5 and 9. Affidavits/Declarations of Carolyn Brown, Barbara Morgan Mel Patterson, MD and Chip E. All of these home-based services have been provided for years through the MR/RD Medicaid waiver program. The costs of hospitalization and institutionalization of these Plaintiffs, if these services were discontinued, would greatly exceed the costs of continuing these services in their homes. It is not necessary for Plaintiffs to enter institutions before their right to stay

out of segregated settings can be enforced by this Court. Defendants have argued in the past that Plaintiffs losses are speculative. The injury is not speculative to Peter B. The decline in his mental and physical condition since his companion services were terminated has already been documented. Exhibits 1, 3 and 14. Affidavits/Declarations of Carolyn Brown, Tod Reel and Lennie Mullis. It is not speculative that Chip E. and Michelle M. could not survive without around-the-clock services. Exhibits 4, 5 and 9. Affidavits/Declarations of Barbara Morgan, Mel Patterson, MD and Lennie Mullis. This Court should not require the Plaintiffs to fall on their face before ordering the State to continue their services, the elimination of which would violate the clear mandates of the ADA. Arguing that the risk of discrimination to Plaintiffs is speculative is akin to suggesting that black children must first attend segregated schools, and prove personal harm, before the court will enforce their right to be protected from the discrimination caused by segregation. Nothing in the ADA or *Olmstead* suggests that people with disabilities have to be removed from their less restrictive placement and have their health jeopardized by congregate placement before their rights to live in an integrated setting will be protected. Both Peter B. and Michelle M. have lived in institutions where they have experienced such stigma. Their conditions deteriorated when they lived in a congregate setting. Exhibits 1, 2, 3, 4 and 5. Declaration of Carolyn Brown, Testimony of Jackie Walker, Declarations of Tod Reel, MD and Mel Patterson, MD. SCDDSN moved them from congregate settings, determining that those placements were inappropriate and overly restrictive. SCDDSN determined that they could be successfully served in the community and they have both benefitted from this less restrictive setting. Exhibits 3 and 5. Affidavit of Mel Patterson, MD and Declaration of Tod. Reel, MD. Forcing Peter B. and Michelle M. back into an institutional setting to determine whether they would again suffer

the same harms would be a cruel experiment.

Although Chip E. has never lived in an institution before, it is undeniable that he will not be able to survive at home without the personal care and companion services he requests. Exhibit 9. Affidavit of Jimmy Chip E. He cannot move his arms or his legs. Chip E. cannot prepare a meal, he cannot even move a glass of water to his lips. He is able to drive his wheelchair with his mouth, once his personal care attendant moves him from his bed to the chair. He uses his computer with a device his care attendant places on his head. There can be no doubt but that Chip E. will require institutional services if his personal care attendant services are reduced. If his personal care attendant hours are reduced, he will be forced to sleep in his wheelchair.

What Plaintiffs request from this Court is simple: the right to continue to live in their homes and communities without the fear that comes from the existing and very real threat of being forced to move to an institutional setting. *Marlo M. v. Cansler, supra.* The congregate services Defendants wish to replace home-based services with are more expensive than the services Plaintiffs want to receive at home. Plaintiffs are likely to succeed on the merits because the Supreme Court has clearly directed in *Olmstead,* that states are required to provide community-based treatment for persons who have disabilities when the State s treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with disabilities. 527 U.S. at 607. The Plaintiffs meet all criteria for entitlement to community services: they have chosen to live in less restrictive settings, the State has determined that their current

placements are appropriate and there is strong evidence to support Plaintiffs claims that the requested services can be provided without the State fundamentally altering its programs. The ADA, Section 504 and *Olmstead* mandate that Plaintiffs be served in the least restrictive setting, making it likely that they will succeed on the merits because, as discussed below, the Plaintiffs have made a clear showing of irreparable harm, the balance of the equities tip in their favor and the public interest would be served by this court issuing an injunction.

