UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

CLINTON L., by her guardians and next friend CLINTON L., SR. and TIMOTHY B., by his guardian and next friend ROSE B., and others similarly situated,	)	
Plaintiffs,	)	
v.	)	CIVIL ACTION NO. 1:10CV00123
LANIER CANSLER, in his official capacity as Secretary of the Department of Health and Human Services, and DAN COUGHLIN, in his official capacity as CEO and Area Director of the Piedmont Behavioral Healthcare Local Management Entity,	)	
Defendants.	)	

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

Preliminary Statement

The United States files this Statement of Interest, pursuant to 28 U.S.C. § 517, because this litigation implicates the proper interpretation and application of Department of Justice regulations implementing the Americans with Disabilities Act, 42 U.S.C. § 12101 et. seq., ("ADA") and compliance with the mandate of community integration under *Olmstead v. L.C.*, 527 U.S. 581 (1999). Accordingly, the United States has a strong

interest in the resolution of this matter.[1] Defendants, in pleadings filed Feb. 16, 2010, raise new facts intending to dispute plaintiffs' claims. Given the short time and the need to provide this memorandum to the Court, the United States lacks sufficient time to independently verify defendants' most recent statements. However, the United States supports plaintiffs' arguments that their record of successful care in the community and their record of suffering harm while in group settings in the past are enough for the Court to grant a preliminary injunction to preserve the status quo for these individuals.[2] In addition, the Court should refuse defendants' invitation to approve broad brush budget cuts, made without regard to individual needs of people whose medical histories demonstrate serious harm if they are unable to maintain their current living situations.

This lawsuit challenges defendants' reductions to reimbursement rates that will have the effect of eliminating medically necessary services that support plaintiffs in their homes in the community. Plaintiffs have successfully resided in the community for years

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[1] The Administration's commitment to realizing the goals of community integration as set forth in *Olmstead* has led the United States to file briefs in a number of *Olmstead* enforcement cases. *See* "President Obama Commemorates Anniversary of Olmstead and Announces New Initiatives to Assist Americans with Disabilities," June 22, 2009, Office of the Press Secretary, *available at* http://www.whitehouse.gov/the_press_office/President-Obama-Commemorates-Anniversary-of-Olmstead-and-Announces-New-Initiatives-to-Assist-Americans-with-Disabilities/).

[2] Defendants seek to moot out this lawsuit, and to that end, Defendant Coughlin filed a letter from the attorney for provider Easter Seals UCP saying that it has agreed to maintain current services to Plaintiff Clinton L. below cost, but only if a certain number of hours are reimbursed, and that if the number of hours or other terms of this twelfth-hour deal are altered, the provider "might need to reconsider this position." Coughlin Response, Ex. 2. The fact that defendants submitted such a letter, rather than a sworn statement, and that it includes conditional statements by ESUCP casts doubt about what is going unreported here, and, provides no effective rebuttal to plaintiffs' evidence.

and cuts to their services will drive them into institutional settings that are likely to harm them. Defendants have provided services in the community through a combination of state Medicaid waiver funding[3] and state supplemental funds.[4] However, Defendant Piedmont Behavioral Healthcare Local Management Entity (PBH LME) recently issued a memorandum informing providers of significant rate cuts (ranging from nearly 30% to over 50% cuts to the existing reimbursement rates).[5] Driving plaintiffs into segregated facilities as a result of reductions in funding that violate the Americans with Disabilities Act (ADA) and the Rehabilitation Act of 1973 would directly contravene the requirement to integrate persons with disabilities into the community as mandated by the Supreme Court in *Olmstead v. L.C.*, 527 U.S. 581 (1999).

The facts alleged in the Complaint, together with the declarations submitted in support of the motion for preliminary injunction, demonstrate a likelihood of success on the merits of plaintiffs' title II integration claim. In addition, it is likely that even short term placement in a congregate setting or an institutional setting, even for a period of two months while funding schemes are adjusted in the case of Timothy B., will cause

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[3] North Carolina Piedmont Innovations HCBS Waiver, effective April 1, 2008. The waiver supports people with intellectual and other developmental disabilities in a five county service area.

