IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

MARLO M., by her guardians and next friends WILLIAM and CARLETTE PARRIS, and DURWOOD W. by his guardian and next friend WILLIE WILLIAMS, Plaintiffs, v. LANIER CANSLER, in his official capacity as Secretary of the Department of Health and Human Services, and KAREN SALACKI, in her official capacity as Area Director of The Beacon Center Local Management Entity, Defendants.	)	CIVIL CASE NO. _____ MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

In order to maintain the status quo and preserve their community placements, Plaintiffs have filed a Motion for a Temporary Restraining Order and a Preliminary Injunction. Plaintiffs require injunctive relief to prevent the termination of their state-funded services. Without these state-funded services (which represent almost half of Plaintiffs' plans of care), they are at risk of institutionalization and the simultaneous dismantling of their homes and systems of care.

SUMMARY OF THE CASE

Plaintiffs are adults with dual diagnoses of a developmental disability and mental illness, as well as other chronic conditions. Plaintiffs require continuous supervision and support in all aspects of their lives, which need is met through a combination of state and federally-funded services. On December 15, 2009, Plaintiffs will lose their "Supervised Living" services, a state-funded mental health, developmental disabilities, and substance abuse service. Supervised Living is a "wrap-around" service that provides residential staffing services to supplement the limited supervision and support available to Plaintiffs through North Carolina's Home and

Community-Based Services (HCBS) Medicaid waiver program designated as the Community Alternatives Program for Persons with Mental Retardation and Developmental Disabilities (CAP-MR/DD or CAP-MR/DD waiver). When Plaintiffs lose Supervised Living services on December 15, 2009, Plaintiffs will consequently lose their long-time community placements – their own homes – as they will no longer receive the continuous supervision and support they require to live in the community, in violation of the Americans with Disabilities Act and the Rehabilitation Act of 1973. *See* 42 U.S.C. § 12101 *et seq.*; 29 U.S.C. § 794. As a result, Plaintiffs are at risk of institutionalization, an inappropriate placement that is more costly than the cost of their care in the community.

Defendant Salacki is the Area Director of the Beacon Center, Plaintiffs' Local Management Entity, and is statutorily responsible for the coordination of state-funded services at the local level. *See* N.C.G.S. § 122C-101, *et seq.* Defendant Salacki has the authority and discretion to authorize, deny, reduce, suspend, and terminate state-funded services for Plaintiffs, including Supervised Living services. To prevent their unnecessary institutionalization, Plaintiffs request a temporary restraining order and preliminary injunction prohibiting Defendant Salacki from terminating their state-funded Supervised Living services on December 15, 2009.

Defendant Lanier Cansler is the Secretary of the North Carolina Department of Health and Human Services (DHHS). DHHS is the "single state agency" responsible for the administration and supervision of North Carolina's Medicaid program under Title XIX of the Social Security Act. 42 C.F.R. § 431.10 (2008). Secretary Cansler bears ultimate responsibility for the implementation and management of the North Carolina Medicaid program, including in particular the State's Medicaid waiver program, the Community Alternatives Program for Persons with Mental Retardation and Developmental Disabilities (CAP-MR/DD). Defendant

Cansler is also responsible for the oversight of LME area directors to make sure that they provide publicly funded services in accordance with the law. *See* N.C.G.S. § 122C-111, *et seq*.

Defendant Cansler has failed to exercise his authority and direct Defendant Salacki to restore state-funded services for Plaintiffs. Defendant Salacki has failed to properly exercise her discretion to assess Plaintiff's individual needs and maintain their state MR/MI funding and keep them in their long-time community placements. Additionally, Defendant Cansler failed to direct the Division of Medical Assistance (DMA) or the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services (DMHDDSAS) to make changes to the service definitions in the CAP-MR/DD waiver to allow Plaintiffs and others similarly situated to access funding for continuous, twenty-four hour, direct residential care through the waiver. Although in theory the budget for each Plaintiff's CAP-MR/DD waiver services could be large enough to maintain Plaintiffs in the community, limitations in the service definitions and utilization guidelines prohibit Plaintiffs from benefitting from the full $135,000 budget of services to which Plaintiffs should otherwise be entitled. Defendant Cansler has the authority and discretion to waive restrictive service definitions under the waiver enabling Plaintiffs to access the full CAP-MR/DD budget in order to preserve their community placements. Plaintiffs request a temporary restraining order and preliminary injunction directing Defendant Cansler to make reasonable modifications to service definitions in the CAP-MR/DD waiver to allow Plaintiffs access to twenty-four hours per day of residential staffing services, thus eliminating Plaintiffs' reliance on the state-funded Supervised Living service to maintain their community placements.

