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.	)	**REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

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INTRODUCTION

Defendants do not rebut the central facts underlying Plaintiffs' claims that thousands of people with I/DD remain institutionalized because of Defendants' over investment in institutions and under-investment in community-based alternatives and that thousands more are at risk for the same reasons. Defendants argue that Plaintiffs are not permitted to seek systemic relief, yet they offer no legal support for this contention. Defendants also assert an undue hardship defense, despite having failed to provide any supporting evidence. The record in this case shows that, absent declaratory and injunctive relief, Defendants' long-standing failure to adequately address the causes of unnecessary institutionalization will continue indefinitely.

To avoid the relief sought by Plaintiffs, Defendants raise the specter of boundless, costly changes to the State's health care programs, seemingly to deter the Court from acting. The actual relief sought by Plaintiffs bears no resemblance to the picture Defendants paint. Plaintiffs expressly seek a measured and sustainable remedy through the development of a much needed and long overdue Olmstead plan. Plaintiffs' proposal that the Court appoint one or more experts to aid in developing such a plan is made because of the long-term failure of Defendants to do so.

I. There Are No Legal Bars to Declaratory and Injunctive Relief

Defendants cite no law that supports the proposition that thousands of individuals must litigate individual claims. Consistent with case law and the DOJ Guidance, Plaintiffs have

established that they may pursue a remedy for Defendants' systemic failure to comply with the Integration Mandate. Pls.' Mem. 39-41.[1]

A. Plaintiffs' Claim for Relief Is Supported By Chapter 168A and the Law Governing Associational Standing.

Calling Chapter 168A "an individual rights statute" (Defs.' Resp. 18-21) does not have any legal meaning and is contrary to the plain language of the statute. On its face, Section 168A-7(b) provides for injunctive relief when a covered government entity fails 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) (emphasis added). Plaintiff DRNC can seek injunctive relief on behalf of its constituents by enforcing the requirement that Defendants administer their services and programs consistent with the Integration Mandate. Pls.' Resp. 14-16; *see also* Pls.' Mem. 40 (citing cases permitting systemic, rather than individual, claims and relief).

Systemic litigation is designed to seek remedies that are not available as individual remedies, if the relief sought is related to the actual injury sustained. *See Thorpe v. District of Columbia*, 303 F.R.D. 120, 126, 142-43 (D.D.C. 2014) ("Where a private [Olmstead] action raises systemic issues, courts have uniformly granted class certification to allow plaintiffs to pursue those claims."); *see also Wake Cares, Inc. v. Wake Cnty. Bd. of Educ.*, 190 N.C. App. 1, 22-23 (2008) (declining to dismiss claims based on availability of individual relief where plaintiffs raised systemic issue). Courts thus recognize that declaratory and injunctive relief, "if

[1] Plaintiffs' opening brief in support of their Motion for Partial Summary Judgment is referred to as Pls.' Mem. The other briefs cited herein are referred to as follows: Pls.' Resp. refers to Plaintiffs' Response to Defendants' Motion for Summary Judgment. Defs.' Resp. refers to Defendants' Response to Plaintiffs' Motion for Partial Summary Judgment.

granted, will inure to the benefit of those members of the association actually injured" and avoid "repetitious resolution" of a common injury. *Warth v. Seldin*, 422 U.S. 490, 515 (1975).

Congress afforded Plaintiff DRNC, as a protection and advocacy ("P&A") organization, statutory authority to pursue claims on behalf of individuals with I/DD through the Developmental Disabilities Act. 42 U.S.C. § 15001, *et seq*. ("DD Act");[2] *see also*, Pls.' Mem. 39-41 (citing cases regarding P&A associational standing authority). Because Plaintiff DRNC "has alleged and provided evidence of an ongoing, system-wide harm to its constituents that could be redressed by the injunctive relief it seeks," Plaintiffs are entitled to bring a claim seeking system-wide relief. *Disability Advocates, Inc. v. Paterson*, 598 F. Supp. 2d 289, 292, 310-11 (E.D.N.Y. 2009) (holding that plaintiff P&A was entitled to system-wide injunctive relief – an order requiring defendants to move plaintiff's constituents to alternative housing); *see also, Nnebe v. Daus*, 644 F.3d 147, 154, 156 (2nd Cir. 2011) (ruling that "nothing prevents an organization from bringing a §1983 suit" on behalf of its members even when §1983 only expressly provides for a right of action "personal" to the injured party).

[2] An express purpose of the DD Act:

> is to assure that individuals with developmental disabilities and their families participate in the design of and have access to needed community services, individualized supports, and other forms of assistance that promote self-determination, independence, productivity, and integration and inclusion in all facets of community life, through culturally competent programs authorized under this title including specifically [through]. . . protection and advocacy systems in each State to protect the legal and human rights of individuals with developmental disabilities.

