IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
CIVIL CASE NO. _____

MARLO M., by her guardians and next friends WILLIAM and CARLETTE PARRIS, and DURWOOD W. by his guardian and next friend WILLIE WILLIAMS, Plaintiffs, v. LANIER CANSLER, in his official capacity as Secretary of the Department of Health and Human Services, and KAREN SALACKI, in her official capacity as Area Director of the Beacon Center Local Management Entity, Defendants	)	COMPLAINT

INTRODUCTION

1. Plaintiff Marlo M. is 39 years old. Among other diagnoses, she is dually diagnosed with a developmental disability and mental illness. She lives in Wilson, North Carolina.

2. Plaintiff Durwood W. is 49 years old. Among other diagnoses, he is dually diagnosed with a developmental disability and mental illness. He lives in Wilson, North Carolina.

3. In North Carolina, adults dually diagnosed with mental retardation and mental illness are part of a target population that may be eligible to receive state mental health, developmental disability, and substance abuse services funds designated as MR/MI funds, formerly called *Thomas S.* funds. Plaintiffs are both eligible for and have previously received MR/MI – *Thomas S.* funds. Additionally, upon information and belief, Plaintiff Durwood W. was a class member in *Thomas S. v. Morrow*, 601 F. Supp. 1055, 1984 U.S. Dist. LEXIS 23537 (W.D.N.C. 1984), *aff'd in part and modified in part, remanded*, 781 F.2d 367, 1986 U.S. App. LEXIS 21712 (4th

Cir. 1986), *cert. denied sub nom.*, *Kirk v. Thomas S.*, 476 U.S. 1124, 106 S. Ct. 1992 (1986), *cert. denied sub nom.*, *Childress v. Thomas S.*, 479 U.S. 869, 107 S. Ct. 235 (1986); *later proceeding*, *Thomas S. v. Flaherty*, 699 F.Supp. 1178, 1988 U.S. Dist. LEXIS 13086 (W.D.N.C. 1988), *aff'd*, 902 F.2d 250, 1990 U.S. App. LEXIS 7044 (4th Cir. 1990), *rehearing, en banc, denied*, 1190 U.S. App. LEXIS 19875 (4th Cir. 1990), *cert denied*, 498 U.S. 951, 111 S. Ct. 373 (1990).

4. Plaintiffs have been successfully living in the community with a combination of federal Medicaid waiver funds (the Community Alternatives Program for Persons with Mental Retardation/Developmental Disabilities) and supplemental state funds; Plaintiff Marlo M. for over five years, and Plaintiff Durwood W. for more than a decade. Recently, Defendant Karen Salacki arbitrarily terminated all state funds for Plaintiffs' care, as well as for others similarly situated. Plaintiffs pursued administrative appeals of these cuts, but failed to achieve relief that prevented the loss of state-funded services. As a result of this arbitrary decision to terminate all supplemental state funds, Plaintiffs will be displaced from their long-term community placements on December 15, 2009. Plaintiffs are at risk of institutionalization, a placement that would be more costly than Plaintiffs' care in the community.

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

6. Plaintiffs seek declaratory and injunctive relief to preserve their receipt of care in the community until adequate CAP-MR/DD or state-funded services are made available to them to

ensure Plaintiffs' ability to receive services in the most integrated setting appropriate to their needs and conditions, which has been demonstrated to be in Plaintiffs' homes.

JURISDICTION AND VENUE

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

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

9. Venue is proper because a substantial part of the actions and omissions of which Plaintiffs complain occurred in this District. 28 U.S.C. § 1391(b).

DEFENDANTS

10. Defendant Lanier Cansler is the Secretary of the North Carolina Department of Health and Human Services (DHHS). DHHS is the "single state agency" responsible for the administration and supervision of North Carolina's Medicaid program under Title XIX of the Social Security Act. 42 C.F.R. § 431.10 (2008). Secretary Cansler bears ultimate responsibility for the implementation and management of the North Carolina Medicaid program, including in particular the State's Medicaid Home and Community-Based Services (HCBS) Community Alternatives Program Waivers (CAP-MR/DD, CAP-C, and CAP-D), consistent with federal law. Defendant Cansler is sued in his official capacity.

