

STATE OF NORTH CAROLINA

FILED

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

WAKE COUNTY

2022 NOV -2 A 8:52

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)
KODY KINSLEY, in his official capacity as)
Secretary of the North Carolina)
Department of Health and Human Services,)

Defendants.)

ORDER

This matter came before the Undersigned on May 12, 2022 for a determination of injunctive relief pursuant to Rule 65(d). With the expressed consent of all parties, the Court heard the issue in Chatham County Superior Court via WebEx. After considering the materials submitted and the contentions of the parties, the Court issues the following Order granting the injunctive relief described below.

I. Reasons for Issuance

On February 4, 2020, summary judgment was granted in favor of Plaintiffs on their Persons with Disabilities Protection Act claim that Defendants unnecessarily institutionalize, or place at risk for institutionalization, people with intellectual and developmental disabilities (I/DD). In summary, the record in this case established the following:

- People with I/DD enter and remain in institutions when there is no viable community-based alternative.
- Defendants do not have in place adequate community-based services for all individuals with I/DD who prefer a community-based setting to institutionalization.
- North Carolina is over-reliant on institutions with regard to people with I/DD.
- There are thousands of people with I/DD living in institutions in North Carolina, including over 4,000 in public and private Intermediate Care Facilities, with the remainder in Adult Care Homes.
- Innovations Waiver services are an alternative to institutionalization for people with I/DD. The waiting list for Innovations Waiver services, called the Registry of Unmet Need, exceeds 16,000 people.
- The lack of availability of Direct Support Professionals (“DSPs”) is a significant barrier for individuals with I/DD in need of community-based support.
- Addressing the gaps in community-based services is necessary to prevent institutionalization, including the need to increase access to DSPs.

Systemic relief is required that addresses the needs of people with I/DD who are institutionalized, as well as those who are at risk for institutionalization. The Court allowed Defendants the opportunity to develop a plan to remedy the ongoing violation of the Persons with Disabilities Protection Act. Defendant NC Department of Health and Human Services (DHHS) employed a national consulting firm, the Technical Assistance Collaborative (TAC), which recommended that Defendants, *inter alia*:

- adopt a specific and measurable plan for reducing reliance on institutional settings for people with I/DD, including through diversion, in-reach, and reducing institutional capacity. *TAC Report*, pp. 112-113, 116-117, 119-120.
- reduce the Innovations Waiver waiting list by reallocating funds in addition to seeking additional funding and developing alternative Medicaid-funded services. *Id.* at 126-127.
- address the insufficient provider network by professionalizing the DSP workforce through credentialing and appropriate compensation. *Id.* at 124-125.
- reduce reliance on state-operated facilities by redirecting state staff toward supporting beneficiaries in the community. *Id.* at 124.
- implement a system for ensuring measurable progress. *Id.* at 125-126.

Defendants have not implemented these recommendations, have not remedied their ongoing violation of the Persons with Disabilities Protection Act, and have not provided the Court with an actionable plan with specific and measurable goals for compliance.

II. Definitions

The following definitions apply to the terms of this Order:

Adult Care Home. An assisted living facility licensed under N.C. Gen. Stat. Chapter 131D; *see also, Pashby v. Delia*, 709 F.3d 307, 322 (4th Cir. 2013) (holding that residing in an Adult Care Home qualifies as institutionalization).

Divert or diversion. Providing sufficient community-based services to individuals who are being considered for admission to a public or private Intermediate Care Facility or an Adult Care Home such that they are no longer considered as being appropriate for admission, or who would otherwise have entered an institutional setting but for timely intervention. The fact that an

individual is denied admission to an institution is not, in itself, sufficient; the individual will be considered to have been diverted only if the individual's admission was prevented by the provision of additional home or community-based services. If Defendants opt to implement a pre-admission or other assessment tool to identify and count qualifying diversions, such tool must be approved by the Court in order for the outcomes to be used to satisfy the terms of this Order.

Informed choice. A decision made by an individual residing in an institution about whether to transition to community-based supports and services. Informed choice may require sustained education and opportunities for visits to community-based settings, as well as efforts to remove barriers to transition.

Innovations Waiver. The federal Medicaid 1915(c) Home and Community Based Services (HCBS) waiver approved by the Centers for Medicare and Medicaid Services. In the event the name or designation of the Innovations Waiver changes, references to Innovations should be deemed to refer to the then-current I/DD HCBS waiver.

In-Reach. Frequent education efforts targeted to individuals in institutional settings. In-Reach includes providing information about the benefits of community-based services; facilitating visits in community-based settings; and offering opportunities to meet with other individuals with disabilities who are living, working and receiving services in integrated settings, with their families, and with community providers. In-Reach involves face-to-face interaction to engage with each individual and establish rapport.