42 U.S.C. § 15001.

Defendants also contend incorrectly that Integration Mandate claims require individualized proof from every affected individual. Defs.' Resp. 18-25.[3] Such a requirement would eliminate the availability of associational standing and class actions, running counter to Congress' grant of authority to Plaintiff DRNC as the State's P&A to seek relief on behalf of North Carolinians with I/DD. *See Dunn v. Dunn*, 219 F. Supp. 3d 1163, 1171 (M.D. Ala. 2016) (citing cases holding that Congressional grant of authority to P&As expressly permits litigation that does not require the participation of individuals who would benefit from a remedy). Further undermining Defendants' position that Integration Mandate claims must be individually litigated, the DOJ Guidance describes in detail the systemic relief that may be appropriate in an Integration Mandate case. *See* DOJ Guidance, p. 8 ("Remedies typically require the public entity to expand the capacity of community-based alternatives by a specific amount, over a set period of time. Remedies should focus on expanding the most integrated alternatives."). Notably, Defendants agreed to systemic - not individualized - relief in their own settlement with the U.S. Department of Justice in an Integration Mandate case regarding individuals with serious and persistent mental illness. Ex. I: Settlement Agreement, *United States v. North Carolina*, 5:12-cv-557-F (8/23/12).[4]

Further, where plaintiffs do not seek redress for individual deprivations but only for systemic relief to remedy violations suffered by similarly situated individuals, differences in individual facts do not undermine the dominant common legal question. *See generally Marisol*

[3] The two cases cited by Defendants - *Clinton L.* and *Short* - were cases brought for individual relief, and they are therefore irrelevant to whether systemic relief is also available. Defs.' Resp. 22-23.

[4] Although the Settlement Agreement indicates that it cannot be used as evidence of liability, it is offered here in rebuttal to Defendants' apparent contention that there cannot be systemic relief for Integration Mandate claims.

A. by Forbes v. Giuliani, 126 F.3d 372, 376-77 (2nd Cir. 1997) (approving class certification); *Neal v. Casey*, 43 F.3d 48, 64 (3rd Cir. 1994) (holding a court does "not need to make individual, case-by-case determinations in order to assess liability or order relief. Rather, the court can fashion precise orders to address specific, system-wide deficiencies."). In *Marisol*, the court characterized the common legal question as "whether defendants systematically have failed to provide . . . legally mandated services," effectively rejecting the defendants' argument that each plaintiff's claimed injury implicated different inquiries. *See Marisol A.*, 126 F.3d at 376-77. In so holding, the *Marisol* court noted that each plaintiff did not need to be equally affected by every legal violation alleged in the complaint. *Id*.

Here, the common legal question is whether Defendants' failure to provide for legally mandated community-based services has resulted in excessive, and risk of, institutionalization of North Carolinians with I/DD. *See Dunn*, 219 F. Supp. 3d at 1167 (holding a P&A may "bring claims on behalf of identifiable groups of similarly situated constituents" akin to a class action). While specific individuals may not suffer from Defendants' violation in the exact same manner, the challenged conditions and practices are common to all of Plaintiff DRNC's constituents with I/DD. Therefore, individual differences are irrelevant to the disposition of this case.

Moreover, contrary to Defendants' contention (Defs.' Resp. 22-23), at least one of the named Plaintiffs has standing to assert each of the claims in this action:

- Samantha R. is unnecessarily institutionalized (First and Third Claims for Relief). Pls.' Mem. 17, 40.
- All of the individual Plaintiffs, an additional named non-Plaintiff, Alissa Haley (whom Defendants fail to reference at all), and individuals waiting for services on the Registry of

Unmet Need (who are known to Defendants) are at serious risk of institutionalization (First and Third Claims for Relief). Pls.' Mem. 10-11, 30, 40-41.

- All individual Plaintiffs who receive Innovations Waiver services, and thousands of others similarly situated, are subject to Defendants' failure to enforce reasonably ascertainable standards (Second Claim for Relief). Pls.' Resp. 30-34.

Plaintiffs, therefore, are entitled to pursue a remedy in this case.

B. Defendants Failed to Properly Plead And/or Produce Evidence to Support an Undue Hardship Defense.

Defendants' undue hardship defense fails to preclude summary judgment for Plaintiffs on their Integration Mandate claim for four reasons: (1) there is no undue hardship defense to an Integration Mandate claim; (2) Defendants did not plead undue hardship as to that claim; (3) Defendants failed to produce responsive discovery as to the alleged undue hardship, despite Plaintiffs' specific discovery requests; and (4) Defendants only provided unsworn assertions and hyperbole to support this defense.

