STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
WAKE COUNTY	17 CVS 6357

SAMANTHA R., by her Guardian, TIM R., MARIE K., by her guardian, EMPOWERING LIVES GUARDIANSHIP SERVICES, LLC CONNIE M., by her guardian CHARLOTTE R., JONATHAN D., by his guardian MICHAEL D., MITCHELL T., by his guardian, BETSY S., and DISABILITY RIGHTS NORTH CAROLINA, Plaintiffs, v. STATE OF NORTH CAROLINA, NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, and MANDY COHEN, in her official capacity as Secretary of the North Carolina Department of Health and Human Services, Defendants.	)	**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

Defendants' Motion for Summary Judgment addresses the case Defendants would have preferred Plaintiffs to file - one with narrow, individual claims that could be subjected to restrictive administrative remedies. Defendants thus focus almost entirely on selected contentions regarding individual Plaintiffs. This case, however, is not about narrow claims for specific individuals, but about the deficiencies in North Carolina's I/DD system and the impact these deficiencies have on the thousands of North Carolinians with I/DD, including the named individual Plaintiffs. Defendants' mootness, statute of limitations, and exhaustion of remedies arguments as to the individual Plaintiffs, as demonstrated in Section III, below, are legally and factually without merit and simply not relevant to the issues at hand.[1]

Plaintiffs brought this action to end Defendants' violation of the Integration Mandate with regard to services for people with I/DD and to seek redress of systemic failures that harm thousands of individuals dependent on such services. Defendants do not deny that North Carolina unnecessarily institutionalizes individuals with I/DD. Defendants' own experts, Rule 30(b)(6) designees, and key staff forthrightly admit: (i) Defendants' overreliance on institutions; (ii) Defendants' failure to maintain sufficient quality or quantity of community-based providers; (iii) the harm associated with the growing waiting list for services; and (iv) the lack of a plan to address these issues. Mem. Support Pls.' Mot. Partial Summ. J. ("Pls.' Mem.") 14, 17-19, 28, 33. Defendants similarly fail to proffer any viable defense for their lack of compliance with the Integration Mandate.

[1] Plaintiffs respond to the specific arguments related to individual Plaintiffs to make it clear that Defendants' reframing of the issues does not affect Plaintiffs' entitlement to relief.

Defendants' Motion for Summary Judgment relies on the premise that this case is about one program - the Innovations Waiver - and makes various arguments based on that premise. Defendants' reliance on the Innovations Waiver ignores the scope of the Integration Mandate. The Waiver program, as designed and implemented by Defendants, has its own shortcomings when it comes to addressing risk of institutionalization, including service limits and a long waiting list. The Integration Mandate is broad. It provides for an obligation by the State to serve individuals in the most integrated setting appropriate to the individuals' needs, and does not limit or proscribe the means for accomplishing that end. The mere existence of the Innovations Waiver does not satisfy the Integration Mandate nor does it remedy Defendants' violations.

North Carolinians with I/DD remain institutionalized because of the broad, systemic failure of Defendants' I/DD system to provide for adequate and comparable community-based services. Hundreds of individuals want to leave state-operated institutions but have not been able to access adequate community-based services. More are institutionalized in private settings where Defendants have failed to even identify those who want to leave. Pls.' Mem. 17-18. Thousands on the Registry of Unmet Need (according to Defendants' admissions) require, but are not receiving, sufficient services to avoid institutionalization. *Id.* at 25. All individual Plaintiffs, and hundreds more who have been subject to budget cuts and service limits due to Defendants' policies, remain at risk due to the pervasive inadequate provider network, periodic budget cuts, and other policies that keep people with I/DD at risk. *Id.* at 27-30.

Plaintiffs seek a remedy to the admitted widespread deficiencies in Defendants' service system and have shown that Defendants have (1) failed to comply with the Integration Mandate and (2) do not have a plan for complying. Defendants fail to address these systemic failings evident in the record and do not set forth any applicable legal basis on which Defendants are

entitled to summary judgment. The Court should therefore deny Defendants' Motion for Summary Judgment and instead enter judgment in favor of Plaintiffs.

STATEMENT OF FACTS

Plaintiffs respectfully refer the Court to the uncontested material facts contained in the Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment.

ARGUMENT

I. Plaintiffs Seek Systemic Relief for Defendants' Violation of the Integration Mandate and Not Individual Remedies

Defendants' Memorandum attempts to reframe this case in a way that is contrary to the Amended Complaint Plaintiffs actually filed. Plaintiffs' claims for relief are not for individual remedies, but for systemic changes to address Defendants' ongoing violations of the Integration Mandate and due process. *See* Am. Comp., First Claim ¶¶ 272-276, Second Claim ¶¶ 277-283, Third Claim ¶¶ 284-289. The systemic relief sought in this case is consistent with Chapter 168A and with remedies applied in other Integration Mandate cases.

The Integration Mandate, by its terms, addresses the manner in which public entities operate services and programs, requiring a "covered governmental entity" to "administer its services, programs, and activities in the most integrated setting appropriate to the needs of persons with disabilities." N.C. Gen. Stat. § 168A-7(b). Violation of the Integration Mandate may be remedied through declaratory and injunctive relief. *Id*. § 168A-11(a)-(b) .

Because the Integration Mandate applies to how governmental entities "administer" services, the remedies available for violations necessarily include changes to how those entities administer services. *See* U.S. Dep't of Justice, *Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and*

Olmstead v. L.C., June 22, 2011 ("DOJ Guidance") p. 3 (detailing common components of systemic remedies); *see also, Disability Advocates, Inc. v. Paterson*, 598 F. Supp. 2d 289, 310-11 (E.D.N.Y. 2009)(rejecting argument that New York Protection and Advocacy agency lacked standing to pursue "system-wide relief" where the *Olmstead* claim alleged and was supported by "evidence of an ongoing, system-wide harm to its constituents that could be redressed by the injunctive relief it seeks"); *N.B. v. Hamos*, 2013 U.S. Dist. LEXIS 171471, at *27 (N.D. Ill. Dec. 5, 2013) (rejecting defendants' argument that an *Olmstead* claim can provide "remedies for individual instances of discrimination" but not "a right to 'programmatic' relief").

A. Plaintiffs Have Shown Serious and Systemic Violation of the Integration Mandate with Regard to Defendants' Overreliance on Institutionalization

Defendants' only argument about the ongoing unnecessary institutionalization of individuals with I/DD is that one such individual (Samantha R.) cannot maintain a claim because no community-based providers are available to meet her needs. Mem. Law Support Defs.' Mot. Summ. J. ("Defs.' Mem.") 39. Plaintiffs' claims challenge precisely this gap in service providers and related deficiencies: people who are in similar situations as Samantha R. cannot leave their institutions because Defendants have not provided for alternatives. Pls.' Mem. 5-7, 19.

Defendants' argument is based on the false premise that the availability of community-based services has nothing to do with Defendants. The Integration Mandate, among other provisions (see below), is unambiguous that it is Defendants' obligation to ensure alternatives to segregation. *See* N.C. Gen. Stat. § 168A-7(b) ("A covered governmental entity shall administer its services, programs, and activities in the most integrated setting appropriate to the needs of persons with disabilities.").