2. Plaintiffs will suffer irreparable harm if a preliminary injunction is not granted.

All of the Plaintiffs are expected to suffer physical harm as a result of the reduction of waiver services. In addition, the emotional injury to Plaintiffs has already been significant and irreversible. These injuries cannot be compensated by money damages. It has been documented that soon after Peter B. s companion services were terminated, his anxiety and depression increased. Exhibits 1 and 14. Declarations of Carolyn Brown and Lennie Mullis. Peter B. lost nine pounds between the time that his companion services were terminated and this lawsuit was filed. *Id.* This physical deterioration is likely to exacerbate his diabetic condition without the supervision of his specialized diet and exercise provided by his companion. This will result in higher medical costs to the State and will likely require him to move to a group home, at significantly greater costs to the Medicaid program. *Id.* This regression was predicted by Peter B. s treating physicians, but ignored by the Defendants. Exhibit 1, 2 and 3. Declaration of Carolyn Brown, Testimony of Jackie Walker and Declaration of Tod Reel, MD. Without necessary services, Peter B. s condition will deteriorate further, preventing him from continuing to live in his independent apartment and forcing Peter into a congregate residential setting. *Id.* Peter B. has lived in an independent

apartment for more than 20 years. An SLP setting has been repeatedly determined by the State to be the least restrictive setting appropriate to meet his needs. But each day Peter B. comes closer to requiring services in a congregate setting, as his medical condition deteriorates and the likelihood of losing the job he has enjoyed for twenty years increases. He would then be forced to attend a congregate workshop where nearly 200 persons with disabilities are segregated and isolated from the community in a metal building that was formerly an industrial site. Exhibit 12. Spartanburg Herald Journal, Sept. 24, 2007, *Cleanup process gets under way at former Holmberg Electronics plant: But much less of a problem than some, officials say* at http://www.goupstate.com/article/20070924/NEWS/709240322 and Greenville News, July 5, 2007: *Charles Lea Center training program to expand* at http://www.goupstate.com/article/20070705/NEWS/707050335. The revenues from the labors of these mentally retarded trainees is paid to the SCDDSN pursuant to the South Carolina Appropriations Act of FY 2010. Exhibit 13. Part 1B, Section 24-J16, 24.1. Peter B. s earnings would be significantly reduced if he lost his competitive employment. Even more importantly, he would lose the pride in his job that he has enjoyed as an employee of Palmetto Textiles. Exhibits 1 and 14. Declarations of Carolyn Brown and Lennie Mullis.

Chip E. lives in absolute terror of his worst nightmare coming true - being forced out of his home and moved into a congregate residence in order to receive the care he requires. Exhibit 9. Affidavit of Chip E. Money cannot compensate Chip E. for this injury. If Chip E. resists moving to an ICF/MR, he will be forced to sleep in his wheelchair, because of the reduction in his personal care attendant hours. SCDDSN has notified Chip E. that they intend

to reduce his personal care attendant hours from eight hours a day to four hours a day. The risk of Chip E. developing bed sores will increase exponentially if his personal care attendant services are reduced. If Chip E. is forced to move to an institution, he will also lose the opportunities he has in his home community to participate as a valued member of the Clinton High School Football team. Instead of helping the racing team diagnose engine trouble, he will likely be forced to sit in an assigned seat around a table in a SCDDSN workshop with persons who have mental retardation, where the revenue from his labor will be paid to SCDDSN. Exhibit 13. South Carolina Appropriations Act 2009-2010, Part IB, Section 24-J16, 24.1. He cannot move his limbs, cannot get out of the bed without hands-on assistance and cannot feed himself. Chip E. will be forced to have people he has not selected to touch him and to provide hands-on assistance with the most intimate activities of daily living. He will no longer have daily contact with his family members. Any discretionary spending will end. Chip E. will be required to pay all but $60 of his monthly income to the State if he is placed in an ICF/MR. He will be required to pay for clothing, toiletries and entertainment from that $60 a month. With the changes put into effect on January 1, 2010, Chip E. lost access to adaptive communications equipment. Although the equipment is covered by the waiver, a speech and language professional s evaluation is required to obtain a device. All speech and language services were eliminated from the MR/RD waiver on January 1, 2010. These services would be provided to Chip E. in an ICF/MR if he were forced to move into this more restricted and structured setting.