Defendants' Thirteenth Defense states:

> Plaintiffs' claims under Chapter 168A should be dismissed or denied because, *to the extent that one or more of [sic] Plaintiffs have made a request for a reasonable modification, such request(s)* would impose upon Defendants an undue burden as further defined in Chapter 168A.

Ans., Thirteenth Defense, p. 31 (emphasis added). Undue hardship is a defense to a request for a reasonable accommodation under subsection (a), and not a defense to Plaintiffs' Integration Mandate claim under subsection (b) of N.C. Gen. Stat. § 168A-7. Pls.' Mem. 32-33. Thus neither the statute nor the Answer contemplate the undue hardship argument Defendants have made.

Defendants did not produce any documents or provide any information in response to Plaintiffs' request that Defendants explain their undue burden defense (now characterized as

undue hardship). *See* Ex. D: Defs' Second Supp. Resp to Pls.' Third RFP and Third Interrogs., p. 2 (failing to include factual bases for asserted defense) and Ex. J: Discovery Letter, October 11, 2018, pp. 1-2 (requesting any and all facts and documents in support of Thirteenth Defense); *see also, Bumgarner v. Reneau*, 332 N.C. 624, 632 (1992) (affirming exclusion of evidence that party failed to disclose during discovery). Defendants' new assertions (that specific sums of money would have to be spent, creating an undue burden[5]) are not supported by any evidence in the record. Defendants may not rely on unsubstantiated statements in opposing Plaintiffs' motion. N.C. Gen. Stat. § 1A-1, Rule 56(c); *United Cmty. Bank (Ga.) v. Wolfe*, 369 N.C. 555, 560 (2017); *Forsyth v. Barr*, 19 F.3d 1527, 1533 (5th Cir. 1994) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)) ("Needless to say, unsubstantiated assertions are not competent summary judgment evidence."). Defendants failed to produce competent evidence of their newest assertions and cannot, therefore, rely on such purported evidence in an attempt to create a genuine issue of material fact.

Furthermore, Defendants' contentions regarding the asserted undue hardship do not satisfy the statutory factors required to establish an undue hardship defense, including "[t]he overall financial resources of the . . . facilities involved in the provision of the accommodation" and "[t]he overall effect on the financial resources of the covered entity." N.C. Gen. Stat. § 168A-3(11). Defendants offered no information on these topics. Notably, Defendants fail to account for the savings from serving individuals with I/DD in the community rather than in more costly institutional settings. *See* Pls.' Mem. 10-11 (citing data showing relative cost of

[5] Defendants also did not include any evidence in their discovery responses to support their new contention that the lack of availability of Direct Service Providers (DSPs) supports their undue burden defense. Defs.' Resp. 11. Moreover, the lack of availability of DSPs is precisely the type of community-based service gap that Defendants are required to address in order to promote deinstitutionalization. Pls. Resp. 7, 13. The lack of providers cannot be asserted as a defense.

institutional versus community-based services) and Dep. Ex. 29: *DHHS Strategic Plan*, p. 5 ("[C]ommunity-based services are often more cost-effective."). For example, Defendants spend $405 million per year on ICFs, or between $135,000 and $260,000 per person, as opposed to $66,000 for individuals with Innovations Waiver services. Pls.' Mem. 10-11.

For the above reasons, Defendants' scatter-shot and unsupported assertions are not sufficient to defeat the instant motion. *See* N.C. Gen. Stat. § 1A-1, Rule 56(e) (non-moving party "must set forth specific facts showing that there is a genuine issue for trial.").

C. Defendant State of North Carolina is a Proper Party.

Defendants assert for the first time[6] that the State of North Carolina is not subject to suit under Chapter 168A. This assertion lacks legal support. Chapter 168A covers state and local governmental entities. N.C. Gen. Stat. § 168A-3(1). In addition, the statute specifically defines "person" to include the State, N.C. Gen. Stat. § 168A-3(7), and prohibits discrimination by any covered governmental entity *and* any "person" that contracts with any department or political subdivision for the delivery of public services. N.C. Gen. Stat. § 168A-3(1). Furthermore, the State is subject to Plaintiffs' alternative claim for violation of substantive due process in the administration of Defendants' service system for people with I/DD. *See* Pls.' Resp. 35 (noting that Plaintiffs' Third Claim for Relief for violation of substantive due process was pled in the alternative to Plaintiffs' Chapter 168A claim). Finally, Defendants' undue hardship argument, although meritless, is premised on the State as a defendant. Defs.' Resp. 34-39. Thus, Defendants tacitly acknowledge that the State is a proper party.