[4] State-funded Supervised Living 811 and 812 services available through the North Carolina's Department of Health and Human Services (DHHS) Division of Mental Health, Developmental Disabilities, and Substance Abuse Services.

[5] The LMEs are the locus of coordination for Medicaid-funded mental health, developmental disability, and substance abuse services in North Carolina. (Complaint ¶ 14.)

irreparable harm; the balance of hardships weighs in favor of plaintiffs; and granting the injunction is in the public interest. The motion for preliminary injunction should be granted.

Statutory and Regulatory Background

Congress enacted the ADA in 1990 "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). Congress found 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 serious and pervasive social problem." 42 U.S.C. § 12101(a)(2). For those reasons, Congress prohibited discrimination against individuals with disabilities by public entities.

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. As directed by Congress, 42 U.S.C. § 12134, the Attorney General issued regulations implementing Title II, which are based on regulations issued under section 504 of the Rehabilitation Act.[6] 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. The Title II regulations, 28 C.F.R. § 35.130(d), require public entities to "administer services, programs, and activities in the most integrated setting appropriate to the needs of

[6] Section 504 prohibits entities that receive federal funds from discriminating against individuals with disabilities. 29 U.S.C. § 794.

qualified individuals with disabilities." The preamble to the "integration regulation" explains that "the most integrated setting" is 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).

Ten years ago, in a landmark decision, the Supreme Court held that unjustified segregation of individuals with disabilities by public entities constitutes unlawful discrimination under Title II of the ADA and its integration regulation. *Olmstead v. L.C.*, 527 U.S. 581, 586 (1999). The duty to provide integrated services, however, is not absolute. A public entity is required only to make reasonable modifications that do not "fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7) (2009). Thus, a public entity violates Title II if it segregates individuals in institutions when those individuals could be served in the community through reasonable modifications to its program, unless it is able to demonstrate that doing so would result in a "fundamental alteration" of its program. *Olmstead*, 527 U.S. at 595-596.

Summary of Facts

Plaintiffs Clinton L. and Timothy B. are adults dually diagnosed with developmental disabilities and mental illness who require care and supervision twenty-four hours a day. (Bryan Dec. ¶¶ 4, 5; Lockhart Dec. ¶¶ 4, 5.) Plaintiff Clinton L. has been living in the community for over eight years and Plaintiff Timothy B. has been living in the community for more than a decade. (Lockhart Dec. ¶ 7; Bryan Dec. ¶¶ 13,

14.) Plaintiffs receive support services in their home, including residential workers twenty-four hours a day. (Bryan Dec. ¶ 5; Lockhart Dec. ¶ 7.) Before living at home, plaintiffs have lived in various group homes, but were discharged because the placements could not accommodate their behaviors. (Bryan Dec. ¶¶ 10-12; Lockhart Dec. ¶¶ 7, 10.)

Named plaintiffs are representative of a class of individuals within the geographical service area served by the PBH LME who have Individual Support Plans (ISPs) which call for state-funded "Supervised Living" services affected by the cut at issue in this case. Plaintiffs have been successfully living in the community with appropriate supports and services funded through a combination of Medicaid waiver funding (Innovations Waiver) and state supplemental funds.[7] (Complaint ¶¶ 4, 24.) The particular services subject to the cut in reimbursement rate – Supervised Living services – are "residential service[s] which include[] room and support care for one to six individuals who need 24-hour supervision; and for whom care in a more intensive setting is considered unnecessary on a daily basis." (Soviero Dec. ¶ 4.) These services are currently provided to plaintiffs through state funding (rather than through Medicaid funding) available to a target population of individuals dually diagnosed with mental illness and developmental disabilities. (Complaint ¶ 24.)[8]

[7] The Innovations Waiver is a pilot project for the state operated only by the LME in this region and does not impose a maximum budget or cost limit upon any individual . (Complaint ¶ 45, 47.)

[8] These services needed by plaintiffs are only available through the supplemental state funding, and cannot currently be provided through the Innovations Waiver (existing service definitions do not allow for the twenty-four hour staffing needed by plaintiffs). (Complaint ¶ 48.)