A public entity is required to provide in the community any services that exist in an institution so that an individual with a disability does not have to live in an institution to receive

those services. *See Townsend v. Quasim*, 328 F.3d 511, 517 (9th Cir. 2003) (holding that requiring plaintiff to live in a nursing home to receive services for which he qualifies would violate the Integration Mandate, absent proof of a fundamental alteration); *see also, Lane v. Kitzhaber*, 283 F.R.D. 587, 602, 2012 U.S. Dist. LEXIS 118152, at **45 (D. Or. 2012) (certifying class where "plaintiffs are not demanding new service, but seek the provision of existing . . . services to qualified individuals not only in segregated settings, but also in integrated . . . settings") and *Pashby v. Delia*, 709 F.3d 307, 322 (4th Cir. 2013) ("In sum, individuals who must enter institutions to obtain Medicaid services for which they qualify may be able to raise successful [Integration Mandate] claims because they face a risk of institutionalization.").

The regulations governing North Carolina's managed care program likewise require that Defendant DHHS "ensure, through its contracts, that each MCO [Managed Care Organization][2] . . . consistent with the scope of its contracted services . . . [m]aintains and monitors a network of appropriate providers . . . sufficient to provide adequate access to all services covered under the contract for all enrollees." 42 C.F.R. § 438.206(b)(1) (2018). State law likewise requires that Defendants' MCOs provide for "care coordination," which includes helping individuals transition from institutional settings to the community. N.C. Gen. Stat. § 122C-115.4(b)(5). Defendants, however, have failed to enforce this requirement. Care coordinators do not ensure that the services needed for individuals with I/DD to leave the institutional setting are provided. Ashmont 30(b)(6) Dep. p. 24:16-23. Robust transition planning was a function of case management, which Defendants have mostly eliminated. Donin Dep. p. 52:5-18.

[2] Defendants contract with Local Management Entities/Managed Care Organizations (LME/MCOs) for the provision of behavioral healthcare services.

The lack of providers and discharge options is not a defense – it is an indictment of the system and an admission that people with I/DD are institutionalized because of those failings and not because they cannot be supported in the community. *See* Goda (3/20/19) Dep. p. 60:10-16 (describing similarity of needs as between those with I/DD in the community and those with I/DD in institutions). Defendants have failed to show that they are entitled to summary judgment with regard to the unnecessary institutionalization of people with I/DD.[3] To the contrary, the record shows that Plaintiffs are entitled to summary judgment on this claim.

B. Plaintiffs Have Shown Serious and Systemic Violation of the Integration Mandate with Regard to Risk for Institutionalization

1. The Integration Mandate Protects Those at Risk of Institutionalization

Defendants contend for the first time in their summary judgment brief, and without citation, that the Integration Mandate provision of Chapter 168A does not provide redress for placing individuals at risk of institutionalization. Defs.' Mem. 27-28. However, North Carolina adopted the Integration Mandate expressly "to reflect the intent of the U.S. Supreme Court in Olmstead v. L.C." and to specify that the statute is intended "to promote independent living." House Judiciary III, Bill Analysis (Senate Bill 866: Persons with Disabilities Changes) (August 16, 2001).

Cases interpreting the Integration Mandate have overwhelmingly concluded that placing individuals with disabilities at risk of institutionalization implicates the Integration Mandate. *See, e.g.*, *Pashby*, 709 F.3d at 322 ("[T]here is nothing in the plain language of the [Integration Mandate] that limits protection to persons who are currently institutionalized."); *Davis v. Shah*, 821 F.3d 231, 263 (2d Cir. 2016) (holding that "a plaintiff may state a valid claim for disability

[3] Additional discussion regarding Samantha R. specifically is contained in Section III.D.1, below.

discrimination by demonstrating that the defendant's actions pose a serious risk of institutionalization for disabled persons"); *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1181 (10th Cir. 2003) (holding 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"). Defendants have cited no cases to the contrary.

The DOJ Guidance is in accord with the case law, providing that:

> Individuals need not wait until the harm of institutionalization or segregation occurs or is imminent. For example, a plaintiff could show sufficient risk of institutionalization to make out an Olmstead violation if a public entity's *failure to provide community services* or its cut to such services will likely cause a decline in health, safety, or welfare that would lead to the individual's eventual placement in an institution.

DOJ Guidance, p. 5 (emphasis added).

Institutionalization and the risk thereof are not separate. Individuals are placed at risk when community-based services are lacking, thereby creating a flow of admissions and resulting in institutionalization. *See* Ashmont 30(b)(6) Dep. p. 16:8-14. Defendants acknowledge the obligation to avoid such risk and "consider preventing institutionalization to be part of [their] Olmstead obligation." Nichols 30(b)(6) Dep. p. 81:10-13. Experts for both parties agreed that risk of institutionalization and continued institutionalization are driven by these same factors and are inextricably bound together. Agosta Dep. 85:15-86:15; 89:10-23; Kendrick Dep. 37:23-38:9; 42:4-10; 51:13-24; Holden Dep. 76:17-22; 78:7-11.

Defendants' contention that anything short of placement in an institution is permissible runs contrary to the plain language of the Integration Mandate and the case law and DOJ Guidance interpreting it. It is also factually untenable given the unambiguous links between overreliance on institutions and risk of institutionalization.

2. Risk of Institutionalization is Determined By Assessing the Likelihood that Lack of Access to Community Services Will Result in Declines in Health, Safety or Welfare That Would Lead to Institutionalization

By showing "a public entity's failure to provide community services . . . will likely cause a decline in health, safety, or welfare that would lead to the individual's eventual placement in an institution," a plaintiff has established "sufficient risk of institutionalization to make out an *Olmstead* violation." *Davis,* 821 F.3d at 262-63 (citing DOJ Guidance).[4] The likelihood is sufficient where plaintiffs "'may,' 'might,' 'probably' would, or were 'likely' to enter an ACH facility due to the termination of their in-home [personal care services]." *Pashby*, 709 F.3d at 322.

Defendants erroneously argue that a plaintiff must prove causation by showing that they were denied services on account of disability. Defs.' Mem. 30-32. The cases Defendants cite in support of this proposition, however, are disparate treatment discrimination cases and not Integration Mandate cases. *Id*. The Supreme Court in the *Olmstead* decision emphatically rejected such an argument. *Olmstead v. L.C.*, 527 U.S. 581, 597-603 (1999). In examining at length "whether . . . undue institutionalization qualifies as discrimination 'by reason of disability,'" the Supreme Court found that defendants' restrictive reading of the ADA, which Defendants in this case attempt to resurrect, ran afoul of the congressional intent when enacting the ADA. *Id.* at 597-99. "'[D]iscrimination' . . . includes undue institutionalization of disabled persons, *no matter how anyone else is treated*." *Davis*, 821 F.3d at 261 (citation omitted) (emphasis in original). Therefore, an Integration Mandate claim related to risk of

[4] Defendants' designated expert witness employed a different standard, unsupported by any legal or clinical basis, with regard to the individual Plaintiffs. *See, infra*, at. 27.

institutionalization does not require evidence comparing treatment to persons without disabilities. *Id.*

3. Plaintiffs Have Offered Substantial Evidence of the Risk of Institutionalization of Thousands of Individuals with I/DD, Including the Named Plaintiffs

Violation of the Integration Mandate occurs on the system level when a state's policies and practices promote segregation. DOJ Guidance, p. 3. Here, Plaintiffs have established that Defendants' policies and practices promote segregation and that the individual Plaintiffs (and others like them) are impermissibly placed at risk of institutionalization.

During the time prior to this litigation, and in the two years since Plaintiffs filed this action, people with I/DD have continued to enter institutions. *See, e.g.*, Ex. F.: Developmental Center Census Data (showing admissions to public ICFs). Each of these individuals was, by definition, at serious risk of institutionalization at times relevant to this case. Defendants admit that they have not made sufficient progress on obviating the risk of institutionalization (Nichols 30(b)(6) Dep. pp. 115:23-116:1) and have offered no evidence of a change that will slow down the rate at which individuals with I/DD enter into institutional settings or will mitigate the risk of institutionalization. On the contrary, Defendants admit that they have deployed insufficient community-based services to address needs in the community and stem the flow of individuals into institutions. Goda (3/20/19) Dep. 28:16-18; 50:11-15; 51:2-3; 60:21-25; 62:25-63:4; Ashmont 30(b)(6) Dep. p. 16:2-14.