STATEMENT OF FACTS

Plaintiffs are adults with dual diagnoses of mental retardation and mental illness (MR/MI) and other chronic and disabling conditions that require twenty-four hours of care and

supervision. Plaintiffs receive health care and other federally-funded services through North Carolina's State Medicaid Program, including in particular the CAP-MR/DD waiver. Plaintiffs are additionally eligible for and receive state-funded mental health, developmental disabilities, and substance abuse services.

Plaintiff Marlo M.'s diagnoses include Anxiety Disorder, Mental Retardation, Down Syndrome, Congenital Heart Disease, Hypothyroidism, Chronic Gum Disease, and Chronic Headaches. Plaintiff Marlo M.'s community placement was her own apartment, which was uniquely suited to her short stature, including countertops, sinks and furniture lowered to accommodate her proportions. Plaintiff Marlo M. lived independently in her apartment with a rotating schedule of residential workers twenty-four hours a day. Plaintiff Durwood W.'s diagnoses include Psychotic Disorder NOS, Autistic Disorder, Severe Mental Retardation, Diabetes, Sleep Apnea, Frontal Lobe Atrophy, Hepatitis B Carrier, Cerebral Palsy, Grade I/IV Systolic Ejection Murmur, and Glaucoma. Plaintiff Durwood W.'s community placement was his own home, where he lived independently with a rotating schedule of residential workers twenty-four hours a day. Both Plaintiffs lived successfully in their own homes until November 20, 2009, when both were forced to find other, more congregate placements due to the loss of state funds and concurrent inability to fully satisfy their staffing needs through the CAP-MR/DD waiver alone.

Plaintiffs rely on a combination of Medicaid, CAP-MR/DD, and state-funded services to live successfully in their own home and to participate in family and community life. Plaintiffs especially depend on the state-funded Supervised Living service to supplement the limited hours of residential staffing services available through the CAP-MR/DD waiver. Supervised Living is a "residential service which includes room and support care for one individual who needs 24-

hour supervision; and for whom care in a more intensive treatment setting is considered unnecessary on a daily basis." North Carolina's Department of Health and Human Services Division of Mental Health/Developmental Disabilities/Substance Abuse Services MH/DD/SA Service Definitions 164 (January 1, 2003). Currently, it is only through a combination of state-funded Supervised Living services and federally-funded CAP-MR/DD services that Plaintiffs can access the twenty-four hours of care and supervision they need to live in their own homes.

Plaintiffs require twenty-four hour care because of their disabilities. Plaintiff Marlo M. requires one-on-one staffing due to her mental illness, developmental disabilities and congenital heart condition. Plaintiff Durwood W. requires one-on-one staffing due to his uncontrollable and erratic behaviors, and his mental retardation. Alternative services, such as Day Supports, that do not provide the individualized care and attention provided by residential staffing are not appropriate to meet Plaintiffs' needs and will jeopardize the independence and community living Plaintiffs have enjoyed for so long.

Defendant Karen Salacki is the Area Director of the Beacon Center Local Management Entity (LME). In or about June 2009, Defendant Salacki decided that Plaintiffs' Supervised Living service would be terminated unless Plaintiffs could justify their need for the service. Plaintiffs continue to meet medical necessity criteria justifying their need for the Supervised Living service. Accordingly, from June 2009 until the present, Plaintiffs continued to request Supervised Living services on numerous occasions, including exhausting the state appeals process in which both Defendants reiterated and adopted the terminations of services. In response to Plaintiffs' continued requests, Defendant Salacki approved only a series of "time-limited" service authorizations intended to force Plaintiffs to transition to new placements and/or enter institutions. Plaintiffs' current service authorizations will terminate on December 15, 2009.