[6] Defendants did not raise this contention in their Answer, in their Motion to Dismiss, or at any point during the litigation prior to their response to Plaintiffs' Motion for Partial Summary Judgment.

II. Defendants Do Not Deny Their Overreliance on Institutionalization and Have Failed to Show They Have a Plan for Compliance with the Integration Mandate

A. Defendants Fail to Rebut Plaintiffs' Evidence Establishing Defendants' Over-Reliance on Institutions and Failure to Prioritize Community-Based Services.

Contrary to Defendants' contention that Plaintiffs' claims are "abstract" (Defs.' Resp. 12-13), Plaintiffs have produced, and Defendants have failed to rebut, significant evidence of systemic over reliance on institutions and Defendants' failure to serve individuals with I/DD in the most integrated setting appropriate to their needs. Defendants do not rebut:

- Defendants' disproportionate funding of institutions (Pls.' Mem. 9);
- the continued admission of individuals with I/DD into institutions and, contrary to the national trend, the increases in admissions versus discharges (Pls.' Mem. 8);
- the continued institutionalization of individuals with I/DD who want to leave institutions but cannot because of a lack of alternatives (Pls.' Mem. 7)[7];
- the continued growth in the number of individuals on the Registry of Unmet Need (in excess of 12,000) who are at risk for institutionalization (Pls.' Mem. 10).

Defendants' contention about the bases for these and other uncontested facts is that Plaintiffs cannot rely on Defendants' written statements, such as the DHHS Strategic Plan, or on Defendants' witnesses. Defs.' Resp. 32-34. Defendants argument that Plaintiffs cannot rely on the testimony of their witnesses is absurd, particularly in the context of a Rule 30(b)(6) witness, who is designated specifically to speak on behalf of the organization. N.C. Gen. Stat. § 1A-1, Rule 30(b)(6). Defendants designated Katherine Nichols and Natasha Ashmont as Rule 30(b)(6)

[7] Defendants argue that this is a disputed fact because, they contend, not all individuals or guardians of individuals are seeking discharge. Defs.' Resp. 13. This misunderstands the statement - admitted by Defendants - that there are people who are institutionalized despite the desire and ability to live in the community. Am. Comp. ¶ 44; Ans. ¶ 44.

witnesses "to testify on [their] behalf." N.C. Gen. Stat. § 1A-1, Rule 30(b)(6). As designated, Defendants' witnesses' testimony binds the organization as to the facts. *Bullard v. Wake Cty.*, 221 N.C. App. 522, 535 (2012).

While contending that Plaintiffs should not be allowed to rely on it, Defendants admit that the statements in the DHHS Strategic Plan are true. Ex. A: Defs.' Resp. to RFA, pp. 4-5. Moreover, according to Defendants' witnesses, the Strategic Plan was the product of DHHS leadership efforts (including the Secretary) and reflects the collective judgment of the leadership of the Department. Richard Dep. p. 130:18-21.

Thus, Plaintiffs have properly supported the bases for their statements of uncontested facts. These undisputed and admitted facts warrant judgment in favor of Plaintiffs.

B. Defendants Fail to Raise Genuine Issues as to the Nine Specific Facts They Contend are in Dispute.

Defendants contend that disputes over nine of thirty-three undisputed facts identified by Plaintiffs (Pls.' Mem. 6-11) preclude summary judgment for Plaintiffs. Defs.' Resp. 12-16. Defendants' contentions regarding these nine statements fail to raise a material issue of fact.

1. "People with I/DD are capable of living their lives integrated into their communities with community-based supports; they need not be institutionalized." Pls.' Mem. 6, ¶1.

Defendants argue, without supporting facts or citations, that this "statement may be accurate as a general matter, [but] it certainly is not, in DHHS' experience, 100% true for 100%" of people. Defs.' Resp. 12. Defendants argue that Plaintiffs' expert, Dr. Kendrick, said that an institution can be the best place for a person with I/DD in the short term. Defs.' Resp. 13. Dr. Kendrick, however, testified that such short-term institutionalization is only a better option than "dumping" - *i.e.*, discharge with no services. Defs.' Resp. 13; Kendrick Dep. pp. 37:23-38:13.

Dr. Kendrick testified repeatedly that there is no need to institutionalize people if an adequate community-based service system exists -- a position echoed by Defendants' own expert, Dr. John Agosta. Kendrick Dep. p. 30:20-25;[8] Agosta Dep. p. 89:10-23. Defendants have failed to rebut the evidence, including their own testimony through Rule 30(b)(6) witnesses, that individuals with I/DD need not be institutionalized.

