UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF NORTH CAROLINA

CLINTON L., by his guardian and next friend CLINTON L., SR., and TIMOTHY B. by his guardian and next friend ROSE B., and others similarly situated,	)	CIVIL ACTION NO. 10-CV-00123
Plaintiffs,	)	
v.	)	
LANIER CANSLER, in his official capacity as Secretary of the Department of Health and Human Services, and DAN COUGHLIN, in his official capacity as CEO and Area Director of the Piedmont Behavioral Healthcare Local Management Entity,	)	
Defendants	)	

COMPLAINT – CLASS ACTION

INTRODUCTION

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

2. Plaintiff Timothy B. is 44 years old. Among other diagnoses, he is dually diagnosed with a developmental disability and mental illness. Plaintiff Timothy B. is also deaf. He currently lives in Raleigh, North Carolina, but he is originally from Lexington, North Carolina, where his guardian still resides.

3. In North Carolina, adults dually diagnosed with mental retardation and mental illness are part of a target population that may be eligible to receive state mental health, developmental disability, and substance abuse services funds designated as MR/MI funds, formerly called *Thomas S.* funds. Plaintiffs are both eligible for and have previously received MR/MI funds. *See Thomas S. v. Morrow*, 601 F. Supp. 1055, 1984 U.S. Dist. LEXIS 23537 (W.D.N.C. 1984), *aff'd in part and modified in part, remanded*, 781 F.2d 367, 1986 U.S. App. LEXIS 21712 (4th Cir. 1986), *cert. denied sub nom.*, *Kirk v. Thomas S.*, 476 U.S. 1124 (1986), *cert. denied sub nom.*, *Childress v. Thomas S.*, 479 U.S. 869 (1986); *later proceeding*, *Thomas S. v. Flaherty*, 699 F.Supp. 1178, 1988 U.S. Dist. LEXIS 13086 (W.D.N.C. 1988), *aff'd*, 902 F.2d 250, 1990 U.S. App. LEXIS 7044 (4th Cir. 1990), *rehearing, en banc, denied*, 1190 U.S. App. LEXIS 19875 (4th Cir. 1990), *cert denied*, 498 U.S. 951 (1990).

4. Named Plaintiffs have been successfully living in the community with a combination of federal Medicaid waiver funds (provided through the Innovations Waiver**,** as described infra, at Paragraphs 46-48) and supplemental state funds; Plaintiff Clinton L. for over eight years, and Plaintiff Timothy B. for more than a decade.

5. Named Plaintiffs Clinton L. and Timothy B. are representative of a class of individuals within the Piedmont Behavioral Healthcare, also known as PBH, geographical service area, for whom a clinical treatment team has determined that their current Individual Support Plans (ISPs) require independent, state-funded, Supervised Living services to assure adequate staffing and appropriate care to maintain these

individuals in the community, and they are entitled to class relief as set out in the proposed class definition, infra, at Paragraphs 25-32.

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

7. Recently, Defendant Coughlin drastically reduced the availability of state funds for Plaintiffs' care, as well as for all others similarly-situated, by reducing the amounts that providers are reimbursed for this service by at least 30%. The practical effect of this reduction will be the elimination of providers that offer the service that maintains both Named Plaintiffs in the community. Plaintiffs are at risk of institutionalization, a placement that would be more costly than Plaintiffs' care in the community. As a result of this arbitrary decision, both Named Plaintiffs will be at risk of displacement from their long-term community placements on February 15, 2010, the effective date of the reduction.

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

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

10. Plaintiffs further seek class relief for all those individuals who are similarly situated, as described infra, at Paragraph 25, in the proposed class definition.

JURISDICTION AND VENUE

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

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

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

DEFENDANTS

14. Defendant Dan Coughlin is the CEO and Area Director of the PBH Local Management Entity (LME), with a geographic service area encompassing Cabarrus, Davidson, Rowan, Stanly, and Union Counties. Within the Medicaid-funded system of

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

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

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

NAMED PLAINTIFFS

17. The two Named Plaintiffs are adults with dual diagnoses of mental retardation and mental illness (MR/MI).

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

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

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

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

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

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

24. Plaintiffs Clinton L. and Timothy B. are eligible for the Innovations Waiver operated by PBH. Plaintiffs Clinton L. and Timothy B. are also eligible for non-Medicaid state funded services paid for entirely with state funds made available to persons with Mental Retardation/Mental Illness (MR/MI), formerly called *Thomas S.* funds.