11. Defendant Karen Salacki is the Area Director of the Beacon Center, a Local Management Entity (LME), with a catchment area encompassing Edgecombe, Greene, Nash and

Wilson Counties. Within the State and Medicaid-funded system of mental health, developmental disabilities, and substance abuse services in North Carolina, the LMEs are the locus of coordination for these services at the community level. *See* N.C.G.S. § 122C-101; N.C.G.S. § 112C-115.4(a). Defendant Salacki's responsibilities include financial management and accountability for the use of State and local funds and information management for the delivery of publicly funded services. *See* N.C.G.S. § 112C-115.4(b)(7). Defendant Cansler is responsible for the ultimate oversight of LME area directors to make sure that they provide publicly funded services in accordance with the law. *See* N.C.G.S. § 122C-111, *et seq*. Defendant Salacki is sued in her official capacity.

PLAINTIFFS

12. Plaintiffs are adults with dual diagnoses of mental retardation and mental illness (MR/MI).

13. Plaintiff Marlo M.'s diagnoses include Anxiety Disorder, Mental Retardation, Down Syndrome, Congenital Heart Disease, Hypothyroidism, Chronic Gum Disease, and Chronic Headaches.

14. Plaintiff Marlo M. resided with her mother in their family home for most of her life. Upon information and belief, Plaintiff Marlo M. moved directly from her mother's home to her community placement in 2004, which is her own apartment located at St. Christopher Circle, Wilson, N.C. Plaintiff Marlo M.'s home has been substantially modified as an accommodation to her short stature, including the apartment's countertops, sinks, and furniture.

15. Until November 20, 2009 Plaintiff Marlo M. lived independently in her apartment with a rotating schedule of residential workers twenty-four hours a day. Marlo does not currently reside in this apartment because she lost state funding on November 15, 2009, and had

a concurrent inability to fully satisfy her staffing needs through the CAP-MR/DD waiver alone. The loss of state funding forced Marlo to leave her apartment and transition to a congregate placement. The subsequent authorization for services on or about November 24, 2009 (which terminate on December 15, 2009) came too late for Marlo to return to her home. Most of Marlo's staff had been terminated by the provider and Marlo had already moved out of her apartment. However, Marlo's apartment at 2507 St. Christopher Circle remains in her name and available for her to resume residence in through December 31, 2009.

16. Plaintiff Durwood W.'s diagnoses include Psychotic Disorder NOS, Autistic Disorder, Severe Mental Retardation, Diabetes, Sleep Apnea, Frontal Lobe Atrophy, Hepatitis B Carrier, Cerebral Palsy, Grade I/IV Systolic Ejection Murmur, and Glaucoma.

17. Upon information and belief, Plaintiff Durwood W., prior to his community placement, lived at Skill Creations, an ICF-MR facility for persons with developmental disabilities in Goldsboro, North Carolina. Then, as a result of the *Thomas S.* litigation, Plaintiff Durwood W. was discharged from Skill Creations and placed in a small group home more than a decade ago. After a short time, the group home discharged Plaintiff Durwood W. because they could not accommodate his behaviors, and Plaintiff Durwood W. moved to his own apartment with a rotating schedule of residential workers twenty-four hours a day. Plaintiff Durwood W. will remain in his community placement until December 15, 2009, when he will be forced to find another placement due to the loss of state funds and concurrent inability to fully satisfy his staffing needs through the CAP-MR/DD waiver alone.

18. Plaintiff Durwood W.'s community placement is his own home, where he lives independently with a rotating schedule of residential workers twenty-four hours a day.

19. Plaintiffs Marlo M. and Durwood W. are eligible for the Community Alternatives Program for Persons with Mental Retardation/Developmental Disabilities (CAP-MR/DD).