2. "There are institutionalized North Carolinians with I/DD who would prefer to live in the community and have needs that could be met in the community." Pls.' Mem. 7, ¶ 2.

Defendants contend that this statement is "only partly accurate." Defs.' Resp. 13. Plaintiffs cited Defendants' Answer, in which they admit this statement, and Defendants' Medicaid Director for this fact. Pls.' Mem. 7. Defendants contend that there are individuals who do not want to leave institutions. Defs.' Resp. 13. If true, Defendants' statement would not change the admitted fact that there are people who are institutionalized against their will. In addition, Defendants' argument ignores their obligation to address the issues that have caused a subset of individuals and guardians to fear the possibility of an unsuccessful discharge. *See* Pls.' Mem. 21 (discussing DOJ Guidance regarding the obligation of states to address historical barriers to integration); *see also* Farnham Dep. pp. 33:3-9; 34:9-12 (noting guardian reluctance based on inadequacy of community services) and Ashmont (Rule 30(b)(6)) Dep. pp. 39:9-20;

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[8] Dr. Kendrick's testimony on this point was clear:

> Q. So it would be your preference that there would be no institutions, assuming that adequate community services were available. Is that about right?
> A. That would be my position. At least it's -- I'm very persuaded that it's practical to do that.

Kendrick Dep. p. 36:20-25. This is consistent with Defendants' expert, who described the move toward downsizing institutions and the lack of institutions in some states. Agosta Dep. pp. 49:9-50:10.

65:22-66:3 (noting lack of trust as a factor in guardian reluctance). Defendants have failed to raise a material issue of fact as to whether there are individuals with I/DD who are institutionalized despite preferring and being capable of community living.

3. "People enter and remain in institutions when there is no viable community-based alternative." Pls.' Mem. 7, ¶ 5.

Defendants rely on the same arguments as in statements 1 and 2 to dispute that people with I/DD enter and remain in institutions because of a lack of community-based supports. Defs.' Resp. 13. For the same reasons as above, Defendants have failed to rebut the record evidence.

4. "Defendants do not have in place adequate community-based services for all individuals with I/DD who prefer a community-based setting to institutionalization." Pls.' Mem. 7, ¶ 6.

Defendants take issue with the meaning of "adequate," and contend that some individuals are receiving adequate services. Defs.' Resp. 14. Defendants' contention does not rebut the statement made by Plaintiffs because whether some individuals are receiving adequate services has no bearing on the statement - supported by the testimony of Defendants' Rule 30(b)(6) designee, Katherine Nichols - that some are not. Pls.' Mem. 7. Similarly, Defendants cite a statement from Deborah Goda, DHHS Behavioral Health Unit Manager and Defendants' designated expert,[9] that DHHS "adequately provides for community support . . . based on the resources available." Defs.' Resp. 14. Ms. Goda, however, was unable to identify data or other bases for this statement. She further acknowledged that the statement, which related only to Innovations Waiver participants, was simply that those who are not at the spending cap must be

[9] Defendants refer to Ms. Goda as a Rule 30(b)(6) designee (Defs' Resp. 14), but she was not so designated. She was proffered as an expert witness. Goda (3/20/19) Dep. p. 4:18-20.

getting sufficient services because they are not at the cap. Goda (3/20/19) Dep. pp. 27:9-28:7.[10] Moreover, Ms. Goda's opinion was merely that more than 51% (*i.e.* most) of Innovations Waiver participants are receiving adequate services - an averment which, again, does not rebut the admitted fact that other with I/DD are not. Goda (3/20/19) Dep. pp. 34:7-35:4.

5. "Individuals whose needs exceed the limits set in the Innovations Waiver are referred to an ICF." Pls.' Mem. 11, ¶ 30.

Defendants contend that the referral to an ICF occurs when an individual "chooses" not to participate in the Waiver. Defs.' Resp. 14-15. The Waiver form submitted to CMS requests that the state specify, under "Participant Safeguards," how it will "avoid an adverse impact on the participant" if the participant's needs exceed the cost limit or cap. Dep. Ex. 3: Innovations Waiver, Bates Nos. 290-291. The options offered by the form are to provide for additional services to support the individual in the community or "other." Defendants opted for "other" and euphemistically referred to this possibility in the text box on the form as an individual "choosing" not to participate in the Waiver. *Id*. However, the context is that the individual has needs that exceed the budget cap set by Defendants - not that the individual was offered a choice about anything. *Id*. Defendants' reliance on their own euphemistic wording does not change the meaning: individuals who exceed the cap are subject to institutionalization.[11]

6. "The average cost for community-based Innovations Waiver services is approximately $66,000 per year," "[t]he average cost for placement in a private ICF is

[10] Ms. Goda's opinion is not admissible as an expert opinion. *See State v. McGrady*, 368 N.C. 880, 884 (2016) (holding that expert opinion is not admissible if, *inter alia*, it would not assist the trier of fact, it is not based on sufficient data and analysis, or it is not the product of the application of reliable principles or methods).