DHHS is the "single state agency" responsible for administering and supervising the State's Medicaid program. (Id. ¶ 16.) Defendant Cansler is the Secretary of DHHS and thus bears responsibility for the administration and management of DHHS' programs. (Id. ¶ 16.) The State employs Local Management Entities (LMEs) to coordinate services on a local level. (Id. ¶¶ 14, 16.) Defendant Coughlin is the CEO and Area Director of the PBH LME and is responsible for the management of State and local funds. (Id. ¶ 15.)

Despite having funded services to the dually-diagnosed plaintiffs in appropriate community-based settings for long periods of time under the system described above, the reduction in the rate to be paid to providers was set to take effect on February 15, 2010. Prior to the proposed rate cut, Plaintiff Timothy B. was authorized to receive Supervised Living services at a rate of $250 per day and Plaintiff Clinton L. was authorized to receive services at the standard rate of $161.99 per day.[9] (Bryan Dec. ¶16; Lockhart Dec. ¶ 10.) The new rate, $116.15 per diem, thus represents a reduction of nearly 30% for Clinton L. and a reduction of more than 55% for Plaintiff Timothy B. (Complaint ¶¶ 36, 38.) Plaintiffs allege that the reimbursement rate will have the effect of eliminating the ability of consumers to access a medically necessary service and is an indirect way of achieving the same result as a direct cut to the service ("PBH's proposed rate cuts would result in the elimination of all Supervised Living services in the five counties served by

[9] The differences in reimbursement rates for the named plaintiffs correspond to differences in staffing costs for plaintiffs' individualized needs (e.g. staff capable of communicating with him using American Sign Language. (Mem. in Supp. of Prelim. Injunc. at 6.))

PBH. Plaintiffs would no longer have access to services that were originally created for their use." (Id. ¶76.))

This cut to the rate paid by the LME to the provider is so substantial that plaintiffs claim it will force providers to lose money and plaintiffs allege that there is a "substantial certainty that, because providers will only be able to offer Supervised Living services at a loss, they will no longer offer the services in the five counties served by PBH." (Mem. in Supp. of Prelim. Injunc. at 3; Lockhart Dec. ¶ 11; Bryan Dec. ¶ 17.) Plaintiffs have provided evidence in support of this assertion from a current provider, Easter Seals UCP North Carolina ("[i]f this rate cut takes effect, Easter Seals UCP North Carolina will no longer be able to offer this service to our clients." (Soviero Dec. ¶ 7.))[10]

Without these wraparound services, the Complaint alleges that plaintiffs will be displaced from their community settings into institutional placements. (Complaint ¶ 7.) Because plaintiffs require a high level of care, including round-the-clock supervision, that cannot be provided with the services authorized under the waiver alone, plaintiffs "will be forced out of their community placement in their own homes into more restrictive congregate placements and/or institutions." (Mot. for Temporary Restraining Order and Prelim. Injunc. ¶ 10.) Prior attempts to place Plaintiff Clinton L. and Timothy B. in congregate settings have failed, and thus it is almost certain that they will ultimately be placed in an institution unless services in the community are restored for them. (Bryan

[10] Defendant PBH submitted a letter attempting to modify the import of the Soviero declaration, however the contingencies within the letter and the facts surrounding the letter do not clearly eliminate the factual issues of the impact of the reimbursement rate on availability of the service.

Dec. ¶ 7; Lockhart Dec. ¶ 6; Complaint ¶¶ 19, 22.) Plaintiffs further allege that the costs for comparative institutional care will be greater than the cost of serving plaintiffs appropriately in the community, should plaintiffs be forced into institutional placements due to the unavailability of community support services . (Complaint ¶ 7.)

Argument

In determining whether to grant a motion for preliminary injunction, the trial court must consider (1) the likelihood of success on the merits; (2) whether plaintiffs are likely to suffer irreparable harm without the grant of a preliminary injunction; (3) if the balance of hardship tips in plaintiffs' favor; and (4) whether the injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc*., 555 U.S. ___, ___, 129 S. Ct. 365, 374 (2008); *Real Truth about Obama, Inc. v. Federal Election Commission*, 575 F.3d 342, 346 (4th Cir. 2009); *In re Microsoft Corp. Antitrust Litig*., 333 F.3d 517, 526 (4th Cir. 2003). Plaintiffs have satisfied the requirements for a preliminary injunction, showing (1) a likelihood of success on the merits of their Title II claim;[11] (2) a likelihood that even short