CLASS ACTION ALLEGATIONS

25. This action is brought as a statewide class action pursuant to Fed. R. Civ. P. 23(a) and (b)(2) on behalf of:

> all current or future PBH consumers for whom a clinical treatment team has determined that their Individual Support Plan requires independent, state-funded, Supervised Living services (to wit, YM 811 and YM 812) to assure adequate staffing and appropriate care to maintain these individuals in the community.

26. Upon information and belief, the class is so numerous that joinder of all members is impracticable. A public records request revealed that approximately 35 class members are currently served by the PBH LME.

27. All individuals served by PBH for whom their ISP requires that they receive state-funded Supervised Living services share a common claim with the Named Plaintiffs in that their services will be denied, delayed, terminated, interrupted, or reduced by PBH or DHHS directly or through their agents or assigns as a direct result of the rate cuts PBH plans to implement on February 15, 2010.

28. There are questions of law and fact as to the permissibility of the Defendants' policies and practices with respect to denying, reducing, or terminating Supervised Living services that are common to all members of the class. The factual questions common to the entire class include whether Defendants' proposed rate cuts to Supervised Living services would result in an elimination of Supervised Living services. The legal questions common to the entire class include whether Defendants' proposed rate cuts to Supervised Living services would result in a violation of the Americans with Disabilities Act and/or Section 504 of the Rehabilitation Act.

29. The claims of the class representative plaintiffs are typical of the claims of the class. Despite other differences among Individual Support Plans, Plaintiffs currently enjoy independent living arrangements that, like all other members of the proposed class, would be eliminated by Defendants' proposed rate cuts. Doing away with this service for all class members amounts to pulling the rug from beneath a system of care that has been individually tailored to each class member's needs.

30. The Named Plaintiffs will fairly and adequately represent the interests of all members of the class. Plaintiffs know of no conflicts of interest among class members.

31. Prosecution of separate actions by individual class members would create a risk of inconsistent or varying adjudications with respect to individual class members which would establish incompatible standards of conduct for the party opposing the class or could as a practical matter be dispositive of the interests of the other members or substantially impair or impede their ability to protect their interests.

32. Defendants' actions and omissions have affected and will affect the class generally, thereby making appropriate injunctive and declaratory relief with respect to the class as a whole.

FACTUAL BACKGROUND

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

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

35. Plaintiff Clinton L. is currently authorized to receive the "Supervised Living – 2 Resident" service. Providers of "Supervised Living – 2 Resident" services are reimbursed by PBH at a standard rate of $161.99 per day.

36. Effective February 15, 2010, the rate for "Supervised Living – 2 Resident" will be reduced by PBH to $116.15, a reduction of nearly 30%.

37. Plaintiff Timothy B. is currently authorized to receive the "Supervised Living – 1 Resident" service. Providers of "Supervised Living – 1 Resident" services are reimbursed by PBH at a variable per diem rate. In Timothy B.'s case, the rate for the service is $250.00 per day. This rate was designed to correspond with the service provider's costs in hiring staff capable of communicating with Timothy B. through the use of American Sign Language or other means.

38. Effective February 15, 2010, the rate for "Supervised Living – 1 Resident" will be reduced by PBH to $116.15 per day. This represents a reduction of nearly 55% for this service in Timothy B.'s case.

39. Defendant PBH did not notify Plaintiffs of the proposed rate cuts. Plaintiffs have not been provided with any right to appeal the rate cuts. The new rate structure for Supervised Living services will not permit the providers of this service to operate at a profit. Moreover, the new rate structure will cause those providers currently offering the service to operate at a loss. Consequently, these providers will terminate the Supervised Living services for Plaintiffs and other recipients of this service in areas served by PBH.

40. Plaintiffs are able to maintain their long-time and successful community placements through a combination of MR/MI funds and Innovations Waiver funds.