Defendant Salacki's decision to terminate Plaintiffs' services reverses more than five years of Supervised Living authorizations for Plaintiff Marlo M., and a decade of authorizations for Plaintiff Durwood W.

Defendant Lanier Cansler, as Secretary of the Department of Health and Human Services (DHHS), oversees the Division of Mental Health, Developmental Disability, and Substance Abuse Services (DMHDDSAS) and the Division of Medical Assistance (DMA). Defendant Cansler, through his agents at DMA and DMHDDSAS, has the authority to grant a reasonable modification of the service definitions in the CAP-MR/DD waiver. Plaintiffs requested, and were refused, a reasonable modification to the waiver's service definitions that would allow Plaintiffs to combine residential staffing services available under the CAP-MR/DD waiver to achieve twenty-four hours of care and supervision. This reasonable modification of the CAP-MR/DD waiver service definitions would alleviate Plaintiffs' dependence on state-funded services, and would allow Plaintiffs to maintain their community placements through CAP-MR/DD waiver services alone.

As a result of Defendant Salacki's and Defendant Cansler's actions, Plaintiffs will be forced to vacate their current placements and move to other, inappropriate congregate placements that do not provide Plaintiffs with one-on-one supervision and care twenty-four hours a day. Without twenty-four hours of care and supervision, it is anticipated that Plaintiffs will be forced into more restrictive, segregated, institutional settings. Away from their homes and communities, Plaintiffs will face increased risk of community-acquired infections, malnutrition, and depression. They also face immediate risk of loss of the independence and dignity they have enjoyed living successfully in the community -- Plaintiff Marlo M. for over five years, and Plaintiff Durwood W. for more than a decade.

ARGUMENT

A. Standard of Review

To prevail in a motion for a preliminary injunction the trial court must consider (1) whether plaintiffs are likely to succeed on the merits; (2) whether they are likely to suffer irreparable harm in the absence of the preliminary relief; (3) if the balance of hardships tips in their favor; and (4) whether the injunction is in the public interest. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. __ , __, 129 S. Ct. 365, 374 (2008); *Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 346 (4th Cir. 2009), *adopting Winter and overruling Blackwelder Furniture Co. of Statesville v. Seilig Manufacturing Co.,* 550 F.2d 189 (4th Cir. 1977) . The same standard must be met to obtain a temporary restraining order. *Dotson v. Wells Fargo Bank, N.A.,* 2006 U.S. Dist. LEXIS 92278, 7 (S.D.W.Va. 2006); *citing United States Dep't of Labor v. Wolf Run Mining Co., Inc*., 452 F.3d 275, 281 n.1 (4th Cir. 2006) ("A preliminary injunction, which may be entered only after notice, is distinguished from a TRO, which may be entered without notice, only by its duration -- a preliminary injunction is of indefinite duration extending during the litigation, while a TRO is limited in duration to 10 days plus one 10-day extension.") Plaintiffs demonstrate all four requirements and should be awarded the requested injunctive relief.

B. Plaintiffs Are Likely To Succeed On The Merits.

1. The unwarranted termination of Plaintiffs' funding and services places Plaintiffs at risk of institutionalization and violates the Americans with Disabilities Act.

On December 15, 2009, Plaintiffs' state-funded Supervised Living services will be terminated, which will force Plaintiffs to transition to institutions or inappropriate congregate placements that put Plaintiffs at risk of institutionalization. Title II of the Americans with Disabilities Act (ADA) protects qualified individuals with disabilities from discrimination by

public entities. 42 U.S.C. § 12132. Public entities include State and local governments, any department, agency, special purpose district, or instrumentality of same, and their contractors. 42 U.S.C. §§ 12131(1)(A) & (B); *see* 28 C.F.R. § 35.130(b). A disability is a physical or mental impairment that substantially limits one or more major life activities of an individual. 42 U.S.C. § 12102(1). "Qualified individuals with disabilities" are those who "with or without reasonable modifications to rules, policies, or practices . . . mee[t] the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2). Prohibited discrimination by public entities includes the failure to provide persons with disabilities a community-based placement when such placement is appropriate; the individual wishes to reside in the community; and the placement can be reasonably accommodated. *Olmstead v. L.C.*, 527 U.S 581, 587 (1999).