[11] Title II was modeled closely on Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, which prohibits discrimination on the basis of disability in federally conducted programs and in all of the programs and activities of entities, including public entities, that receive federal financial assistance. The ADA and the Rehabilitation Act are generally construed to impose the same requirements. See *Baird ex rel. Baird v. Rose*, 192 F.3d 462, 468-69 (4th Cir, 1999); *Davis v. University of North Carolina*, 263 F.3d 95, 99 (4th Cir. 2001); *Crawford v. Union Carbide Corp*., 202 F.3d 257 (4th Cir. 1999). This principle follows from the similar language employed in the two acts. It also derives from the Congressional directive that implementation and interpretation of the two acts "be coordinated to prevent[ ] imposition of inconsistent or conflicting standards for the same requirements under the two statutes." *Baird*, 192 F.3d at 468 (citing 42 U.S.C. § 12117(b)) (alteration in original). See also, *Yeskey v. Com. of Penn. Dep't of Corrections*, 118 F.3d 168, 170 (3d Cir. 1997) ("[A]ll the leading cases take up the statutes together, as will we."), aff'd, 524 U.S. 206 (1998).

term placement in congregate setting or institutional setting during the pendency of this litigation will cause irreparable harm; (3) that the balance of hardships weighs in favor of plaintiffs; and (4) granting an injunction is in the public interest.

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

Congress enacted the ADA in 1990 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 prohibits discrimination in access to public services by requiring that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. In *Olmstead*, the Supreme Court construed the ADA's integration mandate and concluded that the discrimination forbidden under title II of the ADA includes "unnecessary segregation" and "[u]njustified isolation" of individuals with disabilities. *Olmstead v. LC ex rel. Zimring*, 527 U.S. 581, 582, 600-601 (1999).

The integration mandate specifies that persons with disabilities receive services in the "most integrated setting appropriate to their needs." 28 C.F.R. § 35.130(d) ("[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities."). 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*, 527 U.S. at 592. This mandate advances one of the principal purposes of title II of the ADA, ending the isolation and segregation of disabled persons. See *Arc of Wash. State Inc. v. Braddock*, 427 F.3d 615, 618 (9th Cir.2005).

Other courts to review *Olmstead* claims have consistently analyzed these cases within the framework of the typical requirements for an ADA title II claim. The general foundational requirements of a title II claim require a plaintiff to allege that he or she (1) is a "qualified individual with a disability"; (2) was either excluded from participation in or denied the benefits of a public entity's services, programs, or activities or was otherwise discriminated against by the public entity; and (3) such exclusion, denial of benefits, or discrimination was by reason of his disability. See *Townsend v. Quasim*, 328 F.3d 511, 517 n.3 (9th Cir.2003). So, for example, if a state fails to provide services to a qualified person in a community-based setting, as opposed to a nursing home, a plaintiff can present a title II violation. See *Townsend* at 517; *Fisher v. Oklahoma Health Care Auth*., 335 F.3d 1175, 1181-82 (10th Cir.2003) (imposition of cap on prescription medications placed on participants in community-based program a high risk for premature entry into nursing homes in violation of the ADA).

Crucially, a plaintiff need not wait until he is placed in the institutional setting: the risk of institutionalization itself is sufficient to demonstrate a violation of title II. *Fisher v. Oklahoma Health Care Authority*, 335 F.3d 1175 (2003). In *Fisher*, the Tenth Circuit rejected defendants' argument that plaintiffs could not make an integration mandate

challenge until they were placed in the institutions. The Court reasoned that the protections of the integration mandate "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." *Id*. at 1181. The Court went on to conclude that "*Olmstead* does not imply that disabled persons, who, by reason of a change in state policy, stand imperiled with segregation, may not bring a challenge to the state policy under the ADA's integration regulation without first submitting to institutionalization." *Id*. at 1182. See also *Marlo M. v. Cansler*, No. 5:09-CV-535, 2010 WL 148849 (E.D. N.C. Jan. 17, 2010) (granting preliminary injunction in case where plaintiffs were at risk of institutionalization); *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).