20. Plaintiffs Marlo M. and Durwood W. are also eligible for non-Medicaid state funded services made available to persons with Mental Retardation/Mental Illness (MR/MI), formerly called *Thomas S.* funds. Upon information and belief, Plaintiffs Marlo M. and Durwood W. may be eligible for other non-Medicaid state funded services in addition to the restricted MR/MI funding.

FACTUAL BACKGROUND

21. Recipients of DMHDDSAS state-funded services submit service requests to their LMEs through the "NC CareLink" website.

22. Upon information and belief, on or about June 12, 2009, Defendant Salacki denied, reduced, suspended, or terminated Plaintiff Marlo M.'s service authorization for the state-funded "Supervised Living 811" service, the procedure code for which is C-YM811. On CareLink Authorization Request 62378, Defendant Salacki entered an authorization comment that "[d]ue to change in policy regarding residential payment for a consumer that is also participating in CAP services, this service [Supervised Living – 1 Resident, Procedure Code C-YM811] can no longer be approved without justification of the need for residential payment."

23. Upon information and belief, on or about June 15, 2009, Defendant Salacki denied, reduced, suspended, or terminated Plaintiff Durwood W.'s service authorization for the state-funded "Supervised Living 811" service, the procedure code for which is C-YM811. On CareLink Authorization Request 62345, Defendant Salacki entered an authorization comment that "[d]ue to change in policy regarding residential payment for a consumer that is also

participating in CAP services, this service [Supervised Living – 1 Resident, Procedure Code C-YM811] can no longer be approved without justification of the need for residential payment."

24. Upon information and belief, Plaintiffs were not individually notified of the denial, reduction, suspension, or termination of their state funded services. Plaintiffs were not given the opportunity to pursue an administrative appeal of the utilization review decisions made regarding their state-funded services on June 12 and 15, 2009, respectively.

25. On or about July 29, 2009, the Beacon Center sent a Memorandum to Joyce Barnes of Lois House, Plaintiff Marlo M.'s service provider for her CAP-MR/DD and Supervised Living 811 services, notifying Ms. Barnes that a "time limited" authorization for services would continue only through September 30, 2009.

26. On or about August 13, 2009, the Beacon Center sent a Memorandum to Joyce Barnes of Lois House, Plaintiff Durwood W.'s service provider for his CAP-MR/DD and Supervised Living 811 services, notifying Ms. Barnes that an authorization for $13.12 per day would be put in place for Plaintiff Durwood W. once his current state-funded services authorizations expired. Upon information and belief, no such authorization was ever put in place for Plaintiff Durwood W.

27. From June until the present, Plaintiffs have requested services and received a series of "time-limited" service authorizations for the Supervised Living 811 state-funded service, including the authorizations described in the preceding paragraphs.

28. On December 15, 2009, Plaintiffs' state-funded service authorizations will expire. At that time, neither Plaintiff will be authorized for or receive any state-funded services.

29. As a consequence of losing state funding on December 15, 2009, Plaintiffs will no longer be able to afford the supplemental residential staffing necessary to maintain their long-

time community placements. Both Plaintiffs will be forced to locate alternative congregate or institutional placements on December 15, 2009.

30. On December 15, 2009, Plaintiff Marlo M. will either remain in the inappropriate congregate placement where she currently resides or she will be placed in an institution. In these placements, Plaintiff Marlo M. will no longer receive the one-on-one supervision and staffing she requires. Plaintiff Marlo M. will lose the benefit of an apartment that was custom-fitted to her short stature, including countertops, sinks, and furniture specially-sized to her proportions. Plaintiff Marlo M. will also lose the calm and quiet that her own home provides, and which she needs to minimize the anxiety and stress she experiences as a result of her anxiety disorder.