Michelle M. is likely to suffer the same unexplained physical injuries she experienced at Whitten Center, before her parents brought her back home from the institution. Exhibit 4

and 5. Affidavits of Barbara Morgan and Mel Patterson, M.D. She is at risk of choking from aspiration due to the recent elimination of speech and language services. Exhibit 5. Affidavit of Mel Patterson, MD. In a congregate setting, Michelle M. will be at risk for infections, particularly of her stoma where she is fed through a tube into her stomach. Michelle M. pulls out her feeding tube when she tries to stand up while being fed. She will likely have to be restrained in a chair if she is placed in an institution. Exhibit 14. Declaration of Lennie Mullis. Michelle M. is at risk of falling unless she has hands on assistance with walking. Because of Michelle M. s behavioral issues and loud outbursts, she is at great risk in a congregate setting for abuse by other residents, as well as by frustrated and frequently poorly trained staff members. *Id.* Michelle is totally unable to defend herself. Exhibits 5 and 14. Affidavit/Declaration of Mel Patterson, M.D. and Lennie Mullis. Institutional turn-over of staff will place her at risk of harm, because fill-in staff members will not be familiar with her physical needs. Being removed from her home will likely lead to an increase Michelle s symptoms of depression and anxiety. Exhibits 4 and 14. Affidavit of Mel Patterson, MD and Declaration of Lennie Mullis.

Federal courts have recognized emotional harm as irreparable injury, just as the United States Supreme Court recognized stigma and emotional injury as harm in both *Olmstead* and *Brown*. In *Crabtree v. Goetz*, the district court recognized that forcing the plaintiffs into institutions would cause mental depression, a shorter life expectancy, and for some, even death. No. 08-cv-0939, 2008 WL 5330506 (M.D. Tenn. Dec. 19. 2008) at *30. Finding irreparable harm to the plaintiffs in that case, that court enjoined the state from implementing reductions to home based waiver services despite CMS (the federal Medicaid

agency) having approved the reductions. The emotional harm to the plaintiffs in that case was easily recognized by the court: The evidence at this point is strong that Plaintiffs will suffer regressive consequences if moved, even temporarily. Plaintiffs have behavioral and special needs, and benefit from a stable environment and personalized treatment. *Id.* at *25.

The federal court in *Long v. Benson* found each day in an institution would be irreparable harm due to those plaintiffs perception of quality of life in an institutional setting. No. 08-cv-26, 2008 WL 4571903*2 (N.D.Fla. Oct. 14, 2008). In that case, a district court in Florida took into account the emotional impact of institutionalization of that plaintiff, finding: this will inflict an enormous psychological blow...each day he is required to live in the nursing home will be irreparable harm. A settlement agreement was reached in that case which will require the state to spend $27 million on new waiver slots over a 12 month period. No. 4:08-cv-26-RH-WCS (N.D.Fla. Sept. 15, 2009).

Psychological harm was also recognized as irreparable injury in *Marlo v. Cansler*, No. 5:09-cv-535, 2010 WL 148849 (E.D.N.C. Jan. 17, 2010). In *Ball v. Rodgers*, the Arizona district court found irreparable harm where the state created mental and physical distress by failing to provide home based services instead of forcing plaintiffs to enter more expensive nursing homes. 4:00-cv-00067-EHC.(D. Ariz. April 24, 2009). In that case the court held that the state violated the ADA by failing to provide services in the most integrated setting appropriate to the needs of plaintiffs.

Plaintiffs in this case will suffer irreparable injury if Defendants are permitted to eliminate or significantly reduce their funding and services. Plaintiffs will be forced to exchange their safety and independence of their individual community placements, where

they have been able to receive regular and reliable treatment and care, for more restrictive and inappropriate institutional or congregate settings that do not meet their needs. In addition, the entire system of care that Plaintiffs have enjoyed for years will be dismantled and is in danger of being permanently lost.

3. The balance of the equities weighs in Plaintiffs favor.

Once irreparable injury is shown, "the next step then for the court to take is to balance the likelihood of irreparable harm to the plaintiff from the failure to grant interim relief against the likelihood of harm to the defendant from the grant of such relief." *Multi Channel TV Cable, supra* citing *Direx Israel,* 952 F.2d at 812. In assessing whether the Plaintiffs have met this burden, the district court has a "duty . . . to balance the interests of all parties and to weigh the damage to each." *See L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1203 (9th Cir. 1980).