Plaintiffs are qualified individuals with disabilities who are being illegally discriminated against by Defendant public entities. Defendant Cansler is the Secretary of the North Carolina Department of Health and Human Services (DHHS), which is a public entity. Defendant Salacki is the Area Director of the Beacon Center Local Management Entity (LME), a local political subdivision of the State and a public entity. *See* N.C.G.S. § 112C-116(a). As Area Director of the Beacon Center, Defendant Salacki is vested with the authority to manage state-funded services in her LME's catchment area. *See* N.C.G.S. § 122C-101; N.C.G.S. § 112C-115.4(a). Plaintiffs are individuals with disabilities in that they are diagnosed with mental retardation and mental illness, which are intellectual and mental impairments that substantially limit one or more of their major life activities, including but not limited to, thinking, communicating, learning, working, caring for themselves, and concentrating. *See* 42 U.S.C. § 12102. Plaintiffs are qualified persons with disabilities in that they meet the essential eligibility requirements for and

are in receipt of services from the State Medicaid program, the CAP-MR/DD waiver program, and State-funded mental health, developmental disabilities, and substance abuse services programs with or without reasonable modification to the rules, policies, and practices of those programs. See 42 U.S.C. §12131(2).

Defendants' actions constitute illegal discrimination under *Olmstead*. Plaintiffs' community-based placements are appropriate as demonstrated by their long history of living safely and successfully in their own homes – Plaintiff Marlo M. for almost six years and Plaintiff Durwood W. for a decade. Community-based treatment is especially appropriate for Plaintiffs as it guarantees them a level of one-on-one attention that is unavailable to them in any congregate or institutional setting. Plaintiffs' wish to continue residing in their homes can be reasonably accommodated through either continuation of their state-funded services or through modifications to the CAP-MR/DD waiver. Indeed, it is cheaper to care for Plaintiffs in their own homes than in an institution. However, despite Plaintiffs' successful integration into their communities, the cost-effectiveness of their care in the community, and their continued eligibility for the CAP-MR/DD waiver and state-funded Supervised Living services, Plaintiffs will be forced to leave their homes on December 15, 2009. The failure of Defendant Salacki to authorize Plaintiffs for Supervised Living services and Defendant Cansler's attendant failure to make reasonable modifications to the CAP-MR/DD waiver program to allow Plaintiffs to remain in the community violates Plaintiffs' rights to be free from discrimination based on their disability under the ADA and *Olmstead*.

Defendants have claimed that Plaintiffs are able to access suitable levels of services and care solely through the CAP-MR/DD waiver program. However, this position is indicative of a fundamental misunderstanding of the CAP-MR/DD service array and the interrelations between

various services offered as part of the waiver program. The CAP-MR/DD service definitions and utilization guidelines provide that Plaintiffs are eligible for only 12.5 hours of residential staffing services per day under the waiver. Residential staffing services available through the CAP-MR/DD waiver cannot be combined in any way to achieve twenty-four hour staffing and supervision without modification of specific limitations contained in the service definitions. Plaintiffs require twenty-four hour one-on-one staffing and supervision. Defendant Salacki's failure to authorize Plaintiffs for state-funded Supervised Living services and Defendant Cansler's failure to make reasonable modifications to the rules, policies, and procedures governing the CAP-MR/DD waiver program will result in Plaintiffs' loss of twenty-four hour care and their forced isolation and segregation in harmful institutional settings or other inappropriate settings against their will in violation of Title II of the ADA, 42 U.S.C. § 12132, and its implementing regulation, 28 C.F.R. § 35.101, *et seq*.

2. Defendants' reduction of Plaintiffs' funding and services will result in Plaintiffs' unnecessary institutionalization in violation of Section 504 of the Rehabilitation Act of 1973.