Defendants also admitted to the General Assembly that individuals on the Registry of Unmet Need are at risk because "[w]ithout additional [Waiver] slots, there will be an increased demand for the more restrictive, more costly ICF[] placements." Dep. Ex. 19: NC DHHS Biennium Special Provision Action Form, p. 4; *see also*, Dep. Ex. 18: Background Briefing, p. 1 ("[A]ccess to more restrictive settings (ICF[]) is more readily available, creating an institutional

bias."). Similarly, in the section of the Innovations Waiver application entitled "Institutionalization Absent Waiver," Defendants represented to the Centers for Medicare and Medicaid Services (CMS), that "[t]he State assures that, absent the waiver, individuals served in the waiver would receive . . . institutional care." Dep. Ex. 3: Innovations Waiver, Bates. No. 274. Defendants cannot reasonably contend that individuals on the Registry are not at risk for institutionalization when they have expressly relied on that risk to obtain the Waiver from CMS and to seek funding from the General Assembly.

Even for individuals with Innovations Waiver services, Defendants' policies leave important gaps for those with higher needs and provide explicit preferences for segregating or institutionalizing such individuals rather than providing for services in the community. *See* Pls.' Mem. 28-32 (detailing Innovations Waiver policies and practices that perpetuate risk of institutionalization, including by denying services to individuals where the express alternative referenced in the Waiver is institutionalization).

Plaintiffs' expert, Dr. Michael Kendrick (who has 40 years experience working with service systems and on best practices for full integration of people with I/DD), testified that individuals do not become institutionalized when there are sound community services (Kendrick Dep. p. 42:2-6) but that Defendants lack a functional community based provider system sufficient to serve the needs of people with I/DD. Kendrick Dep. p. 47:11-23. The continued entry of individuals into institutions is "a sign of the failure of the community service system to ensure that people stay in the community." Kendrick Dep. p. 49:15-24. He concluded that Defendants do not have an adequate plan to ensure community services to obviate risk or correct the current overreliance on institutions. Kendrick Dep. pp. 44:19-45:12. Defendants' expert, Dr. John Agosta, agreed that Defendants continue to struggle with deinstitutionalization, have fallen

further behind the national average in investing in I/DD services, and have not met the modest benchmarks he set in 2012 for addressing the needs of individuals on the Registry of Unmet Need. Agosta Dep. p. 108:5-14.

Defendants have offered nothing to counter the substantial evidence that their policies and practices systemically promote segregation.[5]

C. Defendants' Challenge to the Systemic Relief Sought Is Without Merit

Defendants assert that Chapter 168A "protects individual rights, not a Protection and Advocacy entity like DRNC," citing the definition of "person with a disability." Defs.' Mem. 43. Defendants also contend that detailed information regarding specific individuals is necessary to Plaintiffs' claims. *Id.* These arguments fail to address Plaintiff DRNC's associational standing, which is the sole context in which Plaintiff DRNC is a party in this matter. *See* Am. Comp. ¶ 199 (asserting associational standing).

1. Plaintiff DRNC Has Associational Standing to Obtain the Relief Sought

Associational standing enables an organization to assert claims on behalf of its members or constituents where: (1) the organization's "members would have standing to sue in their own right"; (2) "the interests it seeks to protect are germane to plaintiff['s]… purpose"; and (3) "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *River Birch Assoc. v. Raleigh*, 326 N.C. 100, 129-130 (1990) (quoting *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977)). Associational standing does not rely on an express grant of authority in any and all statutes to be enforced, but on the application of the *Hunt* test – a test which would be

[5] Defendants' arguments regarding the risk of institutionalization of the individual Plaintiffs are addressed, *infra*, Section III.D.2.

unnecessary if associational standing depended on an express inclusion in the applicable statute. *Hunt*, 432 U.S. at 343.

Plaintiff DRNC has associational standing to represent the interests of North Carolinians with I/DD. *See Wilson v. Thomas*, 43 F. Supp. 3d 628, 632 (E.D.N.C. 2014) ("Disability Rights [North Carolina] is a protection and advocacy organization whose characteristics are similar to the [organization] which the Supreme Court found to have associational standing in *Hunt*….[T]he Court finds that Disability Rights has associational standing.") Plaintiff DRNC's constituents with I/DD who are institutionalized (including Samantha R.) or at risk for institutionalization (including the other named Plaintiffs) have standing to challenge Defendants' violations of the Integration Mandate and due process, satisfying the first *Hunt* element. *See Olmstead*, 527 U.S. at 601; *Pashby*, 709 F.3d at 322. The interests Plaintiff DRNC seeks to vindicate in this case are germane to the organization's purpose, which Defendants admit, satisfying the second *Hunt* element. Am. Comp. ¶ 196; Ans. ¶ 196. As to the third *Hunt* element (that individual participation in the litigation is not required) Congress' grant of authority to P&As like Plaintiff DRNC to pursue legal remedies on behalf of individuals with disabilities abrogated that element. *See Dunn v. Dunn*, 219 F. Supp. 3d 1163, 1171 (M.D. Ala. 2016) (surveying courts that have "squarely held[] that Congress, by granting P&As the authority to pursue legal remedies to ensure the protection of those with disabilities, abrogated" the third *Hunt* element). Moreover, per *Hunt*, Plaintiffs expressly assert claims and seek relief in this action that do not require the involvement of individual constituents. Am. Comp. ¶ 198.

The Court, in denying Defendants' Motion to Dismiss, previously rejected Defendants' arguments regarding Plaintiff DRNC's standing, and Defendants have offered no new arguments or evidence challenging the basis for Plaintiff DRNC's standing.

2. Defendants Are Fully Aware of the "Unnamed" Constituents of DRNC Being Harmed by Defendants' Violations of the Integration Mandate and Due Process

Defendants' contention that they lack information about Plaintiff DRNC's constituents and the implication that detailed and specific information about such individuals is somehow "critical" to Plaintiffs' claims is incorrect. Defs.' Mem. 43-44. Associational standing presumes the existence of unnamed individuals and provides a means to address common injury to a group. *See*, *Dunn v. Dunn*, 219 F. Supp. 3d 1163, 1170 (M.D. Ala. 2016) ("Indeed, there need not be any plaintiff other than the P&A; this is the very crux of associational standing.").

Moreover, Defendants know the names of hundreds of the purportedly unnamed individuals who are unnecessarily institutionalized (in addition to Samantha R.). They maintain transition lists of such individuals who should be transitioning from DD Centers. Ashmont Dep. p. 55:9-15. Defendants also know the names of individual Waiver beneficiaries who have faced budget cuts because they sent notifications to these individuals of those cuts. Ex. B: Defs.' Supp. Resp. to Pls.' Second Interrogs. and Second RPD, pp. 5-6; Ex. H: Budget Cut Data. Plaintiffs asked for the names of people on transition lists and those whose budgets were cut. Based on Defendants' privacy and confidentiality objections, the parties agreed to the disclosure of numerical information in lieu of names. Ex. B: Defs.' Supp. Resp. to Pls.' Second Interrogs. and RPDs, pp. 2-5.