31. On December 15, 2009, Plaintiff Durwood W. will move from his own apartment into either an inappropriate congregate placement with other residents or into an institution. Plaintiff Durwood W. will no longer receive the one-on-one supervision that he requires in his new placement. Plaintiff Durwood W. required placement in his own home because of his inability to recognize others' personal space or personal things, his tendency to wander away, and his displays of extreme excitement which can be very jarring and unsettling for those around him. In the past, when Plaintiff Durwood W. lived in congregate and institutional settings, these behaviors were very unpleasant for the other residents of the facility, and resulted in his discharge from a group home.

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

institutionalization. If Plaintiffs are able to remain in their own homes, the risk of institutionalization will alleviate immediately.

33. Previously, Plaintiffs were able to maintain their long-time and successful community placements through a combination of MR/MI – *Thomas S.* funds and CAP-MR/DD waiver funds.

34. Plaintiffs will continue receiving CAP-MR/DD funding after December 15, 2009. However, Plaintiffs will lose their CAP-MR/DD funding if they are institutionalized.

35. Plaintiffs have made use of the State appeals process for non-Medicaid services. *See* 10A NCAC 27G .7004; 10A NCAC 27I .0601, *et seq*. However, there is no entitlement to maintenance of non-Medicaid services while a consumer appeals a Local Management Entity's decision to deny, reduce, suspend, or terminate state-funded services. *See* 10A NCAC 27G .7004(g) (the LME "*may* authorize interim services until the final review decision"). Similarly, Plaintiffs could be re-authorized for state-funded services tomorrow and terminated again the next day – there are no procedural protections in place that maintain Plaintiffs' necessary supplemental staffing services aside from a ruling from this Court.

36. But for the termination of state funds and/or the failure to make reasonable modifications to the CAP-MR/DD waiver service definitions, Plaintiffs could continue to be successfully served in their current community placements.

THE COMMUNITY ALTERNATIVES PROGRAM FOR PEOPLE WITH MENTAL RETARDATION/DEVELOPMENTAL DISABILITIES (CAP-MR/DD)

37. The Department of Health and Human Services (DHHS) is designated as the state Medicaid agency responsible for the administration and supervision of North Carolina's Medicaid Program under Title XIX of the Social Security Act. DHHS delegated chief

responsibility for administering the federal Medicaid program to its Division of Medical Assistance (DMA).

38. The Medicaid Act authorizes states to obtain Home and Community Based Services waivers (HCBS waivers) from the Centers for Medicare and Medicaid Services (CMS). *See* 42 U.S.C. § 1396n(c) (also known as Section 1915(c) of the Social Security Act). These programs allow the State to provide home-based habilitative services to, among others, persons who would otherwise require care in an Intermediate Care Facility for Persons with Mental Retardation (ICF-MR). *Id*. The CAP-MR/DD waiver is such a program. Pursuant to a Memorandum of Understanding (MOU) with the Division of Medical Assistance (DMA), the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services (DMHDDSAS) is the lead agency for operation of the CAP-MR/DD waiver program.

39. The CAP-MR/DD waiver provides participants with a maximum budget of $135,000.00 (the equivalent cost of caring for Plaintiffs in an ICF-MR facility) that they can use for home and community-based services. Presently, Plaintiffs' budgets are below the maximum.

40. Plaintiff Marlo M.'s current proposed yearly budget for services is $114,053.16. Taking into account Plaintiff Marlo M.'s contribution of personal funds to her budget, the requested budget amount drops to $101,633.16. It saves the State over $33,000.00 per year to care for Plaintiff Marlo M. in the community rather than in an ICF-MR facility.

41. Plaintiff Durwood W.'s current proposed yearly budget for services is $111,582.44. Taking into account Plaintiff Durwood W.'s contribution of personal funds to his budget, the requested budget amount is approximately $104,400.00. It saves the State over $30,000.00 per year to care for Plaintiff Durwood W. in the community rather than in an ICF-MR facility.