Plaintiffs here have alleged such high risk for entry into segregated institutions and the consequential threat to their health that such institutionalization presents. Plaintiffs Clinton L. and Timothy B. are currently still in the community, however the proposed cuts mean they will likely need to leave their homes and, in light of their failures in group home settings, are at a high risk of institutionalization. (Bryan Dec. ¶ 7; Lockhart Dec. ¶ 6; Complaint ¶¶ 19, 22.) The availability of the Supervised Living service is critical to

plaintiffs' physical and mental health and their continuing ability to remain in the community, as opposed to being isolated in an institution. (Mem. in Supp. of T.R.O. and Prelim. Injunc. at 1.) Plaintiffs have alleged a strong likelihood that they will succeed in showing that the rate cut for the Supervised Living service that allows them to remain in the community will place them at serious risk of institutionalization.

The State of North Carolina has already determined that plaintiffs are qualified to receive services in less restrictive settings. In fact, they have been providing these very services in community settings for many years. (Bryan Dec. ¶ 13; Lockhart Dec. ¶ 7.) Despite the State's long history of supporting plaintiffs in integrated settings, defendants have recently decided to constructively cut services through a rate cut, forcing plaintiffs out of the community settings where they have resided for many years. This cut was made without communicating with the guardians of individuals being served about the potential damaging effect of forcing plaintiffs into institutional settings in order to receive the services they need. (Id. ¶15.) The Court in *Olmstead* explained the ADA's integration mandate, recognizing that "unjustified isolation . . . [is] discrimination based on disability" and that "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 . . . and institutional confinement severely diminishes individuals' everyday activities." *Olmstead,* 527 U.S. at 597, 600, 601.

A State's obligation to provide services in the most integrated setting is not unlimited, however, and may be excused in instances where a state can prove that the relief sought would result in a "fundamental alteration" of the state's service system. *Id*. at 601-03. While a state may attempt to claim budgetary shortages as alleviating their responsibilities under *Olmstead*, the Tenth Circuit held in *Fisher v. Oklahoma Health Care Authority* that "the fact that [a state] has a fiscal problem, by itself, does not lead to an automatic conclusion" that providing the community services that plaintiffs sought would be a fundamental alteration. *Fisher*, 335 F.3d 1175, 1181 (10th Cir. 2003). See also *Pennsylvania Protection and Advocacy, Inc. v. Pennsylvania Dept. Of Public Welfare*, 402 F.3d 374, 380 (3d. Cir. 2005).

The Tenth Circuit observed further that Congress was aware when it passed the ADA that "'[w]hile the integration of people with disabilities will sometimes involve substantial short-term burdens, both financial and administrative, the long-range effects of integration will benefit society as a whole.' ... If every alteration in a program or service that required the outlay of funds were tantamount to a fundamental alteration, the ADA's integration mandate would be hollow indeed." *Fisher*, 335 F.3d at 1183. The fundamental alteration determination involves a more searching analysis "involv[ing] a specific, fact-based inquiry ... taking into account Defendants' efforts to comply with the integration mandate with respect to the population at issue and the fiscal impact of the requested relief, including the impact on the State's ability to provide services for other

individuals with mental illness." *Disability Advocates, Inc. v. Paterson*, 653 F. Supp. 2d 184, 192 (E.D.N.Y. 2009). Plaintiffs allege that providing services in the community is less costly than serving plaintiffs in an institution. (Complaint ¶ 7.) The appropriate cost-comparison for an institutional setting would need to take into account plaintiffs' particular needs, for instance Timothy B. would need an American Sign Language interpreter if placed in an institution, thus any cost-comparison would need to incorporate such additional costs. (Complaint ¶ 59.)