Defendants should know which people with I/DD want to leave private ICFs and ACHs because they would need that information to comply with the Integration Mandate by offering

community-based alternatives. *See* DOJ Guidance pp. 4-5 (explaining the affirmative duty to foster deinstitutionalization). Defendants, however, do not have a process for identifying such individuals and aiding them in transition. [6] Nichols 30(b)(6) Dep. pp. 31:24-32:24. Those who are institutionalized are not hypothetical people. Each is a human being who is dependent on Defendants' operation of its I/DD service system.

Defendants suggest that Plaintiffs DRNC "unnamed" constituents should have pursued "Chapter 108D administrative remedies." (Defs.' Mem. 20-21). This argument again misreads the nature of this case, and incorrectly implies there are administrative remedies for all people with I/DD. Def Cite Chapter 108D relates only to the very narrow circumstances where an Innovations Waiver participant is denied a requested service through a "managed care action." N.C. Gen. Stat. § 108D-15. It does not apply at all to those in institutions or those who do not have a Waiver slot, and, as explained below, it does not provide a remedy for the systemic violation of the Integration Mandate that this case is about.

Plaintiffs have established their Integration Mandate claim and the right to pursue systemic relief. Defendants have failed to offer any factual or legal basis for denying such relief.

II. Plaintiffs' Claims Are Not Premised on or Preempted by the Innovations Waiver

Defendants' contention that Plaintiffs' claims are preempted by North Carolina's Innovations Waiver (Defs.' Mem. 14), demonstrates a misunderstanding of Plaintiffs' claims and the applicable statute. [7] A Medicaid waiver can be a tool to provide for service needs in the

[6] The North Carolina Council on Developmental Disabilities (NCCDD), an agency within Defendant DHHS, contracted with DRNC for a pilot project to, *inter alia*, identify individuals with I/DD living in ACHs. Affidavit of Cas Shearin Aff. ¶¶ 3, 5. The 27 individuals with I/DD DRNC identified had had no contact with their MCOs. Affidavit of Gabriella Bush Aff. ¶ 5.

[7] While referring to "all" Plaintiffs raising concerns about the operation of the Waiver, Defendants discuss only Michael A. and Connie M. Defs.' Mem. 16-17. As explained in this

community as an alternative to institutionalization. *Olmstead*, 527 U.S. at 601; Richard Dep. 99:6-100:5. Defendants, however, have an independent obligation to provide for services in the most integrated setting appropriate to people with disabilities. Reliance on the existence of a waiver does not in and of itself satisfy that obligation.

CMS has expressly rejected Defendants' argument that waivers immunize states from Integration Mandate obligations and claims:

> [S]tates have obligations pursuant to the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, and the Supreme Court's Olmstead decision interpreting the integration regulations of those statutes. ***Approval of any Medicaid Waiver action does not in any way address the State's independent obligations under the [Integration Mandate]***.

Centers for Medicare and Medicaid Services, Application for a § 1915(c) Home and Community-Based Waiver: Instructions, Technical Guide and Review Criteria (2015), p. 13 (emphasis added). CMS similarly includes as standard language in its waiver approval letters that the "approval does not address the state's independent and separate obligations under the [Integration Mandate]." *See, e.g.*, https://www.medicaid.gov/medicaid/hcbs/downloads/nc/nc-initial-approval.pdf.

The DOJ likewise advises that:

> [a] state's obligations under the [Integration Mandate] are *independent from* the requirements of the Medicaid program. Providing services beyond what a state currently provides under Medicaid may not cause a fundamental alternation, and the [Integration Mandate] may require states to provide those services, under certain circumstance.

DOJ Guidance, p. 5 (emphasis added).

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section, Defendants' Integration Mandate obligations are not obviated by the fact that there is a Waiver. *See also*, Pls. Mem. 28-32 (explaining the Waiver policies that leave high needs participants at risk for institutionalization).

Courts have also concluded that CMS's approval of a state's waiver has no bearing on the state's Integration Mandate obligations. *See Stogsdill et al. v. Azar et al.*, 2019 U.S. App. LEXIS 7233, *9-10 (4th Cir. Mar. 12, 2019) ("[F]ederal approval of the [waiver] did not relieve the state defendants of their [Integration Mandate] obligations."). Approval of a state's waiver program only represents CMS's determination that a state's waiver plan comports with specific requirements under the Medicaid Act. *B.N. v. Murphy et al.*, 2011 U.S. LEXIS 132482 at *37-38 (N.D. Ind. Nov. 16, 2011). CMS is only "charged with administering the Medicaid Act." *Id*. at *37 (rejecting defendants' argument that Indiana's sixty-hour cap in their waiver program did not violate federal laws because CMS approved it).

By Defendants' logic, they could evade the operation of the Integration Mandate by operating a waiver that serves a small percentage of people with I/DD and leaves tens of thousands at increased risk due to lack of services. Defendants' position is inconsistent with the above-referenced agency guidance and case law.

Defendants' argument that the Waiver is federal law that limits Plaintiffs' rights is likewise contrary to law. Defendants' position is premised on an overly broad reading of *Arrowood v. N.C. Dep't. of Health and Hum. Svs.*, which held it permissible for DHHS, under the specific facts of that case, to enforce an AFDC benefit limit without having adopted a rule. *Arrowood v. N.C. Dep't. of Health and Hum. Svs,* 353 N.C. 351, *rev. for reasons stated in dissent in* 140 N.C. App. 31 (2001). The Court of Appeals subsequently distinguished *Arrowood* and determined that a Medicaid waiver was neither state nor federal law because it had not been promulgated as a rule. *McCrann v. NC DHHS*, 209 N.C. App. 241, 249, *disc. rev. den.*, 365 N.C. 198 (2011). The General Assembly then amended the statute to provide that a Medicaid waiver has the force and effect of a state administrative rule, not federal law. N.C. Gen. Stat. § 108A-

54.1B(d). To the extent the holdings in *McCrann* and *Arrowood* were contradictory or in tension, the subsequent legislative change noted above now deems waivers to be "rules" under state law. Thus, there is no basis for Defendants' federal pre-emption argument.

The approval of the Waiver does not confer immunity from Defendants' failure to comply with the Integration Mandate, and does not bar Integration Mandate claims related to a state's provision of Medicaid services.

III. Defendants' Remaining Arguments as to Plaintiffs' Integration Mandate Claim Lack Merit

Defendants' assertions that the individual Plaintiffs' claims are barred by the statute of limitations, res judicata, and the mootness doctrine, and that none of the individual Plaintiffs are unnecessarily institutionalized or at risk of institutionalization, are not supported by the law or facts of this case.

A. Plaintiffs' Claims Are Not Barred by Statutes of Limitations

A claim for violation of Chapter 168A has a two-year statute of limitations. N.C. Gen. Stat. § 168A-12 (2018). State constitutional claims have a three-year statute of limitations. N.C. Gen. Stat. § 1-52. Under North Carolina law, a right of action generally accrues, and the limitations period begins, when "the right to institute and maintain a suit arises." *Williams v. Blue Cross Blue Shield*, 357 N.C. 170, 178-79 (2003). Thus, a cause of action for violation of the Integration Mandate accrues when a person with a disability suffers unjustified institutionalization, segregation, or risk thereof as a result of the Defendants' administration of its services to persons with disabilities. Each of the individual Plaintiffs has been either institutionalized or at risk during the relevant limitations period. *See infra*, Section III.D. The procedural due process violations described below are based on the November 2016

implementation of Defendant' Resource Allocation program and, therefore, fall within the three years prior to the filing of the Complaint. Am. Comp. ¶ 129; Ans. ¶ 129. Accordingly, Plaintiffs' claims are timely.