The termination of Plaintiffs' state-funded Supervised Living services and concurrent inability to access available federal CAP-MR/DD waiver funds places them at immediate risk of unnecessary institutionalization in violation of the Rehabilitation Act of 1973. In the Rehabilitation Act of 1973, Congress stated that "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a), *referencing* 29 U.S.C. § 705(2). "Program or activity" includes a department, agency, special purpose district, or other instrumentality of a State or of a local government. 29 U.S.C. § 794(b)(1)(A). The

Rehabilitation Act defines disability as a physical or mental impairment that substantially limits one or more major life activities. 29 U.S.C. § 705(20)(B), *referencing* 42 U.S.C. § 12102(1). Prohibited discrimination includes denial of the opportunity to participate in or benefit from an aid, benefit, or service. 28 CFR § 41.51(b). Moreover, a recipient of federal funds must administer its services, programs, and activities in the "most integrated setting appropriate" to the needs of the qualified individual. 28 CFR § 41.51(d).

Plaintiffs are individuals with disabilities in that they are diagnosed with mental retardation and mental illness, which are impairments that substantially limit one or more of their major life activities, including but not limited to, thinking, communicating, learning, working, caring for themselves, and concentrating. *See* 42 U.S.C. § 12102; 29 U.S.C. § 705(20)(B). Plaintiffs are qualified persons with disabilities in that they meet the essential eligibility requirements for and are in receipt of services from the State Medicaid program, the CAP-MR/DD waiver program, and state-funded mental health, developmental disabilities, and substance abuse services programs with or without reasonable modification to the rules, policies, and practices of those programs. *See* 42 U.S.C. §12131(2); 29 U.S.C. § 794(a). Defendant Cansler is the Secretary of the North Carolina Department of Health and Human Services (DHHS), which is a state agency receiving Federal financial assistance. Defendant Salacki is the Area Director of the Beacon Center Local Management Entity (LME), which is an instrumentality of the State of North Carolina receiving Federal financial assistance.

In North Carolina, adults with dual diagnoses of mental retardation and mental illness are part of a target population that may be eligible to receive state-funded services designated as MR/MI funds, formerly called *Thomas S.* funds. The North Carolina General Assembly recognized the continued need for MR/MI funds for this target population when the Assembly

specifically excluded these funds from across-the-board cuts to state-funded services in the current North Carolina State budget which provides:

> *Except as otherwise provided in this section for former Thomas S. recipients*, CAP-MR/DD recipients are not eligible for any State-funded services except for those services for which there is not a comparable service in the CAP-MR/DD waiver. The excepted services are limited to guardianship, room and board, and time-limited supplemental staffing to stabilize residential placement. *Former Thomas S. recipients currently living in community placements may continue to receive State-funded services.*

SL 2009-451 § 10.21B (emphasis added).

Defendant Salacki has failed to properly exercise her authority and discretion by failing to conduct any individualized assessment of Plaintiffs' needs, as contemplated by the General Assembly. Instead, Defendant Salacki's arbitrary termination of Plaintiffs' Supervised Living services substantially increases Plaintiffs' risk of institutionalization or other placement in a segregated setting. Defendant Cansler's has failed to make reasonable modifications to the rules, policies, and procedures governing the CAP-MR/DD waiver program, thus preventing Plaintiffs from accessing the full $135,000.00 waiver budget that is purportedly made available to each comprehensive CAP-MR/DD waiver participant. Such denial of access to CAP-MR/DD funding will force Plaintiffs to vacate the integrated home settings that are appropriate to their needs. Such denial moreover is based on Plaintiffs' needs for constant care and supervision necessitated by their particular disabilities. Both Defendants previously determined that Plaintiffs' level and combination of federal and state-funded services were medically necessary through assessment tools that DHHS, DMA and DMHDDSAS have been using for years (*e.g.*, the Person-Centered Plan of Care). Actions of both defendants constitute unlawful discrimination in violation of Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, and its implementing regulation, 28 C.F.R. Part 41.