42. Despite the fact that Plaintiffs' budgets are each far below the $135,000.00 maximum, they enjoy access to less than half of that amount due to service restrictions set by the State in the waiver. Plaintiffs each receive Residential Supports Level IV through the CAP-MR/DD waiver, which provides for up to 12.5 hours of residential staffing and $59,644.65 in funding yearly. Since Plaintiffs receive this specific Residential Supports service, they are unable to access any other residential staffing services (or additional funding) under the CAP-MR/DD waiver. The same would be true if Plaintiffs received another residential staffing service instead of Residential Supports. Upon information and belief, residential staffing services available through the CAP-MR/DD waiver cannot be combined in any way to achieve twenty-four hour staffing and supervision without reasonable modification of the service definitions.

MENTAL RETARDATION/MENTAL ILLNESS (MR/MI) – *THOMAS S.* STATE FUNDED SERVICES

43. In addition to operating the CAP-MR/DD waiver, DMHDDSAS bears responsibility for the oversight of non-Medicaid services, including MR/MI - *Thomas S.* funding. Defendant Salacki bears responsibility for the coordination of MR/MI – *Thomas S.* and other state-funded services at the community level. *See* N.C.G.S. § 122C-101; N.C.G.S. § 112C-115.4(a) & (b)(7).

44. MR/MI - *Thomas S.* funding is provided to eligible State residents who have applied for mental health, developmental disabilities, and substance abuse services through their Local Management Entity (LME). State MR/MI funds are made available to promote successful community living, and are used to extend the services and supports provided through Medicaid and other public and private funding. Accordingly, Plaintiffs and others similarly situated relied upon these MR/MI funds to access necessary supplemental residential staffing services for the

hours that are not provided for by the CAP-MR/DD waiver. One such state-funded supplemental staffing service is called "Supervised Living 811 – 1 Resident."

45. Supervised Living is a "residential service which includes room and support care for one individual who needs 24-hour supervision; and for whom care in a more intensive treatment setting is considered unnecessary on a daily basis." Division of Mental Health/Developmental Disabilities/Substance Abuse Services, MH/DD/SA Service Definitions 164 (January 1, 2003). Medical necessity for this service is met when the recipient has an Axis I or II diagnosis or the person has a developmental disability, meets Level of Care Criteria, Level NCSNAP/ASAM, is at risk for placement outside the natural home setting, and has intensive verbal and limited physical aggression due to symptoms associated with diagnosis which are sufficient to create functional problems in a community setting. MH/DD/SA Service Definitions at 165.

46. Plaintiffs are authorized for Supervised Living 811 services until December 15, 2009. Plaintiffs will continue to meet medical necessity criteria for these services after December 15, 2009.

47. Upon information and belief, Plaintiff Marlo M. has been authorized for $64,298.40 per year for Supervised Living 811 services since 2005. Upon information and belief, Plaintiff Marlo M.'s Supervised Living 811 service provider, in recognition of the State budget crisis, cut staff salaries and employed other cost-cutting measures to reduce Plaintiff Marlo M.'s dependence on State funds. As a result, the current requested state funds rate for Plaintiff Marlo M. is $51,548.95 per year – an annual savings to the State of approximately $14,000.00. Compare this amount - $51,548.95 per year - to the estimated cost of caring for Plaintiff Marlo M. at the O'Berry Center or other institution (which relies on funding from North Carolina taxpayers), a cost the State estimates to be at least $135,000.00 per year.

48. Upon information and belief, Plaintiff Durwood W. has been authorized for $70,682.25 per year for Supervised Living 811 services since 2005. Upon information and belief, Plaintiff Durwood W.'s Supervised Living 811 service provider, in recognition of the State budget crisis, cut staff salaries and employed other cost-cutting measures to reduce Plaintiff Durwood W.'s dependence on State funds. As a result, the current requested state funds rate for Plaintiff Durwood W. is $55,399.70 per year – an annual savings to the State of approximately $15,000.00. Compare this amount - $55,399.70 per year - to the estimated cost of caring for Plaintiff Durwood W. at Skills Creations or other institution (which relies on funding from North Carolina taxpayers), a cost the State estimates to be at least $135,000.00 per year.