Plaintiffs seek a preliminary injunction which would require Defendants to simply continue paying for services they have determined for years to be medically necessary and have included in Plaintiffs plans of care. The services Plaintiffs have requested would cost less than the institutional services they will need if this injunction is not granted. Injury to the Defendants will be minimal, if there is any real harm at all. In actuality, according to the cost estimates provided by SCDDSN in the waiver amendments, the services Plaintiffs request will be less costly than the services that will be needed if Plaintiffs are forced to resort to congregate services. Exhibits 10 and 11. Waiver Year 5, 2004-2009 MR/RD Medicaid Waiver, Waiver Year 1, MR/RD Medicaid Waiver 2010-2015.

Compared to the harm to Defendants, however, the harm to the Plaintiffs is extreme.

It includes both likelihood of serious risk of both physical injury and psychological harm. The Plaintiffs will be forced from their homes into congregate day and residential programs. Their living arrangements will not be easily reestablished once dismantled. Peter B. will lose his apartment if his health continues to decline. All but a small portion of his income will be paid toward the costs of his care in a congregate residence. He will likely be forced to move from his apartment complex, where he has established friendships with neighbors, into a group home that may be located in another part of the state. Most importantly, Peter B. will likely lose his job if his mental and physical condition continues to decline. If he is forced to attend the congregate workshop, Peter B. would be subjected to the same effects of discrimination experienced by black children who were told they were not allowed to attend white schools. Peter B. will suffer the social stigma, isolation and emotional harm that results from segregation. If Peter B. s condition continues to decline, as expected, when he loses his job, he will be forced to attend a congregate workshop, at a cost of more than $80 a month *more* than his companion services cost. The cost of a group home will be at least double the cost of care in his current setting. As Peter B. s diabetes progresses, without the supervision and exercise provided by his companion, his medical costs will increase. Exhibit 3. Declaration of Tod Reel, M.D. The injury to the Defendants is by far outweighed by the injury Peter B. will experience, especially since the services he requests cost less then those he will need if his companion services are not restored.

If Chip E. does not receive the personal care attendant services SCDDSN has determined for years that he needs, he will develop bed sores and the resulting infections which will be more expensive to treat than the cost of his care at home. Chip E. would lose

the ability to access adaptive communications equipment, because a speech and language therapist must perform and evaluation and recommend the device. All speech and language services were eliminated from the MR/RD Medicaid waiver on January 1, 2010. Chip E. s losses will include not only the loss of living in the home where he was born, but the loss of his friendships in the Clinton community. He would be placed in the next available bed, which is likely to be distant from his home. Not only would this be a loss for Chip E., but his absence from the community would be a tragedy for the young men whose notions about people with disabilities have been irrevocably changed by working with him on the Clinton High School football team. Chip E. has set an example to teach them about overcoming obstacles and his defeat by being forced from his home would send a terrible message to them about the value our State places on the lives of people who have disabilities. Chip E. has already suffered psychological trauma by the threat of being forced from his home and isolated in a congregate facility, perhaps far from his family and friends. Exhibit 9. Affidavit of Chip E. The benefit to the State of reducing Chip E. s home-based services are far outweighed by his losses, which cannot be compensated by money damages. The home-based services Chip E. requests are considerably less expensive than the institutional services he will require if an injunction is not granted. There is no justifiable benefit to the State in reducing Chip E. s services.

The harm Michelle M. is likely to experience is a repeat of the unexplained injuries she experienced before when she lived in a SCDDSN Regional Center. Exhibit 4. Affidavit of Barbara Morgan. She is unable to communicate verbally, either to make her needs known or to report abuse or neglect. Michelle M. s medical records document that she has received

excellent care at home, at considerably less cost than SCDDSN was paying when she lived in a Regional Center. Exhibit 5. Affidavit of Mel Patterson, M.D. Michelle M. is at risk of aspiration and no longer has access to swallowing evaluations, since Defendants terminated all speech and language services in January. With the help of the $525 monthly stipend SCDDSN has paid since she returned home from Written Center, her parents moved to a modest home large enough to accommodate their adult daughter s needs. Exhibit 4. Affidavit of Barbara Morgan. They would be unable to maintain this home, where the three of them share expenses, if Michelle M. were to return to an institution. All but $60 of Michelle M. s monthly income would be paid to SCDDSN toward her cost of care. Michelle M. would suffer regressive consequences if moved, even temporarily. She has behavioral and special needs and Michelle M. has benefitted from a stable environment and personalized treatment.