41. Although, Plaintiffs will still be eligible to continue receiving Innovations Waiver funding after the rate reduction on February 15, 2010, since Plaintiffs cannot be maintained in the community on these funds alone, they will also lose their Innovations Waiver funding if they are admitted to an institution.

42. On January 29, 2010, Plaintiffs' counsel wrote to Defendants demanding a postponement of the implementation of the new Supervised Living rate structure. This delay was requested so that Defendants can reach an accord with Supervised Living providers as to an appropriate per diem rate for Supervised Living services to assure that Plaintiffs will be maintained in their community placements. To date, Defendants have not responded.

THE INNOVATIONS WAIVER PROGRAM

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

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

one such program. Pursuant to a Memorandum of Understanding (MOU) with the Division of Medical Assistance (DMA), the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services (DMHDDSAS) is the lead agency for operation of the CAP-MR/DD waiver program.

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

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

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

48. Residential staffing services available through the Innovations Waiver cannot be combined in any way to achieve twenty-four hour staffing and supervision without reasonable modification of the service definitions. Consequently, an Individual Support Plan under the Innovations Waiver must be supplemented with additional stated funded services if twenty-four hour staffing is required.

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

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

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

51. Supervised Living is a "residential service which includes room and support care for one individual who needs 24-hour supervision; and for whom care in a more

intensive treatment setting is considered unnecessary on a daily basis." Division of Mental Health/Developmental Disabilities/Substance Abuse Services, MH/DD/SA Service Definitions 164 (January 1, 2003). Medical necessity for this service is satisfied when a recipient has an Axis I or II diagnosis or the person has a developmental disability, meets certain Level of Care Criteria, Level NCSNAP/ASAM, is at risk for placement outside the natural home setting, and has intensive verbal and limited physical aggression due to symptoms associated with a diagnosis, which are sufficient to create functional problems in a community setting. MH/DD/SA Service Definitions at 165.

52. Plaintiff Clinton L. is authorized to receive Supervised Living services until May 31, 2010. Plaintiff Timothy B. is authorized to receive Supervised Living services until November 31, 2010. Plaintiffs will continue to meet medical necessity criteria for these services after their current authorizations expire.

53. Upon information and belief, providers of Supervised Living services incur numerous costs related to the staffing of supervisory personnel needed for the care of Named Plaintiffs and other similarly situated individuals.

54. The costs incurred by the providers of residential services for Supervised Living consumers such as Timothy B. and Clinton L. will exceed PBH's proposed per diem rate of $116.15. Because providers would only be able to provide Supervised Living services at a loss, they will no longer offer it in the five counties served by PBH. The rate cuts create a substantial certainty that all Supervised Living service providers in the five counties served by PBH will withdraw from offering the services.

55. With no providers in the areas served by PBH, Plaintiffs and other similarly situated individuals would be effectively denied access to the Supervised Living services currently authorized in their plans of care.

56. Upon information and belief, some providers of Supervised Living services have begun to eliminate staff and services needed to adequately supervise Plaintiffs and other similarly situated individuals in anticipation of the February 15, 2010 rate cuts.

57. As a consequence of losing access to Supervised Living services, Plaintiffs will no longer be able to maintain their long-term community placements. After February 15, 2010, both Plaintiffs will be at risk of relocating to alternative congregate or institutional placements.

58. It is not expected that the congregate placements will be successful for either Plaintiff. Both Plaintiffs require constant one-on-one supervision and attention, which congregate placements do not provide. If and when Plaintiffs' placement in a congregate setting are determined to have failed (as is expected), it is believed that both Plaintiffs will face forced institutionalization.

59. For individuals, such as Timothy B., who have additional medical or support needs, certain supplemental services, such as an American Sign Language interpreter, must be provided in the institutional setting, at an additional cost to the State.

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

60. Plaintiffs adopt and restate the allegations set forth in paragraphs 1 – 59 of this complaint.

61. Title II of the Americans with Disabilities Act (ADA) provides that "no qualified individual with a disability shall, by reason of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity or be subject to discrimination by such entity." 42 U.S.C. § 12132.