Moreover, Plaintiffs' claims under Chapter 168A are not time-barred because Defendants' discriminatory practices constitute a "continuing wrong." When a defendant engages in "continual unlawful acts," "a statute of limitations does not begin to run until the violative act ceases." *Williams*, 357 N.C. at 179; *see also Costin v. Shell*, 53 N.C. App. 117, 120, 280 S.E.2d 42, 44 (1981); *and Hamer v. City of Trinidad*, 2019 U.S.App. LEXIS 14359 at *3 (10th Cir. 2019) ("We hold that a public entity violates [disability discrimination laws] each day that it fails to remedy a non-compliant service, program, or activity" under the repeated violation doctrine).

In *Hamer*, the Court rejected a statute of limitations argument that attempted to tie the plaintiffs' claims to the first date on which the defendants had operated a discriminatory public service. Instead, the court held, under the repeated violation doctrine, each time the plaintiffs were unable to access the service, there was a new claim for violation of the plaintiffs' rights. *Hamer*, at *3,*17. Here, Defendants have continually and repeatedly violated the Integration Mandate via a range of practices and policies that have increased the risk of institutionalization and segregation for individuals with I/DD. *See* Pls. Mem. 23-32. Each day that Defendants operate their system in violation of the Integration Mandate a new limitations period begins. *Hamer*, at *17.

Moreover, Defendants' arguments as to each of the named Plaintiffs and, more specifically, when their respective guardians first had concerns regarding their services or that they might be institutionalized, ignores the actual nature of the harm alleged and disregards

subsequent actions by Defendants that give rise to new or ongoing claims. For example, each new demand by Defendants' contractor that Connie submit a plan to fade her services, the latest made in February 2017, constitutes a new action giving rise to a new limitations period. Rash Dep. p. 74:12-24. Mitchell T.'s budget was cut (thus increasing his risk for segregation or institutionalization) on December 9, 2016 - within two years of the filing of the Complaint. Short Dep. pp. 56:23-57:11 (referencing Deposition Exhibit 72). Samantha R. is currently institutionalized. Defs.' Mem. 38. The contentions regarding Marie K. and Jonathan D. are likewise unrelated to their claims regarding risk of institutionalization and relate to miscellaneous background facts. Defs.' Mem. 13. Each of these named Plaintiffs thus have timely claims against Defendants.

Defendants' argument regarding Plaintiff DRNC misunderstands the nature of associational standing. Regardless of when Plaintiff DRNC first became aware of reports reflecting Defendants' violations of the Integration Mandate,[8] the question is whether one or more constituents of Plaintiff DRNC suffered injury within two years prior to the filing of the Complaint. *See Dunn*, 219 F.Supp.3d at 1170. Plaintiff DRNC is not seeking to vindicate harm to itself, but harm to its constituents, only one of whom need have suffered an injury during the applicable limitations period. *Hunt*, 432 U.S. at 343.

B. Plaintiffs' Claims Are Not Barred by Res Judicata

Defendants' contention that Michael A.'s claim is barred by res judicata is without merit. Defs.' Mem. 4-7. Res judicata applies only to final judgments. *Culler v. Hamlett*, 148 N.C. App. 389, 392 (2002). Michael A. has appealed the administration decision to which Defendants refer

[8] Defendants cited nothing in the record to show Plaintiff DRNC's knowledge at a specific time.

and thus that decision does not constitute a final judgment. Ex. G: Notice of Appeal. Michael A.'s claim, therefore, is not barred by res judicata.[9]

C. Plaintiffs' Claims Are Not Moot

Plaintiffs' claims are not moot simply because Jonathan D. and Marie K. have been assigned emergency Innovations Waiver slots. Defs.' Mem. 7-10. Neither Jonathan D. nor Marie K. asserted claims for such a slot. Instead, Jonathan D. and Marie K., along with the other Plaintiffs, alleged that Defendants operate a service system that leaves individuals at risk for institutionalization, including some of those with Innovations Waiver slots who face harmful budget cuts and service limits, or lack of access to adequate quality providers. Am. Comp. ¶¶ 233, 246, 272-289.

Under North Carolina law, mootness is "a principle of judicial restraint." *Thomas v. N.C. Dep't of Human Resources*, 124 N.C. App. 698, 705 (1996). Although different in origin, the mootness doctrine is treated almost identically in federal and state courts. *Id*. "A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Cumberland Cnty. Hosp. Sys. v. N.C. Dep.'t of Health and Hum. Svs*., 242 N.C. App. 524, 528 (2015). "As long as the parties have a concrete interest in the outcome, however small, the case is not moot." *Id.*

In claiming mootness based upon alleged voluntary discontinuance of challenged activities, a defendant faces "a heavy burden of showing no reasonable expectation that they will repeat their alleged wrongs." *Feldman v. PRO Football*, 419 Fed. App'x 381, 387 (4th Cir. 2011). "Such a burden will typically be met only by changes that are permanent in nature and

[9] Since Michael A. is pursuing an individual remedy through his appeal, Plaintiffs have filed a Notice of Voluntary Dismissal as to Michael A.

that foreclose a reasonable chance of recurrence of the challenged conduct." *Tandy v. City of Wichita*, 380 F.3d 1277, 1291 (10th Cir. 2004).

In this case, Defendants cannot meet this formidable burden by providing Waiver slots to two Plaintiffs. Jonathan D. and Marie K. do not have a permanent guarantee of an Innovations Waiver slot or particular services, such as placement in a specific residential setting. Innovations Waiver services are subject to annual review and Innovations Waiver slots are subject to forfeiture if, for example, an individual becomes institutionalized. Dep. Ex. 3: Innovations Waiver, Bates Nos. 275, 289. The current services provided to Jonathan D. and Marie K. are subject to change, and therefore the mootness doctrine would not apply even if they had been seeking individual remedies. *See Pashby*, 709 F. 3d at 316 (holding NC DHHS' voluntary reinstatement of benefits to plaintiffs did not moot case because DHHS was able to reassess beneficiaries which could result in change or termination of benefits). Defendants have made no permanent changes to the overall system, and continue to use a Resource Allocation and budget limits that reduce services even where there is no change in the need for those services. Pls.' Mem. 28-32.

Since Defendants have identified no changes to their overall practices to address the systemic issues complained of, Plaintiffs' claims cannot be classified as moot.

D. Defendants' Factual Defenses to Individual Plaintiffs' Integration Mandate Claims Are Without Merit

Defendants' contention that no individual Plaintiffs are unnecessarily institutionalized or at risk of institutionalization is contrary to the record. Defs.' Mem. 31-43.

1. Samantha R. Can Be Served in the Community and Is Therefore Unnecessarily Institutionalized

Plaintiffs have identified more than sufficient evidence that Samantha R. – and others like her – are unnecessarily institutionalized due to Defendants' failure to maintain adequate community services and engage in needed discharge planning. Pls.' Mem. 14-23. Samantha R. lived at home for 26 years and was institutionalized after cuts to her Innovations Waiver services left her parents unable to care for her at home. Tim R. Dep. pp. 103:15-104:1. Plaintiffs' expert, Dr. Jeffrey Holden, testified that Samantha R.'s needs can again be met in the community – as they were for 26 years – if sufficient supports are put in place. Holden Dep. pp. 98:2-99:23. Defendants do not challenge Dr. Holden's credentials[10] or opinions. They did not submit any sworn evidence from their own designated expert as to the individual Plaintiffs, including Samantha R. Instead, they rely entirely upon an unsworn expert report from Dr. Bonny Forrest. The report's conclusion as to the appropriateness of continuing to institutionalize Samantha R. was not a clinical opinion but rather a recitation of Defendants' undue hardship defense. Dep. Ex. 124: Forrest Report, p. 9.