[11] Defendants also refer here and elsewhere to Michael A.'s administrative appeal. That matter is on appeal to the North Carolina Court of Appeals, and Michael A. has filed a Notice of Voluntary Dismissal as to his involvement in this case. Pls.' Resp. 23.

approximately $135,000 per year," and "[t]he average cost for placement in a state-operated ICF (DD Center) is $235,000 per year." Pls.' Mem. 10-11, ¶¶ 25, 26, 27.

Defendants contend that these statements are "flawed, and not an undisputed fact" because individual costs may vary. Defs.' Resp. 16. Defendants' contention that the cost of serving individuals may vary is inapposite because the quoted statements relate to the *average cost data* as *provided by Defendants*. Moreover, Defendants acknowledge that it costs less to serve an individual with I/DD in the community.[12] Dep. Ex. 29: *DHHS Strategic Plan*, p. 5; Goda (3/20/19) Dep. p. 27:17-20; Ex. D.: Defs.' Supp. Resp. to Pls.' Third RPD and Third Interrogs., pp. 6, 8. Defendants have offered no evidence to the contrary.

Defendants have failed to show a genuine dispute as to material issues of fact that would preclude summary judgment for Plaintiffs.

C. Defendants' Unsupported Description of Current Services Fails to Show Compliance with the Integration Mandate.

Defendants devote four pages of their Response to describing different types of services that they contend they provide - with no citation to anything in the record. Defs.' Resp. 3-6. Nothing in Defendants' description explains how any of the listed services relate to current institutionalization or risk of institutionalization, or changes Defendants' own analysis that the system is failing to address overreliance on institutionalization. Dep. Ex. 29: *DHHS Strategic Plan*, p. 87.

A recitation of current services and/or future plans, without support, is not a sufficient Olmstead plan. DOJ Guidance, pp. 6-7. A state's:

[12] This fact is missing from Defendants' arguments regarding their undue burden defense, undermining Defendants' contentions (unsupported by the record) regarding the potential costs of compliance.

> plan for implementing its obligation to provide individuals with disabilities opportunities to live, work, and be served in integrated settings. . . . must do more than provide vague assurances of future integrated options or describe the entity's general history of increased funding for community services and decreased institutional populations.

Id. Defendants' unverified recitation of services falls far short of the standard for establishing that there is a comprehensive and effective Olmstead plan in place.

D. Being Better Than Alabama Is Not the Standard.

The Integration Mandate is violated where a state operates its service system "in a manner that results in unjustified segregation of persons with disabilities." DOJ Guidance, p. 3. Defendants have offered no alternative, recognized standard, instead relying on a vague notion that systems "evolve." Defs.' Resp. 7. This approach was specifically rejected by the DOJ Guidance, which provides that there must be "concrete and reliable commitments to expand integrated opportunities. . . . [and] specific and reasonable timeframes and measurable goals for which the public entity may be held accountable." DOJ Guidance, p. 7.

Furthermore, the data point the Defendants offer in support of North Carolina's purported evolution is a comparison of North Carolina with a handful of other states, including Alabama, with respect to the number of people served with Medicaid dollars - *including those institutionalized in ICFs*. Defs.' Resp. 8. Defendants' best effort to argue that North Carolina is average[13] relies on a data point that does not tell us anything about the extent of comparative reliance on institutionalization versus community services. By contrast, Defendants' expert, Dr. Agosta, produced several other measures showing that, relative to other states, Defendants

[13] Even the chart Defendants' rely on shows North Carolina below the national average. The copy in Defendants' brief was incomplete. Defs.' Resp. p. 8. The bottom section of the chart was cut off. That section notes that "NC is below the national average. To meet the national average, North Carolina would have to serve . . . 6,902 more people." Dep. Ex. 114, p. 2.

continue their overreliance on institutionalization and failure to adequately address the long wait list for community services. Pls.' Mem. 8-9, 16-17, 20-21. Thus, even by an "evolution" standard, Defendants have failed to show that the State complies with the Integration Mandate.

E. Defendants Have Failed to Act for Decades and Have No Plan for Compliance.

Defendants do not have an Olmstead plan and they do not contend otherwise. Instead, they vaguely assure the Court that "North Carolina's efforts are ongoing, and its system will evolve and improve, as directed by the General Assembly." Defs.' Resp. 10. In support of this statement, Defendants point to: (1) the Strategic Plan; (2) Medicaid Transformation; and (3) a new Senate bill. None of these, however, effectuate actual change to the I/DD system.