Information in her medical records indicates that Michelle M. has conditions and behaviors which make her a poor candidate for successful transition to a Regional Center. Exhibits 5 and 14. Affidavit of Mel Patterson, M.D. and Declaration of Lennie Mullis. Officials from SCDDSN called Michelle M. s parents at 9:00 one evening more than ten years ago, asking them to take her home. Upon information and belief, this transition occurred as a result of investigations of abuse and neglect at the facility.[3] Exhibit 17. Investigation of reports of abuse and neglect at Written Center. After Michelle returned home, she attended a congregate day program supervised by SCDDSN until that day

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[3] A Written Center employee was recently arrested for assaulting one or more residents who has/have mental retardation. Exhibit 16. Clinton newspaper article, arrest of Written Center employee.

program discharged her, telling her parents they could not meet her needs because of her tube feeding. The costs to the State would be greater if Michelle is returned to an institution, where SCDDSN admitted before she does not belong. The cost to Michelle and her family could well be her life.

Balancing the equities in this case, the scale does not tip, it plunges toward these Plaintiffs. The only recognizable harm to the Defendants would be the loss of the unfettered discretion to determine where MR/RD waiver participants will live, without regard for the integration mandate of the ADA and *Olmstead*. The South Carolina General Assembly recognized this federal integration mandate in South Carolina Code of Laws § 44-26-140.[4] Restricting the arbitrary and unfettered discretion of SCDDSN to force Plaintiffs into more restrictive services is a restriction on State power that should be ordered by this Court, because continuing to discriminate against persons who wish to receive services in their own homes instead of in an institution violates federal law, as well as the intention of the South Carolina General Assembly as expressed in state law.

4. Granting an Injunction is in the Public Interest.

The public interest weighs strongly in favor of an injunction in this case. Requiring

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[4] This section requires SCDDSN to administer care and habilitation skillfully, safely, and humanely, with full respect for the client's dignity and personal integrity. The department was directed by the General Assembly to make every effort, based on available resources, to develop services necessary to meet the needs of its clients. The General Assembly in this code section prohibited SCDDSN from providing services in a setting that is more restrictive than is warranted to meet his needs if alternative care is available. The General Assembly also directed SCDDSN in this statute to move clients from: (1) more to less structured living; (2) larger to smaller facilities; (3) larger to smaller living units; (4) group to individual residence; (5) segregated from the community to integrated into the community; and (6) dependent to independent living. South Carolina Code of Laws § 44-26-140.

state agencies and public officials to comply with federal law is always in the public interest. The integration mandate of the ADA and *Olmstead* leads to one conclusion: failing to provide these individuals with services in the least restrictive setting, where they are integrated into their communities constitutes discrimination that will not be tolerated by the federal courts.

Providing Plaintiffs home-based services at less cost compared to institutional services benefits taxpayers. None of these individuals can be served at a lower cost in a congregate residential setting funded by SCDDSN compared to their cost at home. The costs for every one of the Plaintiffs will increase if their home based services are not restored or continued. These reductions were made by Defendants under the guise of budget reductions, at the same time that SCDDSN simultaneously increased the number of waiver participants requiring institutional services and increased the reimbursement rate for institutional respite by 70%. Defendants failed to perform even a cursory cost analysis considering the costs of institutionalization and increased attendance in congregate services in workshops before approving the reductions. By its own admissions, the changes implemented by SCDDSN on January 1, 2010 will result in more than four times the number of waiver participants having to turn to the ICF/MR institutions for respite services. Exhibits 10 and 11. Chart of Year 5 for MR/RD Medicaid waiver services and Chart for Year 1 attached to amended MR/RD Medicaid waiver application. Not only will more waiver participants be institutionalized for waiver respite services at a daily cost of nearly four times the cost of home-based daily respite under the old waiver, because of the reductions of home-based support, SCDDSN estimates that each waiver participant using institutional respite will spend 50% more days in

an ICF/MR than they spent in 2009. *Id.* The public has an interest in providing cost effective services in the least restrictive environment, especially where the costs for institutional respite services under the amended waiver will increase by more than $1 million from the less restrictive services provided last year. *Id.*