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

63. Regulations implementing Title II of the ADA require that a public entity administer its services, programs and activities in "the most integrated setting appropriate" to the needs of qualified individuals with disabilities. 28 C.F.R. § 35.130 (d).

64. Regulations implementing Title II provide that

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

65. Regulations implementing Title II further provide:

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

> (v) Aid or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity's program. 28 C.F.R. § 35.130(b)(1).

66. The United States Supreme Court in *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999), held that unnecessary institutionalization of individuals with disabilities is a form of discrimination under Title II of the ADA. In doing so, the high Court interpreted the ADA's "integration mandate" as requiring persons with disabilities to be served in the community when: (1) the state determines that community-based treatment is appropriate; (2) the individual does not oppose community placement; and, (3) community placement can be reasonably accommodated. 527 U.S. at 607.

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

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

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

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

70. Plaintiffs' community placements were the result of, *inter alia*, PBH's determination that community-based treatment was appropriate for them. Plaintiffs do not oppose community placement. Plaintiffs' community placement can be reasonably accommodated, as demonstrated by their continuous care in the community for many years; Plaintiff Clinton L. for more than eight years and Plantiff Timothy B. for more than a decade.

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

72. Defendant Coughlin's failure to make reasonable modifications to the service definitions applicable to the Innovations Waiver program denies Plaintiffs the full twenty-four hour per day residential staffing they need to remain in their homes. The failure to make reasonable modifications to the Innovations Waiver service definitions to

allow Plaintiffs to remain in their integrated home settings constitutes unlawful discrimination in violation of Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132 and its implementing regulation, 28 C.F.R. § 35.130(d).

73. Defendant Cansler is the Secretary of the North Carolina DHHS, the "single state agency" responsible for the administration and supervision of North Carolina's Medicaid program under Title XIX of the Social Security Act. 42 C.F.R. § 431.10 (2009). LMEs such as PBH cannot "change or disapprove any administrative decision of that [single state agency], or otherwise substitute their judgment for that of the Medicaid agency with respect to the application of policies, rules, and regulations issued by the Medicaid agency." 42 C.F.R. § 431.10(e)(3) (2009). Additionally, Defendant Cansler is responsible for the ultimate oversight of the LMEs to make sure that they provide publicly funded services in accordance with the law. *See* N.C.G.S. § 122C-111, *et seq*.

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

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

76. PBH's proposed rate cuts would result in the elimination of all Supervised Living services in the five counties served by PBH. Plaintiffs would no longer have access to services that were originally created for their use.

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

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

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

79. Plaintiffs adopt and restate the allegations set forth in paragraphs 1 – 78 of this complaint.

80. Section 504 of the Rehabilitation Act of 1973 provides, "no otherwise qualified individual with a disability in the United States...shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to

discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a).

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

82. "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).

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

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

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

86. PBH is a recipient of Federal financial assistance under Section 504 and its implementing regulations.

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

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

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

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

90. PBH's proposed rate cuts would result in the elimination of all Supervised Living services in the five counties served by PBH. Plaintiffs would no longer have access to services that were originally created for their use.

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

92. Defendant Cansler's failure to adequately supervise PBH's actions and instruct PBH to reasonably modify the Innovations Waiver service definitions to allow Plaintiffs to combine residential staffing services to achieve a full twenty-four hours of continuous staffing constitutes unlawful discrimination in violation of Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 and its implementing regulation, 28 C.F.R. 41.51(d).

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

RELIEF REQUESTED

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

1. Certify this action as a class action pursuant to Fed. R. Civ. P. 23.

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

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

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

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

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

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

Dated: February 11, 2010

Respectfully submitted,

/s/ John R. Rittelmeyer

John R. Rittelmeyer
john.rittelmeyer@disabilityrightsnc.org
N.C. State Bar No. 17204

Jennifer L. Bills
jennifer.bills@disabilityrightsnc.org
N.C. State Bar No. 37467

Andrew B. Strickland
andrew.strickland@disabilityrightsnc.org
N.C. State Bar No. 40490

DISABILITY RIGHTS NC
2626 Glenwood Avenue, Suite 550
Raleigh, NC 27608
Phone: (919) 856-2195
Fax: (919) 856-2244
Attorneys for Plaintiffs