The Strategic Plan, as described by Defendants, is not a plan but an "aspirational policy document." Defs.' Resp. 9. Defendants have not identified any results from that document nor have any steps been taken to actually implement the Strategic Plan since it was released in January 2018.

Medicaid Transformation (Defs.' Resp. 9) is a reorganization of *current* services that will not provide for more services, will not provide Waivers or other services to more people with I/DD, and will not include deinstitutionalization efforts. Goda (3/20/19) Dep. pp. 113:12-22; 114:3-19.

Finally, a Senate Bill proposing 1000 additional Waiver slots (which Defendants elsewhere contend would be an undue hardship to procure (Defs.' Resp. 10, 38)) is speculative and not evidence of the actual provision of additional services, let alone sufficient to address long-term system needs. Furthermore, a pending House Bill would enable and fund *unlimited* private ICF admissions through elimination of the certificate of need (CON) requirement for

private ICFs, which would be able to proliferate without limitation.[14] *See* H126-CSBC-57, 1.6(a)(i) (attached) (providing for elimination of CON requirement for ICFs). Such an unlimited expansion would yet again increase Defendants' over investment in institutionalization because the State is required to pay for admission to an ICF for those who require an ICF level of care. Hedrick Dep. p. 37:8-25. This bill runs counter to Defendants' contention that the system will improve "as directed by the General Assembly."

Defendants' reliance on the above fragments does not suffice to meet the DOJ Guidance standard, which provides that an Olmstead plan "must have demonstrated success in actually moving individuals to integrated settings in accordance with the plan . . . [and] comprehensively and effectively addresses the needless segregation of the group at issue in the case." DOJ Guidance, p. 7; *see also Pashby v. Delia*, 709 F.3d 307, 317 (2013) (declining to dismiss claims based on North Carolina's future plans to replace a Medicaid program because such changes could be delayed or abandoned.).

The "future plans" proposed by Defendants echo the reports, planning sessions, meeting agendas, legislative funding requests, and countless false starts in the twenty years since the *Olmstead* decision that have failed, and will continue to fail, to produce an effective Olmstead plan. *See* Pls.' Mem. 35-38 (describing Defendants' history of inchoate planning efforts).

Defendants have failed to rebut the substantial evidence in the record - including the facts and analyses supplied by Defendants and their Rule 30(b)(6) designees and experts - that North Carolina's system of services for people with I/DD does not comply with the Integration Mandate. Accordingly, Plaintiffs are entitled to summary judgment.

[14] Through the CON requirement, there has been a moratorium on the development of new ICF facilities. Hedrick Dep. pp. 36:7-37:7.

III. Plaintiffs' Requested Relief Does Not Violate the Separation of Powers

Defendants have offered a cartoon version of the supposed relief Plaintiffs seek. Plaintiffs did not ask to have an expert "take over the Medicaid system" or "to completely demolish the entire Innovations Waiver." Defs.' Resp. 31. Nowhere have Plaintiffs demanded the immediate expenditure of an "unlimited budget" or the unsubstantiated figures tossed out by Defendants. Defs.' Resp. 38, 41-42. Instead, Plaintiffs have asked the Court to look at the data and admitted or undisputed facts, declare that the system violates the Integration Mandate, and appoint one or more experts to aid in crafting a sustainable, long-term solution. In short, Plaintiffs ask for what Defendants should have already created: a plan for compliance with the Integration Mandate, *i.e.,* an Olmstead plan. Pls.' Mem. 42-43.

Defendants suggest the Court cannot impose such a remedy and must not "skip affording the state the opportunity to comply with a court order." Defs.' Resp. 42. Defendants, however, provide no explanation as to why they failed to implement an effective plan over the last twenty years since the *Olmstead* decision, nor have they have identified how they would do so now.

A. Separation of Powers Does Not Bar a Remedy for Injunctive Relief in This Case.

North Carolina Courts are empowered to order deficiencies remedied. In *Hoke County Bd. of Educ. v. State*, the Supreme Court of North Carolina stated,

> Certainly, when the State fails to live up to its constitutional duties, a court is empowered to order the deficiency remedied, and if the offending branch of government or its agents either fail to do so *or have consistently shown an inability to do so*, a court is empowered to provide relief by imposing a specific remedy and instructing the recalcitrant state actors to implement it.

358 N.C. 605, 642 (2004) (emphasis added) (citations omitted). As long as the Court does not direct the legislative and executive branches in a "singular fashion," the Court may act. *Id.* at 642, 645. Courts have a duty to enter judgment granting "relief as needed to correct the wrong"

so long as the court "minimiz[es] the encroachment on other branches of government." *Leandro v. State*, 346 N.C. 336, 357 (1997) (citations omitted).