In any event, there is no evidence that the financial cost to the taxpayers was actually reduced when personal care attendant, adult companion, occupational therapy, physical therapy, speech and language therapy, nursing and daily respite services were reduced or eliminated through amendments to the MR/RD Medicaid waiver program on January 1, 2010. These services were paid for by local DAN Boards which receive a capitate rate from SCDDSN for each waiver participant being served in that county. Since January 1, 2010, the number of hours of services these local DAN Boards are responsible for providing has decreased significantly, yet the amount SCDDSN pays the local DAN Boards has remained the same. There has been no corresponding reduction in the capitate rate SCDDSN pays the local Boards since the amendments were put into place on January 1, 2010. Thus, there can be no real cost savings to the public fisc. SCDDSN is paying the same capitate rate for each waiver participant as it paid before January 1, 2010. Services have been reduced, but costs per capita have remained the same.

The public is well served by expending funds to provide MR/RD Medicaid waiver services because each state dollar spent will be matched with four federal dollars. This infusion of federal dollars to South Carolina, if federal Recovery Act funds had been spent as intended, would have a positive effect of creating and preserving jobs. A recent study published by the Direct Care Alliance, Inc. reported that Home health aide is the third-

fastest growing job category in the U.S. and personal and home care jobs the fourth-fastest. Exhibit 19. Howes, Candace, *The Best and Worst State Practices in Medicaid Long-Term Care*, April 2010 at 1. According to that report, The number of home and community-based direct care workers recently surpassed the number of nursing assistants in nursing homes. Id. South Carolina has one of the highest unemployment rates in the country. SCDDSN has admitted that thousands of employees previously funded by the agency have lost their jobs due to budget reductions, while the federal funding for these programs has not decreased. Exhibit 21 and 22. Letter from David Goodell and Letter from Beverly Buscemi and Commissioners. The Direct Care Alliance report placed South Carolina in the category of states with the worst-performing record for providing home and community based services, compared to institutional services. Exhibit 19 at 4. Direct Care Alliance Report. That study compared long term care services for elderly and physically disabled persons, finding that South Carolina was in the category of states that provide almost exclusively nursing home care services to below average numbers of people. Id. at 4. For example, South Carolina provides only 3 persons out of 1,000 residents with home and community based services, whereas North Carolina provides 7.6 persons out of 1,000 residents with these less restrictive services. When comparing services in a nursing home, South Carolina provides nursing home services to 3.7 out of 1,000, whereas North Carolina provides nursing services to 4.8 persons out of 1,000. Id. at 3 and 4.

In another study of home-based Medicaid services, the American Association of Retired Persons (AARP) agreed that South Carolina focuses on institutional services for elderly and disabled persons, instead of providing home-based services. That study reported

that compared to the United States average, South Carolina allocates a greater portion of its long term care spending on institutional services. Exhibit 20. Kassner, Enid, AARP, *A Balancing Act: State Long Term Care Reform.* (As with the Direct Care Alliance, the AARP study reported on Medicaid programs for elderly and disabled, not MR/RD populations, but both studies confirm the State s failure to integrate persons who have disabilities into the community in the least restrictive setting.)

The public interest would be served by providing jobs to unemployed South Carolinians. The jobs of many South Carolinians who worked as caregivers for persons who have disabilities have been terminated due to budget reductions. Exhibits 21 and 22. Letter from David Goodell and letter from Beverly Buscemi and commissioners. When these direct care workers are given the opportunity to provide caregiving services, the unemployment rate will decline, with fewer tax dollars being used to pay unemployment benefits.

What is even more important, on a larger, systemic scale, is the chilling effect the actions taken by Defendants (to reduce home based services) has had and will continue to have on the efforts to move persons out of SCDDSN Residential Centers and other ICF/MR facilities. Last year, SCDDSN spent 18% of its budget providing services in its Regional Centers to just 3% of the consumers served by the agency. SCDDSN pays $320 per day for institutional care, compared to only $138 per day for care in homes and communities under the MR/RD Medicaid waiver. Exhibit 23 at 47. FY 2008-2009 Annual Accoutability Report of SCDDSN. When the agency was required to cut its budget in February 2010, it chose to eliminate *all* home based services, rather than reducing funding to institutional services. There was no attempt to reduce costs by offering incentives to institutionalized persons who