Institution or institutional setting. A state operated or privately operated Intermediate Care Facility, including without limitation the three DHHS state operated developmental centers, or an Adult Care Home.

Intellectual and Developmental disabilities. An intellectual disability (ID) is defined as having “significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before age 22.” N.C. Gen. Stat. § 122C-3 (22). A

developmental disability (DD) is a condition that manifests before age 22, is likely to continue indefinitely, reflects a need for lifelong or extended services, and produces functional limitations in three or more of the following areas: self-care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living, and economic self-sufficiency. N.C. Gen. Stat. § 122C-3 (12a).

Intermediate Care Facility / ICF. A state operated developmental center (Developmental Center) or private facility meeting the federal Medicaid definition for ICF/IID.

Registry of Unmet Need or Registry. The waiting list for an Innovations Waiver slot or services.

Transition. Providing an individual with the necessary supports and services to move to a community-based setting, often after a period of sustained In-Reach activities designed to ensure that the individual may make an informed choice about community-based options.

III. Terms of Injunction

A. Benchmark 1: Divert and Transition Individuals from Institutionalization

Defendants shall divert or transition those who do not oppose a community-based setting, and for whom a community-based setting is appropriate, as follows:

- By January 1, 2024, Defendants shall divert or transition 100 individuals with I/DD from institutional settings to community-based settings.
- By January 1, 2025, Defendants shall divert or transition 300 individuals with I/DD from institutional settings to community-based settings.

- By January 1, 2026, Defendants shall divert or transition 600 individuals with I/DD from institutional settings to community-based settings.
- By January 1, 2027, Defendants shall divert or transition 1000 individuals with I/DD from institutional settings to community-based settings.
- By January 1, 2028, Defendants shall divert or transition 1500 individuals with I/DD from institutional settings to community-based settings.
- By January 1, 2029, Defendants shall divert or transition 2100 individuals with I/DD from institutional settings to community-based settings.
- By January 1, 2030, Defendants shall divert or transition 2700 individuals with I/DD from institutional settings to community-based settings.
- By January 1, 2031, Defendants shall divert or transition 3000 individuals with I/DD from institutional settings to community-based settings.
- After January 1, 2028, Defendants shall ensure a cessation on new admissions to institutional settings. This cessation on new admissions does not apply to or bar the use of institutional settings for respite or short-term stabilization.

At least 25% of the benchmark for each year must be achieved through transitions out of institutional settings and into sustainable home and community-based settings. Transitions may include the conversion of the service model of a resident's institutional setting provider to a community-based setting provider.

The diversion and transition numbers in Section III.A are cumulative, but one individual cannot be counted toward the cumulative total more than once. For example, if an individual enters, or returns to an ACH or ICF after having been counted toward compliance with this section, and then that individual is again transitioned out of an ACH or ICF, that individual

cannot count again towards the cumulative total. If an individual enters, or returns to an institutional setting after having been counted toward compliance with this section, then that individual shall be deducted from the cumulative total.

Nothing in this Section III.A or elsewhere in this Order may be deemed to require an individual to be diverted or to transition from an institution when that individual does not wish to be diverted or transition, or when a diversion or transition is not medically appropriate. The benchmarks above shall track the successful diversions and transitions of those who want to receive services and supports in the community.

Defendants shall reduce reliance on institutional settings based on the informed choice of residents. This Order does not require the closure of specific institutional settings, and nothing in this Order shall be deemed to require closure of any institutional setting.

B. Benchmark 2: Increase Access to Home and Community Based Services

Defendants shall reduce the 16,314 member Registry of Unmet Need as follows:

- By July 1, 2023, reduce the number of people on the Registry to 14,683.
- By July 1, 2024, reduce the number of people on the Registry to 13,051.
- By July 1, 2025, reduce the number of people on the Registry to 11,420.
- By July 1, 2026, reduce the number of people on the Registry to 9,788.
- By July 1, 2027, reduce the number of people on the Registry to 8,157.
- By July 1, 2028, reduce the number of people on the Registry to 6,526.
- By July 1, 2029, reduce the number of people on the Registry to 4,894.
- By July 1, 2030, reduce the number of people on the Registry to 3,263.
- By July 1, 2031, reduce the number of people on the Registry to 1,631.
- By July 1, 2032, reduce the number of people on the Registry to zero.