Defendants' purported undue hardship and fundamental alteration defenses as to Samantha R.'s institutionalization are legally and factually unsupported. Defendants did not plead a fundamental alteration defense, *see* Ans. pp. 29-32 (listing 15 defenses), and even if they had, Chapter 168A does not provide for such a defense. N.C. Gen. Stat. § 168A-7. Defendants' undue hardship defense relates to requests for accommodations, typically in the employment context, and not to claims regarding the Integration Mandate. *Cf.* N.C. Gen. Stat. § 168A-(7)(a)

[10] Dr. Holden is a psychologist with 38 years of experience working almost exclusively in I/DD. Dr. Holden worked for Defendant DHHS for 34 years, serving as a psychologist at a DD Center, and charged with assessing ICF level of care needs, eligibility for admissions to facilities, and risk of institutionalization. Holden Aff. ¶¶ 5-8.

(providing for an undue hardship defense to reasonable accommodation request) and (b) (not providing for an undue hardship defense to the Integration Mandate).

Defendants, moreover, failed to establish that the remedies sought would cause an undue hardship. Defendants did not provide facts about any of the statutory factors required to establish an undue hardship, including the "nature and cost of the accommodations," the "financial resources of the facility or facilities involved," or "[t]he overall effect on the resources on the financial resources of the covered entity." N.C. Gen. Stat. § 168A-3(11). Instead, Defendants quote Samantha R.'s father's opinion that a place would need to be created for Samantha R.. Defs.' Mem. 42. Dr. Holden, Plaintiffs' expert, testified that the services Samantha R. needs are not new services; it is just a question of where they are provided. Holden Dep. pp. 105:10-107:20.[11] The fact that services for Samantha R. are not currently provided for in the community is not a defense; it is a description of an Integration Mandate violation. *See* DOJ Guidance, p. 5 ("Public entities cannot avoid their obligations under the [Integration Mandate] by characterizing as a 'new service' services that they currently offer only in institutional settings.") It is also consistent with the undisputed evidence in this case that Defendants remain disproportionately invested in institutionalization, and have failed to provide for adequate community-based services. *See* Pls.' Mem. 14-23 (detailing evidence in support of Plaintiffs' Integration Mandate claim).

[11] Defendants' Memorandum cites page 105 of Dr. Holden's deposition for the proposition that he agreed that Samantha R.'s parents wanted a setting that does not exist in North Carolina. Defs.' Mem. 42. However, Dr. Holden stated that "the services are the same. The question is who's providing the service." Holden Dep. p. 105:21-22. He then responded at length about identifying different providers to meet individuals' needs, including providing a hybrid of specialized services for individuals in the community. Holden Dep. pp. 105:21-107:20.

Defendants have failed to show that they are entitled to judgment as a matter of law with regard to Samantha R. or others like her. To the contrary, Defendants have acknowledged that Samantha R. remains institutionalized because Defendants require that she stay at the Riddle Center to get the services she needs.

2.Individual Plaintiffs Are At Risk for Institutionalization

Plaintiffs' expert, Dr. Holden, applied the standard for serious risk of institutionalization articulated in the DOJ Guidance and case law[12] to the individual Plaintiffs (except Samantha R.). Holden Dep. pp. 30:16-21, 53:4-24; Holden Aff. ¶ 4. Defendants articulated a similar standard in their Memorandum. Defs.' Mem., 32. However, Defendants' designated expert, Dr. Bonny Forrest, applied a much narrower standard in coming to the conclusion that the individual Plaintiffs are not at risk. Dr. Forrest could not identify a basis for her standard and testified that she developed her own. Forrest Dep. pp. 112:6-114:17; *see also*, Ex. 124: Forrest Report, pp. 4-5. She appeared not to know what the DOJ Guidance is with regard to the standard for risk of institutionalization. Forrest Dep. pp. 291:16-292:23. The standard she developed was primarily an "imminent risk" standard, which was specifically rejected by the DOJ. DOJ Guidance, p. 5 (stating that an individual need not be at imminent risk to raise an Integration Mandate claim). She added that, in addition to imminent risk, serious risk would otherwise require that an individual be on a "certain path" to institutionalization; yet, she could not define what that meant and admitted that it is not currently possible to know whether someone is on a "certain path" to institutionalization until after the fact. Forrest Dep. pp. 125:25-131:1.

[12] As noted above, that standard is that a plaintiff establishes a "sufficient risk of institutionalization to make out an *Olmstead* violation if a public entity's failure to provide community services . . . will likely cause a decline in health, safety, or welfare that would lead to the individual's eventual placement in an institution." *Davis*, 821 F. 3d. at 262-63 (citing DOJ Guidance).

Dr. Holden and Dr. Forrest agree that individuals with I/DD, like the Plaintiffs, have some level of risk of institutionalization and that the level of risk depends on the services available. Forrest Dep. pp. 102:17-103:6; Holden Dep. pp. 65:10-68:4.

Dr. Holden testified that Marie K. is at serious risk of institutionalization based on his assessment of her support needs and the lack of quality and quantity of services being provided. Holden Dep. pp. 114:3-119:4; 123:23-126:1. She needs mental health treatment and high quality services in order to mitigate her risk of institutionalization. Holden Dep. pp. 123:23-124:11. Marie K. obtained an emergency Waiver slot in February 2019.[13] The criteria for an emergency Waiver slot is a significant, imminent risk of serious harm to the individual or others – criteria that Defendants' MCO determined that Marie K. met. Dep. Ex. 3: Innovations Waiver, Bates No. 294. Defendants filed an affidavit that lists services Marie K. is now receiving, but no services are listed related to her mental illness and there is no qualitative assessment of her services. Defs.' Ex. 5.[14]

Jonathan D., like Marie K., received an emergency Waiver slot during this litigation based on a determination that he was at imminent risk of harm. Dep. Ex. 3: Innovations Waiver, Bates No. 294. However, Jonathan D.'s new group home staff had not received sufficient training and guidance in working with an individual with I/DD. Holden Dep. pp. 157:13-158:15.

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[13] The fact that Marie K. now has a Waiver slot is a positive development; however, having a Waiver slot does not necessarily equate to having quality services. Holden Dep. pp. 135:25-136:8.

[14] Dr. Forrest acknowledged that Marie K. was at risk of institutionalization and would "probably" be at serious risk of institutionalization if there were no change in her services. Forrest Dep. pp. 228:7-229:1. Understandably, Defendants do not rely on their designated expert with regard to Marie K.. Instead, Defendants argue that Marie K.'s corporate guardian believed Marie K. needed "an ICF[] level of care." Defs.' Mem. 34. An ICF level of care is not the same as placement in an ICF. It refers to a level of support needs. Holden Aff. ¶ 6; Goda (3/20/19) Dep. p. 8:16-19. Marie K.'s guardian testified that her goal was not to have Marie K. in an ICF, but to have her supported in the community. Fears Dep. pp. 72:23-73:17.

Service quality issues like lack of training and oversight have, in Dr. Holden's experience, created serious risk of institutionalization. Holden Dep. pp. 205:21-210:11; Holden Aff. ¶ 11. Notably, Jonathan D. was hospitalized in or about May 2019 (after he received his emergency Waiver slot and moved to the new group home) because he told staff that he was sad and wanted to go to heaven. Michael D. Aff. ¶ 3.