might have chosen to leave these more expensive settings for less expensive home-based services. If instead of keeping its institutional beds full, SCDDSN had offered quality services in homes and communities, where parents could be assured that safeguards would be provided to maintain the health and safety of these individuals once they left the Regional Centers, many would voluntarily choose a less restrictive, less costly setting. Instead of offering well-funded and secure home-based options to persons now in the institutions, Defendants chose to punish the families who either returned their children home from the institutions or saved the State millions by never institutionalizing their family member in the first place. Residents of the SCDDSN Regional Centers were protected from these draconian budget reductions. People who chose less expensive home-based services were not protected. The families who had chosen to receive home-based services from providers who were not DAN Boards were the targets of the budget reductions. This commitment by SCDDSN to maintaining its institutional facilities sends an important message to any family considering moving their loved one out of an institution: they cannot rely upon promises from the State to provide home-based services as an alternative to institutionalization. When families like Michelle M. s were asked to move their child out of Written Center, the State made promises that are now being broken. If the State is ever to restructure its system so as to comply with the integration mandate of the ADA and *Olmstead,* it must provide reliable, safe and adequate services in the community. Families must feel secure that these services will be continued and that they will be reasonably supported, as promised. The public interest is served by requiring the State to assure families that their home-based services are secure so as to avoid a stalemate of institutionalized persons remaining in these most expensive facilities out of fear of loss of services if they leave the Regional Centers and

ICF/MRs.

V. CONCLUSION

Plaintiffs have shown that they meet all four criteria for this Court to issue a preliminary injunction prohibiting SCDDSN from reducing MR/RD Medicaid waiver services and restoring those services that Plaintiffs have lost. Plaintiffs seek a Preliminary Injunction to enjoin Defendants from reducing or terminating Plaintiffs services and they request that this Court issue an order requiring Defendants to pay for those home-based services which are determined that Plaintiff s treating physicians to be medically necessary, up to the cost of care in an ICF/MR.

Respectfully submitted by:

s/ Patricia L. Harrison, Fed ID 6963
Patricia L. Harrison
611 Holly Street
Columbia, SC 29205
803-256-2017
Email: plh.cola@att.net

s/ Kenneth C. Anthony, Jr., Fed ID 1132
Kenneth C. Anthony, Jr.,
Anthony Law Firm
PO Box 3565
Spartanburg, SC 29304
864-582-2355
Email: kanthony@anthonylaw.com
Attorneys for the Plaintiffs

Dated: April 29, 2010

LIST OF EXHIBITS

Exhibit 1. Declaration of Carolyn Brown

Exhibit 2. Testimony of Jackie Walker, service coordinator, at fair hearing of Peter B.

Exhibit 3. Declaration of Tod Reel, M.D.

Exhibit 4. Affidavit of Barbara Morgan

Exhibit 5. Affidavit and letter of Mel Patterson, MD

Exhibit 6. South Carolina Legislative Audit Council audit of SCDDSN, December 2008

Exhibit 7. White House Press Release re 2009 as Year of Community Living

Exhibit 8. Statement of Thomas Perez re *Olmstead* enforcement

Exhibit 9. Affidavit of Chip E.

Exhibit 10. List of Services, MR/RD Medicaid Waiver 2004-2009, Waiver Year 5

Exhibit 11. List of Services, MR/RD Medicaid Waiver, 2010-2015, Waiver Year 1

Exhibit 12. Newspaper articles re Workability Center

Exhibit 13. South Carolina Appropriations Act for FY 2009-2010, Part IB, Section 24

Exhibit 14. Declaration of Lennie Mullis

Exhibit 15. Minutes of meeting of South Carolina Budget and Control Board, Sept. 2009

Exhibit 16. Clinton Newspaper article re arrest of Written Center employee

Exhibit 17. 1994 investigation of Written Center

Exhibit 18. South Carolina Code of Laws 44-26-140

Exhibit 19. Direct Care Alliance Report

Exhibit 20. AARP, *A Balancing Act: State Long Term Care Reform*, April 2009

Exhibit 21. Letter of David Goodell

Exhibit 22. Letter of Beverly Buscemi and Commissioners

Exhibit 23 Annual Accountability Report of SCDDSN FY 2009