In *Disability Advocates Inc. v. Paterson*, 598 F. Supp. 2d 289, 319 (E.D.N.Y. 2009), the court held that the defendants' allocation of state resources favoring institutional settings over community-based settings supported an actionable title II claim. The court found "if Defendants allocated their resources differently, [plaintiffs] could receive services in a more integrated setting." *Id.* at 319. In finding a violation of title II, the court in *Disability Advocates* focused on the way in which the State administered its mental health service system by "plan[ning] the settings in which mental health services are provided, and allocat[ing] resources within the mental health service system." *Id*. at 318. Here, defendants can make a reasonable modification to their proposed administration of services by choosing to fund care in the community setting, rather than the more expensive cost of caring for plaintiffs in unnecessarily segregated institutional settings. Defendants have been administering such services to the individuals involved in this case for lengthy periods of time, demonstrating their ability to administer services in

a manner that complies with the integration regulation without causing a fundamental alteration to the state's operation of its programs. Plaintiffs thus have a strong likelihood of success on the merits of their claim for an *Olmstead* violation.[12]

2. Plaintiffs Are Likely to Suffer Irreparable Harm if Rate is Cut

The services plaintiffs receive in the community to support their physical and mental health needs are critical to ensuring that their conditions remain stable and enable them to remain in the community. There is no question that removing plaintiffs from the community settings in which they have been successfully living for lengthy periods of time will disrupt their current status and have negative consequences for their conditions.[13] The physical and mental health conditions of both plaintiffs heighten the disruptive effect of inappropriate placements such that even a temporary placement may lead to dire consequences.

The negative effects of institutionalization that plaintiffs will likely experience if placed in more restrictive settings exemplify the concerns driving the Supreme Court's analysis in *Olmstead* that unnecessary segregation is a violation of the ADA.[14] In

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[12]Contrary to the state's argument, the Fourth Circuit interpretation of *Winter*, 129 S.Ct. at 374, does not dramatically alter the application of *Blackwelder Furniture Co. of Statesville v. Seilig Manufacturing Co.*, 550 F.2d 189 (4th Cir. 1977).

[13] In gauging the harm that the moving party will experience should a preliminary injunction not be granted, courts have looked at the specific nature of the plaintiff in relation to the injury that is anticipated. *Nieves-Marquez v. Commonwealth of Puerto Rico, et al*, 353 F.3d 108, 121-22 (1st Cir. 2003).

[14] The Supreme Court described the adverse effects that occur with a State's institutional placement of persons with qualifying disabilities:

granting a preliminary injunction, a court in Florida looked to the emotional impact of institutionalization: "this will inflict an enormous psychological blow...each day he is required to live in the nursing home will be an irreparable harm." *Long v. Benson*, No. 08cv26, 2008 WL 4571903 *2 (N.D. Fla. Oct. 14, 2008).

Irreparable harm was also established recently in an *Olmstead* case in this state where the court noted that

> Plaintiffs...have lived successfully in their community based apartments. In the absence of an injunction, both Plaintiffs will lose funding and be forced from these community settings. 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.

Marlo M. v. Cansler, No. 5:09-CV-535, 2010 WL 148849 (E.D. N.C. Jan. 17, 2010). A court in Tennessee also was persuaded by the detrimental effects that institutionalization would have on plaintiffs: "forcing these Plaintiffs into nursing homes that would be detrimental to their care, causing, inter alia, mental depression, and for some Plaintiffs, a shorter life expectancy or death." *Crabtree v. Goetz*, No. 08-0939, 2008 WL 5330506 *25 (M.D. Tenn. Dec. 19, 2008). The same concerns motivating the court in *Crabtree* are

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> 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.... 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.... In order to receive needed medical services, persons with mental disabilities must, because of those disabilities, relinquish participation in community life they could enjoy given reasonable accommodations, while persons without mental disabilities can receive the medical services they need without similar sacrifice.

Olmstead, 527 U.S. at 600-01.

present here, as this case exemplifies the very harm that the ADA sought to address: the isolation and segregation of disabled persons. Plaintiff Timothy B.'s ability to remain in the community hinges on the availability of these Supervised Living Services: "Timothy could not live independently in his own home but for the residential staff that cares for him twenty-four hours a day, seven days a week. Timothy has thrived in an independent living environment because he is now supervised by individuals capable of communicating with him." (Bryan Dec. ¶ 5.) Plaintiff Timothy B.'s physical health was jeopardized when he was previously placed in group homes that lacked adequate supervision. (Id. ¶ 10.) Timothy B.'s conditions are exacerbated in group settings where he has difficulties communicating: "he often becomes agitated and engages in destructive outbursts." (Id. ¶ 6.) Staff at one group home inappropriately medicated Timothy B. and he became "unable to walk, feed himself, or perform every day living and self-care tasks" and had "toxic levels of psychotropic medication in his system." (Id. ¶¶ 11, 12.)