Connie M.'s risk of institutionalization derives from Defendants' requirement that her services fade. She "really requires 24/7 supervision and supports." Holden Dep. p. 137:15-16. The expectation that her services could be decreased is not clinically viable. Holden Dep. p. 139:8-18. A mandate that she transition to a reduced level of services places her at serious, or even imminent, risk of institutionalization. Holden Dep. 137:19-25; 142:11-13; 176:8-11.[15] Defendants' contention that creating a fading plan does not take long ignores the actual threat to Connie: that her services will be cut because she needs more than the permitted number of hours on a long-term basis. Defs.' Mem. 36; Holden Dep. p. 139:8-18; *see also*, Dep. Ex. 3: Innovations Waiver, Bates No. 371 (indicating that individuals who need more than 16 hours of support per day at home on a long-term basis will be referred to an alternative residential setting).

Mitchell T.'s guardian has had difficulty finding and keeping workers for him. Betsy S. Dep. p. 22:5-8. The lack of behavioral supports in place for him and his lack of ability to communicate using his assistive technology place him at risk of institutionalization. Holden Dep. pp. 175:17-18; 180:1-18. Defendants' contention that Mitchell T. can appeal service denials and is now using a new services misses the point that Mitchell T. is subject to the same threat of

[15] Defendants' expert agrees that Connie needs 24-hour support and would "probably" be at risk of institutionalization if she did not have that level of support. Forrest Dep. pp. 253:24-254:9.

service cuts, and same deficits in the availability of quality providers described elsewhere. Defs.' Mem. 37-38; *see* Pls. Mem. 18-20, 27-28. Mitchell T. is also at risk due to the systemic lack of oversight of quality and insufficient coordination of care. Holden Dep. pp. 178:1-6; 15-17; 181:13-15.

The individual Plaintiffs are institutionalized or at risk of institutionalization for reasons related to Defendants' operation of its service system for people with I/DD. Defendants isolating specific changes in the individual Plaintiffs' lives over the past two years does not alter this fact. Rather, it illustrates Defendants' failure to place the appropriate focus on the systemic changes needed to address overreliance on institutions and the significant gaps in the community-based service system that drive that overreliance.

IV. Defendants Are Not Entitled to Summary Judgment on Plaintiffs' Due Process Claims

The record in this case supports Plaintiff' claim that Defendants have failed to provide for reasonably ascertainable standards and procedures.

A. Plaintiffs' Procedural Due Process Claim is Based on the Lack of Ascertainable Standards Used by Defendants' Contractors

Due process requires the application of reasonably ascertainable standards and procedures by public entities administering benefits. 42 U.S.C. § 1396a(a)(17) (2018); *Goldberg v. Kelly*, 397 U.S. 254, 267-268 (1970); *see In re Lynette H.*, 90 N.C. App. 373, 377, *vacated and remanded on oth'r grounds*, 323 N.C. 598 (1988) (holding involuntary commitment statute void for vagueness due to lack of ascertainable standard); *Holmes v. N.Y. City Housing Auth.*, 398 F.2d 262, 265 (2nd Cir. 1968) ("It hardly need be said that the existence of an absolute and uncontrolled discretion in an agency of government vested with the administration of a vast

program . . . would be an intolerable invitation to abuse …. For this reason, due process requires that [decisions] . . . be made in accordance with 'ascertainable standards'"). Plaintiffs' procedural due process claim relates to Defendants' failure to have and apply (through their contractor MCOs) ascertainable and articulable standards for determining the medical necessity of Innovations Waiver services requested by Waiver participants. Am. Comp. ¶ 281. "The law demands that the designated single state Medicaid agency must oversee and remain accountable for uniform statewide utilization review procedures conforming to bona fide standards of medical necessity." *McCartney v. Cansler*, 608 F. Supp. 2d 694, 701 (E.D.N.C. 2009), *aff'd*, 382 Fed. Appx. 334 (4th Cir. 2010).

Managed care rules, which are applicable to Innovations Waiver appeals, provide for several specific components of due process. First, the standard for determining medical necessity of services must be defined in the contract with the MCOs and applied by the MCOs. 42 C.F.R. § 438.10. Second, MCOs must establish and apply Clinical Practice Guidelines to their "utilization management" (*i.e*. managed care) decisions; these provide standards and practices against which a request for services may be measured. *See* 42 C.F.R. § 438.236 (providing that utilization management decisions must be consistent with an MCO's published clinical practice guidelines, which in turn must be "based on valid and reliable clinical evidence or a consensus of providers"). Finally, federal law requires that decisions about whether to authorize services must be made through a process that does not "compel natural supports" by denying services based on the presumption that a family member or other individual will step in to provide the necessary support on an unpaid basis. 42 C.F.R. § 441.301(c)(2)(v) ("Natural supports are unpaid supports that are provided voluntarily to the individual in lieu of . . . waiver services and supports."); 79 Fed. Reg 2948, 3008 (Jan. 16, 2014) ("The availability of unpaid supports may change from time

to time and the plan must be written so as to be able to adjust the proportion of formal and informal supports without starting over at assessment. *The planning process must not compel unpaid services*.") (emphasis added).

The record in this case more than supports Plaintiffs' claim that Defendants have failed to provide for reasonably ascertainable standards and procedures.

1. Defendants' Contractors Admit They Do Not Use Ascertainable Standards

Defendants' implementation of a Resource Allocation system resulted in budget cuts to hundreds of individuals (Ex. B: Defs.' Supp. Resp. to Pls.' Second Interrogs. and Second RPD, pp. 5-6; Ex. H: Budget Cut Data) and confusion over how to qualify for services that might exceed the set budget. *See* Puckett Dep. pp. 37:22-41:6 (describing conflicts and lack of clarity in application of Resource Allocation to decision-making). The Resource Allocation system assigns people to levels based on an assessment. Goda (8/23/17) Dep. pp. 172:17-173:5. Those levels indicate a range of hours that the individual would be expected to need. Goda (8/23/17) Dep. p. 185:9-25. Defendants' own validation process determined that assigned levels were wrong 27% of the time for adults and 34% of the time for children, even though the reviewers were State and MCO staff who were provided information about the assigned level before determining if it was correct. Goda (8/23/17) Dep. pp. 160:23-161:15.[16] Half of the individuals assigned to levels were assigned to different levels after subsequent assessments, even though I/DD is generally a stable condition. Dep. Ex. 122: HSRI Memorandum, April 2, 2018, p. 17.

[16] Dr. Agosta, who led and managed the Resource Allocation work for Defendants' contractor, acknowledged that this "validation" process has been changed because of the likelihood of confirmation bias. Agosta Dep. p. 212:8-23.

Defendants' MCOs placed great weight on the levels in their decision-making. Smith 30(b)(6) Dep. pp. 21:19-22:7. Plaintiff Mitchell T. was expressly denied services based on his Resource Allocation level, which is contrary to Defendants' contention that the level was only a guideline. Betsy S. Dep. p. 33:6-25; Dep. Ex. 57: Denial Letter. Moreover, the MCOs could not explain how the use of Resource Allocation worked in determining medical necessity.[17] S. Puckett (Vaya 30(b)(6)) Dep. pp. 40:17-41:26, 42:7-14; T. Martin (Cardinal 30(b)(6)) Dep. pp. 18:13-20:2. MCOs require a heightened, but undefined, level of information when an individual needs services in excess of the range associated with their level. *See* T.Martin (Cardinal 30(b)(6)) Dep. pp. 21:3-15 (describing additional scrutiny for services over budget level); R. Smith (Vaya 30(b)(6)) Dep. pp. 22:11-23:25. The heightened but undefined standards applied and the lack of clarity regarding the role of Resource Allocation violate the requirements of reasonably ascertainable standards.