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

49. Plaintiffs adopt and restate the allegations set forth in paragraphs 1 – 47 of this complaint.

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

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

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

53. Regulations implementing Title II provide that

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

54. Regulations implementing Title II further provide:

> "(b)(1) A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability:
> (iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;
> (iv) Provide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others;
> (v) Aid or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity's program. 28 C.F.R. § 35.130(b)(1).

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

56. DHHS, including DMHDDSAS, is a public entity under Title II of the ADA and its implementing regulations.

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

58. Plaintiffs are individuals with disabilities in that they have physical and other impairments that substantially limit one or more of their major life activities, including but not limited to, thinking, communicating, learning, working, caring for themselves, and concentrating. *See* 42 U.S.C. § 12102.

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

60. Plaintiffs' community placements were the result of the Wilson-Greene area authority (now the Beacon Center) and the State's determination that community-based treatment was appropriate for them. Plaintiffs do not oppose community placement. Plaintiff's community placement can be reasonably accommodated, as demonstrated by their continuous care in the

community for many years; Plaintiff Marlo M. for more than five (5) years and Plantiff Durwood W. for more than a decade.

61. Plaintiffs' care in the community in their own home is cost-neutral as compared to the cost of their care in an ICF-MR facility. In fact, caring for Plaintiffs in their own homes is estimated to save the State over $30,000.00 for each Plaintiff each year. Plaintiffs satisfy the cost-neutrality requirement of the CAP-MR/DD waiver program.

62. Without reasonable modification of the rules, policies, and procedures governing the CAP-MR/DD waiver program, Plaintiffs will be forcibly isolated and segregated. Plaintiffs are facing forced institutionalization as a direct result of Defendants' actions.

63. Defendant Cansler's failure to make reasonable modifications to the service definitions applicable to the CAP-MR/DD waiver program denies Plaintiffs the full twenty-four hour per day residential staffing they need to remain in their homes. The failure to make reasonable modifications to the CAP-MR/DD waiver service definitions to allow Plaintiffs to remain in their integrated home settings constitutes unlawful discrimination in violation of Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132 and its implementing regulation, 28 C.F.R. § 35.130(d).

64. Defendant Salacki has failed to exercise her discretion in a non-discriminatory manner, denying Plaintiffs necessary funds used to make up the services shortfall under the CAP-MR/DD waiver.

65. Defendant Salacki's authority and discretion to award state funds to Plaintiffs is set forth in the legislation containing the current State budget, SB § 10.21B, SL 2009-451 § 10.21B, which provides that

> "Except as otherwise provided in this section for former Thomas S. recipients, CAP-MR/DD recipients are not eligible for any State-funded services except for

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

66. Thereafter, on September 14, 2009, to clarify the LME's discretion to authorize state-funded services for Plaintiffs and persons similarly situated, DMHDDSAS released CAP Implementation Update No. 60. The pertinent part of the update states:

> CAP-MR/DD State Fund Service Eligibility
> SECTION 10.21B
> As was discussed in Implementation Update (IU) #59, the General Assembly did impose restrictions on the use of state funds to supplement the benefits that CAP-MR/DD recipients receive through the waiver. Most waiver recipients may only continue to receive State-funded services when there is not a comparable service available in the waiver. Those services are "limited to guardianship, room and board, and time-limited supplemental staffing to stabilize residential placement." There is an exception for former Thomas S. consumers. Those individuals may continue to receive a broader array of State-funded consumers [sic], based upon the LME's authorization…

67. Defendant Salacki failed to properly exercise her discretion and award Plaintiffs state funds for supplemental residential staffing services. Defendant Salacki's failure to make these funds available to Plaintiffs to allow Plaintiffs to remain in their integrated home settings constitutes unlawful discrimination in violation of Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132 and its implementing regulation, 28 C.F.R. § 35.130(d).