Similarly, Plaintiff Clinton L.'s ability to remain in the community is directly related to the Supervised Living Services he has been receiving in his home: "Clinton has thrived in an independent living environment because he is [] supervised by individuals capable of addressing his medical needs." (Lockhart Dec. ¶ 5.) Further, in his community setting, the "frequency and severity of Clinton's outbursts have sharply decreased" and he has "progressed and gain[sic] many skills." (Id. ¶¶ 7, 8.) In prior group placements, Clinton L. became "extremely agitated" related to his living situation. (Id. ¶

6.) Clinton L. is "safer, happier, and healthier" receiving care in his home than in the unnecessarily segregated settings he has resided in prior to his current placement. (Id. ¶ 12.) Inappropriate segregated placements threaten to jeopardize the physical and emotional well-being of both plaintiffs who have demonstrated their ability to live successfully in the community with necessary supports.

3. The Balance of Hardship Tips in Plaintiffs' Favor

The hardship to defendants of maintaining the rate at which providers are reimbursed for Supervised Living Services that has allowed plaintiffs to remain in the community for many years is outweighed by the harm that will be inflicted on plaintiffs should they be forced out of their community settings during the pendency of this litigation. The State has paid for plaintiffs to reside in these settings for lengthy periods of time and to suggest now that reimbursing the exact same services at the existing rate would create a great hardship to the defendants belies the long history of funding that has been repeatedly approved by the state.[15]

4. Granting a Preliminary Injunction is in the Public Interest

There is a strong public interest in granting a preliminary injunction to allow plaintiffs to remain in their community settings. There is a public interest in eliminating the discriminatory effects that arise from segregating persons with disabilities into

[15] A recent decision in this state found the grant of a preliminary injunction minimal where "Defendants will only have to maintain the funding they have provided to Plaintiffs for years and which they have authorized year after year in the past." *Marlo M. v. Cansler*, No. 5:09-CV-535, 2010 WL 148849 (E.D. N.C. Jan. 17, 2010).

institutions when they can be appropriately placed in community settings. As noted in *Olmstead v. L.C.*, the unjustified segregation of persons with disabilities can stigmatize them as incapable or unworthy of participating in community life. *Olmstead* 527 U.S. at 600. Such reasoning grounded a grant of preliminary injunction in *Long*, where the court held that the public interest favored allowing the plaintiff to remain in the community:

> This is what Congress intended when it adopted the Americans with Disabilities Act. If, as it ultimately turns out, treating individuals like [plaintiff] in the community would require a fundamental alteration of the Medicaid program, so that the Secretary prevails in this litigation, little harm will have been done. To the contrary, [plaintiff's] life will have been better, at least for a time...

Long, 2008 WL 4571903 *3. And while 10 years have passed since the *Olmstead* case was decided, the same goals underlying that case and underlying the ADA are present today: a goal of "full participation, independent living, and economic self-sufficiency for such individuals." 42 U.S.C. 12101(a)(8).

Conclusion

For the above stated reasons, the Court should grant Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction. With the Court's permission, counsel for the United States will be present at the hearing on February 17, 2010.

Respectfully submitted this the 16th day of February 2010

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UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

CLINTON L., by her guardians and next friend CLINTON L., SR. and TIMOTHY B., by his guardian and next friend ROSE B., and others similarly situated, Plaintiffs, v. LANIER CANSLER, in his official capacity as Secretary of the Department of Health and Human Services, and DAN COUGHLIN, in his official capacity as CEO and Area Director of the Piedmont Behavioral Healthcare Local Management Entity, Defendants.	)	CIVIL ACTION NO. 1:10CV00123

CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2010 the foregoing Statement of Interest was electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: John R. Rittelmeyer at john.rittelmeyer@disabilityrightsnc.org; Jennifer L. Bills at jennifer.bills@disabilityrighrsnc.org; Andrew B. Strickland at andrew.strickland@disabilityrightsnc.org; Wallace Hollowell, III at chuck.hollowell@nelsonmullins.com; Stephen D. Martin at steve.martin@nelsonmullins.com.

Respectfully submitted,

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