C. Plaintiffs will Suffer Irreparable Injury without Injunctive Relief

A temporary restraining order and preliminary injunction are necessary to prevent Plaintiffs from being institutionalized due to the loss of state-funded services on December 15, 2009. Plaintiffs seeking preliminary relief must demonstrate that they are likely to suffer irreparable injury in the absence of an injunction. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. __ , __, 129 S. Ct. 365, 374 (2008); *Los Angeles* v. *Lyons*, 461 U.S. 95, 103, 103 S. Ct. 1660 (1983); *Granny Goose Foods, Inc.* v. *Teamsters*, 415 U.S. 423, 441, 94 S. Ct. 1113 (1974); *O'Shea* v. *Littleton*, 414 U.S. 488, 502, 94 S. Ct. 669 (1974). Irreparable injuries are those that are non-compensable or cannot be adequately compensated by money damages, such as emotional, psychological, and physical damage. *L.J. v. Massinga*, 838 F.2d 118, 1988 U.S. App. LEXIS 1161 (4th Cir. 1988) (finding that monetary costs and administrative inconvenience to city from grant of preliminary injunction was outweighed by preventing continuing harm to plaintiffs caused by defendants' mismanagement of foster care system); *see also LaForest v. Former Clean Air Holding Co., Inc.*, 376 F.3d 48, 55 (2d Cir. 2004) (stating that reduction of medical benefits and consequent negative impacts on an individual's health is an irreparable injury); *see generally Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546; 1994 U.S. App. LEXIS 7404 (4th Cir. 1994).

Plaintiffs are likely to suffer irreparable injury if this Court does not grant them injunctive relief preventing the termination or reduction of their residential staffing services on December 15, 2009. If Plaintiffs lose residential staffing services, Plaintiffs will immediately face the prospect of institutionalization or forced transition to congregate placements. These placements will cause Plaintiffs emotional, psychological, and physical harm that cannot be compensated by an award of monetary damages. Additionally, for Plaintiff Marlo M., the loss of her current

placement means the loss of an apartment uniquely suited to her short stature. The only remedy for this loss would be to custom-fit another apartment.

Even if this Court should grant Plaintiffs injunctive relief but later determine such grant was in error, the interim costs of caring for Plaintiffs in the community would cost less than caring for Plaintiffs in an institution. Defendants stand to benefit from the grant of injunctive relief to Plaintiffs. Plaintiffs will suffer irreparable injury should they be removed from their current placements that cannot be compensated by money damages.

D. The Balancing of Hardships Tips in Favor of the Plaintiffs

The balance of hardships tips in Plaintiffs' favor. Compliance with the law is not a cognizable hardship on a defendant. *White v. Martin*, 2002 U.S. Dist. LEXIS 27281, 22-23 (W.D. Mo. 2002). Defendants must show that proposed injunctive relief pose more than mere fiscal and administrative problems for Defendants to tip the balance away from Plaintiffs, who will suffer physical and emotional harm in the absence of relief. *Todd v. Sorrell,* 841 F.2d 87, 88 (4th Cir. 1988) ("harm to the plaintiff would have been enormous, indeed fatal, were the injunction denied, and harm to the Commonwealth if granted, while it may not have been negligible, was measured only in money and was inconsequential by comparison"); *Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983). Where the government's actions cause a loss of life's necessities, further illness, or other deprivation to the Plaintiffs, the balance of hardships tips "decidedly" in Plaintiffs' favor. *Lopez* at 1437*; see also Daniels v. Wadley*, 926 F. Supp. 1305, 1313 (M.D. Tenn. 1996) (Plaintiffs' potential harm of forgoing medical care pending resolution of the dispute outweighs the administrative burden to Defendants of modifying policies and procedures.) When the state is in a better position to absorb budgetary impact compared to plaintiffs, harm to plaintiffs outweighs harm to defendant state. *Kansas Hosp.*

Ass'n v. Whiteman, 835 F. Supp. 1548, 1552-53 (D. Kan. 1993) (finding that state's planned action would result in negligible impact on state coffers but detrimentally alter status quo of plaintiff Medicaid beneficiaries and hospitals).

Defendants likely will cite budgetary concern as the basis for the reduction or termination of Plaintiffs' services. However, Defendants fail to consider the budgetary impact of Plaintiffs' institutionalization. Currently, both Plaintiffs' care in the community in their own homes is far below the estimated cost of caring for Plaintiffs in an Intermediate Care Facility for persons with Mental Retardation (ICF-MR facility) or other institutional setting. Plaintiffs will incur serious harm, both mental and emotional, as a result of the substantial cut to their services. The comparative harm to Defendants, however, is small. Additionally, Plaintiffs' injunction seeks only that Defendants comply with federal law.