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

68. Plaintiffs adopt and restate the allegations set forth in paragraphs 1 – 66 of this complaint.

69. Section 504 of the Rehabilitation Act of 1973 provides, "no otherwise qualified individual with a disability in the United States...shall, solely by reason of her or his disability,

be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a).

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

71. "Program or activity" includes a department, agency, special purpose district, or other instrumentality of a State or of a local government. 29 U.S.C. § 794(b)(1)(A).

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

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

74. DHHS receives federal financial assistance under Section 504 and its implementing regulations. Federal Medicaid funds account for approximately 60% of the cost of the North Carolina Medicaid program.

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

76. DHHS, and its contracting agencies, including the Beacon Center LME, are recipients of Federal financial assistance under Section 504 and its implementing regulations.

77. Plaintiffs are "qualified person[s] with disabilities" within the meaning of Section 504 because they have physical and/or mental impairments that substantially limit one or more major life activities, and they meet the essential eligibility requirements for the CAP-MR/DD waiver program. *See* 29 U.S.C. § 705(9)

78. Defendant Cansler has failed to make the full $135,000.00 CAP-MR/DD waiver budget available to Plaintiffs and others similarly situated by creating or allowing the creation of service definitions that do not allow CAP-MR/DD waiver recipients to access twenty-four hours per day of direct care through the waiver. Without reasonable modification of the rules, policies, and procedures governing the CAP-MR/DD waiver program, Plaintiffs have been forcibly isolated and segregated. Plaintiffs are additionally facing forced institutionalization.

79. Defendant Cansler's failure to reasonably modify the CAP-MR/DD waiver service definitions to allow Plaintiffs to combine residential staffing services to achieve a full twenty-four hours of continuous staffing constitutes unlawful discrimination in violation of Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 and its implementing regulation, 28 C.F.R. 41.51(d). Plaintiffs are entitled to reside in the most integrated setting appropriate to their needs. Plaintiffs, with reasonable modifications to the CAP-MR/DD waiver service definitions that allow them to combine residential staffing services can successfully maintain their community placement in their own homes, each of which is the most integrated setting appropriate to their needs.

80. Defendant Salacki's failure to exercise her discretion in accordance with SB § 10.21B (see First Claim for Relief) and make available non-Medicaid state funds for the residential staffing services that Plaintiffs require to avoid segregation and institutionalization, and to remain in their integrated home settings that are appropriate to their needs constitutes unlawful

discrimination in violation of Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 and its implementing regulation, 28 C.F.R. 41.51(d).

RELIEF REQUESTED

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

1. Declare Defendant Cansler's failure to make reasonable modifications to the service definitions in the CAP-MR/DD waiver to be unlawful discrimination in violation of Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.

2. Declare Defendant Salacki's failure to exercise her discretion and award Plaintiffs non-Medicaid state funds pursuant to SB § 10.21B to be unlawful discrimination in violation of Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.

3. Grant preliminary and permanent injunctions enjoining Defendant Cansler and his officers, agents, employees, attorneys, and all persons who are in active concert or participation with him from failing to make reasonable modifications to the CAP-MR/DD waiver service definitions and requiring Defendant Cansler and his officers, agents, employees, attorneys, and all persons who are in active concert or participation with him to continue the provision of individualized coverage of Plaintiffs' service needs in the least restrictive, most integrated setting that is their own home.

4. Grant preliminary and permanent injunctions enjoining Defendant Salacki and her officers, agents, employees, attorneys, and all persons who are in active concert or participation with her from failing to exercise her discretion to make non-Medicaid state funds available to Plaintiffs, and requiring Defendant Salacki and her officers, agents, employees, attorneys, and all persons who are in active concert or participation with her to continue the provision of

individualized coverage of Plaintiffs' service needs in the least restrictive, most integrated setting that is their own home.

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

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

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

Dated: December 11, 2009

Respectfully submitted,

/s/ John R. Rittelmeyer
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