Defendants may reduce the Registry by any combination of reallocated or additional funding, or the provision of comparable other services where the individual chooses to decline an Innovations Waiver slot as a result. Defendants may also seek, by consent of Plaintiffs or permission of the Court, to count toward this benchmark individuals whose service needs are met and fully funded through community-based services programs other than the Innovations Waiver. This would include but not be limited to services funded through the 1915(i) service option and/or other service programs used to fully fund an individual's service needs. Defendants shall not reduce the number of people on the Registry by changing the qualifications or requirements for placement on the Registry, or by imposing new requirements for remaining on the Registry, or by conditioning the provision of other services on the relinquishment of the individual's place on the Registry.

C. Benchmark 3: Address the Direct Support Professional Deficit

In order that the Court may enter specific benchmarks for increasing access to Direct Support Professionals, Defendants shall report the following to Plaintiffs by January 9, 2023:

1. Data showing the number of Medicaid and state-funded service hours for people with I/DD authorized by Local Management Entities / Managed Care Organizations (LME/MCO) but not delivered due to staffing shortages during state fiscal year 2022. *See* N.C. Gen. Stat. § 122C-117. Defendants should report this data by LME/MCO and month, to the extent the data exists in this form. Within 30 days of receiving this data from DHHS, the parties through counsel shall meet and confer on whether and how the existing data can be used to develop a baseline and schedule and/or whether alternative data will need to be developed to accomplish this. Within 14 days after that meeting and

conference, the parties may submit proposed benchmarks to the Court relating to Direct Support Professionals.

2. The status of any efforts to establish a professional credentialing process for Direct Support Professionals, including any contracting undertaken.

After the submission of the above information, and following additional submissions by the parties relating to the issues addressed in Section III.C, the Court shall issue a further order relating to specific and measurable goals for the expansion of access to Direct Support Professionals.

D. Quarterly Reporting

Defendants shall report on their compliance with this Order as follows:

1. Matters to be reported:
 - a. The number of individuals diverted from institutional settings during the preceding fiscal quarter, each preceding fiscal year (if applicable), and cumulatively.
 - b. The number of people transitioned from institutional settings during the preceding fiscal quarter, each preceding fiscal year (if applicable), and cumulatively.
 - c. The number of people remaining on the Registry, and the number removed from the Registry during the preceding fiscal quarter, each preceding fiscal year (if applicable), and cumulatively. The reporting of the number removed from the Registry shall specify the number who received an Innovations Waiver slot, the number who declined an Innovations Waiver slot when it was offered, the number who died, the number who were removed because they were not qualified to remain on the Registry, and the number who were removed for another reason.
 - d. Any additional data required by subsequent orders of the Court.

e. By future order the Undersigned will address the issue of confidential reporting by Defendants of the name and contact information for each individual counted in the foregoing reports, including the name and contact information for the individual's guardian, if applicable, and the category or categories in which the person was counted. Contact information includes telephone numbers, address, and email address.

2. Reporting schedule:

- a. Reporting for the fourth quarter of 2022 shall be made by March 15, 2023.
- b. For each subsequent state fiscal quarter, reporting shall be made by the 15th day of the third month following the end of the quarter. If the 15th day falls on a weekend or a state holiday, reporting shall be made by the following day that is not a weekend day or a state holiday.
- c. Additional reports may be required by the Court on such schedule as the Court may set.

3. Dissemination of quarterly reports: Defendants shall provide each quarterly report to the Court and counsel to the Plaintiffs. Defendants shall make the quarterly report data, without individually identifying information, readily available on the NC DHHS website and in accessible formats.

IV. Jurisdiction and Further Orders

The Undersigned retains jurisdiction of this matter and may issue further orders regarding injunctive relief and other matters.

WHEREFORE, IT IS ORDERED THAT:

1. Defendants shall comply with the benchmarks in Sections III.A. and III.B and the reporting requirements of Section III.D; and
2. Defendants shall submit the data required in Section III.C.

SO ORDERED this 31 day of October, 2022.

A handwritten signature in black ink, appearing to read 'A. Baddour', written over a horizontal line.

THE HONORABLE ALLEN BADDOUR
SUPERIOR COURT JUDGE PRESIDING
DESIGNATED PURSUANT TO TENTH
JUDICIAL DISTRICT LOCAL RULE 2.2

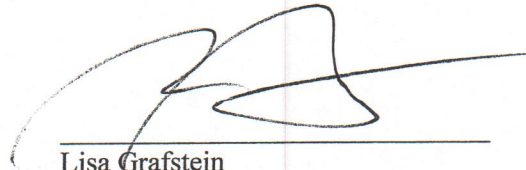
CERTIFICATE OF SERVICE

This is to certify that the undersigned has served a copy of the foregoing **Order** on Defendants by depositing a copy hereof, postage prepaid, in the U.S. Mail, addressed to counsel for the Defendants as follows:

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

This 2nd day of November, 2022.

DISABILITY RIGHTS NORTH CAROLINA



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