Plaintiffs have demonstrated North Carolina's long history of failing to comply with a known obligation. Pls.' Mem. 35-38. Efforts to comply with the Integration Mandate have been studied extensively. Dep. Ex. 27: Email dated 1/15/13, Farnham to Bradley, Re: Materials for Olmstead Group, p. 1. Yet, Defendants have failed to fulfill their Integration Mandate obligations due to lack of political and executive will, lack of urgency, lack of vision, turnover, and distraction. Riddle Dep. p. 120:14-25; Farnham Dep. p. 48:22-25; Vogler Dep. pp. 134:17-21 and 137:8-11; Dep. Ex. 33, Att. 3, p. 2. Defendants' response in this case does not suggest any reason to believe anything has changed or will change in that it fails to take seriously the task of developing and implementing a plan for compliance.

Given the long and cringe-inducing history of Defendants' failed Olmstead planning – including the failure to produce a plan in the two years during which this case has been pending – the Court is well within its constitutional authority to craft a remedy as proposed by Plaintiffs.

B. Appointment of One or More Experts Would Provide for a Remedy that Meets Defendants' Objections.

Plaintiffs proposed a measured approach to a remedy, asking the Court to grant a declaratory judgment and, as injunctive relief, appoint one or more "expert(s) to *design and implement a process*, including stakeholder engagement, for development of a detailed, specific, and highly targeted plan" to address identified deficiencies. Pls.' Mem. 42-43 (emphasis added). Plaintiffs further proposed retention of jurisdiction by the Court and such other relief as may be necessary to effectuate a remedy. Pls.' Mem. 43. Plaintiffs suggested an incremental, careful approach to the development of a plan by subject matter experts, not that the Court order specific and immediate steps in a "singular fashion." *Hoke County*, at 642, 645.

Plaintiffs' expert, Dr. Kendrick, testified that a plan must be developed that is detailed, realistic, "relatively practical," has timelines and designated funding,[15] and is led by one or more individuals with the authority to carry out the work. Kendrick Dep. pp. 41:21-43:24. The purpose is to develop a sustainable solution because if plans "are too ambitious, they fall over, in essence." Kendrick Dep. p. 44:18-19. Based on his 40 years of experience working on deinstitutionalization efforts, Dr. Kendrick acknowledged that "it's a very complex process. . . . so careful front-end planning is helpful." Kendrick Dep. p. 43:18-21.

Plaintiffs seeks Court-mandated development of a "comprehensive, effectively working plan." Defendants' contention that Plaintiffs seek a Court takeover of the Medicaid system - and all the other drastic predictions of judicial overreach - are simply incorrect.

CONCLUSION

Defendants' service system has produced long-term underinvestment in community services and overinvestment in institutionalization. For too long, Defendants have failed to effectuate needed change, despite the ongoing "imbalance of community-based services relative to . . . institutional care." Dep. Ex. 29: *DHHS Strategic Plan*, p. 5. Plaintiffs have demonstrated

[15] The reallocation of existing funding is expressly contemplated as a means to fund community-based services and correct Integration Mandate violations. DOJ Guidance, p. 7. For example, Defendants spend $405 million per year on ICFs. Ex. 29: *DHHS Strategic Plan*, p. 84. By disproportionately funding institutions, Defendants have limited the availability of community-based services. Agosta Dep. pp. 113:13-114:8. Similarly, the State Auditor has determined that Defendant DHHS has failed to properly manage excess funds being held by its contractor MCOs, resulting in $439 million in excess "savings" not being used for behavioral health services. DHHS Division of Medical Assistance Medicaid Capitation Rate Setting Performance Audit, Office of the State Auditor, January 2019, available at https://www.ncauditor.net/EPSWeb/Reports/Performance/PER-2017-4445B.pdf. A plan for compliance can and should address how funds can be reallocated over time to support integration.

that thousands of individuals with I/DD are in need of the measured and careful change proposed by Dr. Kendrick - the development and implementation of a sustainable Olmstead plan.

For the foregoing reasons, and those set forth in the other memoranda submitted in support of Plaintiffs' Motion for Partial Summary Judgment and in opposition to Defendants' Motion for Summary Judgment, summary judgment should be entered in favor of Plaintiffs.

This 28th 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 PLAINTIFFS

CERTIFICATE OF SERVICE

This is to certify that the undersigned has served a copy of the foregoing **Reply in Support of Plaintiffs' Motion for Partial 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 28th day of June, 2019.

DISABILITY RIGHTS NORTH CAROLINA

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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