Federal law requires that MCOs determine medical necessity using Clinical Practice Guidelines for making decisions about service requests (called Utilization Management decisions). 42 C.F.R. § 438.236 (2016). However, the evidence shows that Defendants have failed to enforce these requirements and have permitted (or required) their MCOs to substitute the vague Resource Allocation rules instead. Plaintiffs deposed three of Defendants' MCOs and none had Clinical Practice Guidelines for people with I/DD. *See* C. Martin (Vaya 30(b)(6)) Dep. pp. 9:16-10:10 & Dep. Ex. 54: Vaya Health Guidelines (identifying no I/DD guidelines other than for autism); Babin (Cardinal 30(b)(6)) Dep. pp. 27:4-28:23 & Exs. 46, 47, 48, 49 (describing absence of information about I/DD clinical practices); and Bridges (Partners

[17] Although medical necessity must be defined in the contracts between Defendants and the MCOs, the MCOs do not use that definition, instead referring to Defendants' Clinical Coverage Policies. Bridges (Partners 30(b)(6)) Dep. pp. 10:20-11:4.

30(b)(6)) Dep. pp. 40:22-43:21 & Dep. Ex. 58 (discussing narrow guidelines and lack of applicable I/DD guidelines). One MCO also testified – contrary to federal law – that Clinical Practice Guidelines are not intended to be used for utilization management decisions. Bridges (Partners 30(b)(6)) Dep. pp. 47:12-24.

Finally, Defendants' MCOs do not have a process in place for collecting information and determining the amount of natural supports that are available – and therefore how much additional (paid) support an individual may need. Bridges (Partners 30(b)(6)) Dep. pp. 31:9-18; Puckett (Vaya 30(b)(6)) Dep. p. 27:1:13. Thus, Defendants' MCOs cannot make decisions about medical necessity consistent with managed care prohibitions on compelling natural supports and do not have the factual basis for making determinations about how much support an individual needs. *See* 42 C.F.R. § 441.301(c)(2)(v) (2014) (requiring that authorization process not compel natural supports).

Defendants' failure to ensure compliance with due process is so pervasive that their MCOs fail to grasp critical aspects of applying reasonably ascertainable standards. Defendants have offered no evidence that the above deficits, explored at length during discovery, have been corrected.

2. The Systemic Failure of Defendants' Contractors to Have and Use Ascertainable Standards is Not Subject to Administrative Remedy

There are no adequate remedies at state law for Defendants' due process violations. Defendants premise their argument on a recitation of statements by some individual Plaintiffs or their guardians that they understood that there was a right to appeal. Defs.' Mem. 22-24. Knowledge of the existence of the right to appeal does not correct for the due process violations cited above. The denial letters issued by Defendants' MCOs recite that a determination was made based on medical necessity and consistent with Clinical Practice Guidelines. *See, e.g.*, Dep.

Ex. 57: Denial Letter.[18] There is no way for a recipient of a denial letter to know that the MCO is not in fact applying the correct standard and does not have applicable Clinical Practice Guidelines. As a result, individual appeals are not adequate to address deficits that beneficiaries do not know are built into the appeals process.

B. Plaintiffs' Substantive Due Process Claim Was Pled in the Alternative to Their Chapter 168A Claim and Is Supported by the Record

A substantive due process claim is available for violation of the liberty interests of individuals with disabilities through unnecessary institutionalization or segregation. *Thomas S. v. Flaherty*, 699 F. Supp 1178, 203 (W.D.N.C. 1988). Plaintiffs' Third Claim for Relief (substantive due process) was pled in the alternative to their First Claim for Relief (violation of Chapter 168A) and is necessary only if the Court determines that Chapter 168A does not otherwise protect the liberty interests of the individual Plaintiffs and Plaintiff DRNC's other constituents. Defendants appear to contend that Plaintiffs have an adequate remedy at state law for their substantive due process claim pursuant to Chapter 168A, Defs.' Mem. 24-25, but then contend that Plaintiffs cannot maintain a risk of institutionalization claim pursuant to Chapter 168A. Defs.' Mem. 25-28. Plaintiffs' position remains that Chapter 168A provides a remedy for Defendants' violations of the Integration Mandate. In the alternative, Plaintiffs' substantive due process claim is supported by the same record evidence detailed in this Memorandum and in their Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment.

CONCLUSION

The Integration Mandate provides people with I/DD a right to live in the world – in the most integrated setting appropriate to their needs, free from unnecessary institutionalization. The

[18] Denial letters issued by MCOs are form letters created by Defendant DHHS. N.C. Gen. Stat. § 108D-13(a).

undisputed facts show that the Defendants have violated the Integration Mandate in their overreliance on institutions to provide services to individuals who prefer to live in the community and have needs that could be met in the community. Defendants have failed to create and implement a plan to transition individuals to the community and address the persistent growth of the Registry of Unmet Need. In addition, Defendants' policies impose unnecessary limits on individuals' access to community-based services that place individuals in crisis and at greater risk for institutionalization.

The facts are not in the Defendants' favor. Consequently, they fatally rely on narrowing the Court's view of the facts and evidence to singular contentions regarding individual Plaintiffs' circumstances and erroneously claim that the Innovations Waiver, a single program within their health service system with its own shortcomings, preempts Plaintiffs' claims. However, their support for their Motion for Summary Judgment fails to establish their assertions, and falls short of establishing that Plaintiffs' claims are preempted, moot, barred by any statute of limitations, or that Plaintiffs lack standing. Moreover, Defendants have failed to produce defenses or a forecast of evidence that would support a decision in their favor.

Defendants have failed to demonstrate that they are entitled to summary judgment. Plaintiffs, rather than Defendants, are entitled to judgment as a matter of law. "Summary judgment can be appropriate in an action for a declaratory judgment where there is no genuine issue of material fact and one of the parties is entitled to judgment as a matter of law." See *North Carolina Ass'n of ABC Bds. v. Hunt,* 76 N.C. App. 290, 332 S.E.2d 693, 694 (1985) citing *Threatte v. Threatte*, 59 N.C. App. 292, 296 S.E. 2d 521 (1982). Plaintiffs have shown serious systemic violations of the Integration Mandate and established a basis for the claims and the relief sought.

WHEREFORE, Plaintiffs pray that Court deny Defendants' Motion for Summary Judgment and enter summary judgment in favor of the Plaintiffs, declare Defendants to be in violation of the North Carolina Person with Disabilities Protection Act, and order injunctive relief outlined in Plaintiffs' Motion for Partial Summary Judgment.

This 14th day of June, 2019.

DISABILITY RIGHTS NORTH CAROLINA

Lisa Grafstein
North Carolina Bar No. 22076
lisa.grafstein@disabilityrightsnc.org

Emma Kinyanjui
North Carolina Bar No. 31450
emma.kinyanjui@disabilityrightsnc.org

3724 National Drive, Suite 100
Raleigh, North Carolina 27612
Telephone: (919) 856-2195
Facsimile: (919) 856-2244

DRINKER BIDDLE & REATH LLP
Karen A. Denys
Karen.Denys@dbr.com
105 College Road East
P.O. Box 627
Princeton, New Jersey 08542-0627

LAW OFFICE OF JERRY HARTMAN
By: Jerry Hartman
JerryHartman12@gmail.com
1500 K Street, N.W., Ste. 1100
Washington, District of Columbia 20005-1209

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

This is to certify that the undersigned has served a copy of the foregoing **Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment** on Defendants by email (by consent) to counsel for the Defendants as follows:

Michael T. Wood
Neal T. McHenry
N.C. Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602

This 14th day of June, 2019.

DISABILITY RIGHTS NORTH CAROLINA

Emma Kinyanjui
North Carolina Bar No. 31450
emma.kinyanjui@disabilityrightsnc.org
3724 National Drive, Suite 100
Raleigh, North Carolina 27612
Telephone: (919) 856-2195
Facsimile: (919) 856-2244