E. The Public Interest Demands that the Injunction be Granted

The State of North Carolina and its taxpayers incur fewer costs by providing Plaintiffs' care in the community in accordance with the ADA. The public interest is served when laws passed by Congress are enforced. *White*, 2002 U.S. Dist. LEXIS 27281 at 24, (citing *Glenwood Bridge, Inc. v. City of Minneapolis*, 940 F.2d 367, 372 (8th Cir. 1991)). There is a serious questions of whether the public interest is served by shuffling the burden of Plaintiffs' care from one governmental entity to another. *Lopez* at 1436-7. Budgetary savings are in the public interest; however those measures must give way when they are in conflict with federal substantive law. *Kansas Hosp. Ass'n*, 835 F.Supp. at 1553; *see also Nat'l Wildlife Fed. v. Nat'l Marine Fisheries Serv.*, 235 F.Supp.2d 1143, 1162 (W.D. Wash. 2002); *Haskins v. Stanton*, 794 F.2d 1273, 1277 (7th Cir. 1986) (noting that where an injunction seeks to require defendants to comply with existing law, the injunction imposes no burden but "merely seeks to prevent the

defendants from shirking their responsibilities").

The public interest includes protecting the rights of disabled individuals:

> Our society as a whole suffers when we neglect the poor, the hungry, the disabled, or when we deprive them of their rights or privileges. Society's interest lies on the side of affording fair procedures to all persons, even though the expenditure of governmental funds is required. It would be tragic, not only from the standpoint of the individuals involved but also from the standpoint of society, were poor, elderly, disabled people to be wrongfully deprived of essential benefits for any period of time.

Lopez at 1437. Furthermore, governments and public entities cannot concern themselves solely with fiscal issues, and must pay equal or greater attention to the general health and wellbeing of those residing within the state. *Id.*

The interest of the citizens of North Carolina are best served by enjoining Defendants from enforcing arbitrary cuts and denials of necessary services for Plaintiffs. The ADA requires that persons with disabilities be cared for in the most integrated settings possible, which is being directly undermined by Defendants' actions. The failure to enjoin Defendants' actions would insulate the State and other public entities in this State from injunctions seeking the stay of an improper action.

F. The Court Should not Require a Bond

In their discretion under FRCP 65(c), Federal courts routinely waive bond requirements in suits to enforce important federal rights of public interests. *See, e.g., Barahona-Gomez v. Reno*, 167 F.3d 1228, 1237 (9th Cir. 1999) (noting that "[t]he district court is in a far better position to determine the amount and appropriateness of the security required under Rule 65"); *Doctor's Associates, Inc. v. Stuart*, 85 F.3d 975, 985 (2d Cir. 1996) (affirming the district court's decision not to require bond); *Moltan Co. v. Eagle-Picher Industries, Inc.*, 55 F.3d 1171, 1176 (6th Cir. 1995) (a district court has discretion to require posting of security); *Stockslager v.*

Carroll Elec. Co-op. Corp., 528 F.2d 949, 951 (8th Cir. 1976) ("The amount of the bond required [upon the issuance of a preliminary injunction] rests within the sound discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of that discretion") (citations omitted).

Important federal rights are at stake in this litigation. *See, e.g., Temple Univ. v. White*, 941 F.2d 201, 220 n.27 (3d Cir. 1991) ("Public policy under [federal law governing state modification of Medicaid programs] mandates that parties in fact adversely affected by improper administration of programs pursuant thereto be strongly encouraged to correct such errors"). Given the high likelihood of success on the merits, Plaintiffs' status as public assistance recipients, as well as the fact that the injunction seeks merely to require DHHS to comply with federal law, no bond should issue.

CONCLUSION

This Court should grant the Motion for a Temporary Restraining Order and a Preliminary Injunction because Plaintiffs have met their burden of showing (1) a strong likelihood of success on the merits, (2) a substantial likelihood of irreparable harm, (3) that the balance of hardships tips in Plaintiffs favor, and (4) that the public interests demands that the injunction be granted.

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Respectfully submitted,

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