STATE OF NORTH CAROLINA

WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
17 CVS 6357

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WAKE CO. C.S.C.

BY

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., MICHAEL A. and DISABILITY RIGHTS NORTH CAROLINA,

Plaintiffs,

v.

STATE OF NORTH CAROLINA, THE 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.

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO STAY ENFORCEMENT OF ORDER ENTERED NOV. 2, 2022 (REMEDIES ORDER)

(Case Designated Under Rule 2.2 and assigned to Judge Baddour.)

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NOW COME Defendants, the State of North Carolina ("State"), the North Carolina Department of Health and Human Services, and Kody Kinsley, in his official capacity of Secretary of the Department of Health and Human Services (together, "DHHS"), by and through undersigned counsel, pursuant to Rules 62(a), 62(d) and 62(e), and submit this memorandum in support of their *Motion to Stay Enforcement of the Order Entered November 2, 2022* (the "Remedies Order"). To avoid irreparable injury to Defendants and more importantly to the State's community of people with disabilities, Defendants are asking the Court to stay its enforcement of certain portions of the Remedies Order, described below.

INTRODUCTION

Defendants are deeply committed to the vital principles embodied in the Supreme Court's *Olmstead* decision. DHHS fully supports the goal of shifting away from over-reliance on institutional settings to build a system that supports the authority and dignity of all people with disabilities to live meaningful lives in the community setting of their choice. North Carolina strongly believes that all people with disabilities have the right to receive needed long-term and healthcare services in the most integrated setting appropriate to their needs. This does not mean that individuals may be required to leave a facility or congregate care setting they have chosen. Instead, it means that individuals must be given options and information to make informed decisions to identify the services and settings to best meet their needs. The State's Olmstead Plan, published in January 2022 after more than three years of development work and stakeholder input, embodies both self-determination and individual choice.[1]

Respectfully, as explained below, portions of the Court's Remedies Order are deeply concerning to Defendants, to some people with disabilities, to their families, and to the provider community. In several respects, the Remedies Order directly undermines the careful planning of

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[1] See Notice of Filing (April 26, 2022), **Ex. C** ("Olmstead Plan"). Reflecting the principles of dignity and self-determination, the Plan's goal is to offer choices to individuals and families about where they can live and receive services – depending on each person's individual preferences and needs. The Olmstead Plan shows how the State will move away from using institutions, nursing homes, day programs and sheltered workshops, and how it will support people with disabilities to live in their own homes, work and be part of activities of their choice. The Plan promotes true choice and self-determination by building community options sufficient to meet an individual's needs. The Plan recognized that progress must be incremental, steady and sustained. See Olmstead Plan, at 17 ("The Department of Health and Human Services (DHHS) does not have the staffing capacity or the financial resources to address immediately every system gap or challenge; nor can the Department resolve all systemic barriers alone"). Realistically, it will take time to change decades-old ways of providing services. Even so, the State's remedial efforts already have resulted in genuine improvements for individuals with I/DD, and individuals with other disabilities.

the State's Olmstead Plan, and runs contrary to principles of self-determination and individual choice.

First, the Order ***takes options away*** from people with disabilities by ordering a mandatory cessation of new admissions to institutional settings (Order, Sec. III.A, Benchmark 1). This is not in the spirit of *Olmstead*, which calls for more choices, not fewer. While the cessation requirement officially becomes effective after January 1, 2028, it has an immediate adverse effect today on individuals with disabilities, their families, and providers. The requirement already has created uncertainty, confusion and fear about long-term planning. Many families and providers have contacted DHHS to express their concerns and the impact it is having on them.

Even Plaintiff DRNC has expressed concern about the cessation requirement, acknowledging fear in the disability community. Publicly, DRNC announced it is willing to "pause" the cessation requirement and work with DHHS on alternatives that respect individual choice. DRNC even drafted a proposed joint motion to stay the 2028 cessation requirement, to allow the parties to collaborate. *See* Sec. I.B.2, *infra*.

Second, the aggressive numeric schedules imposed by Benchmark 1 and Benchmark 2 would require a rapid movement of individuals away from institutions and into community settings. These provisions do not appear to be realistically or reasonably achievable, given the serious economic and systemic barriers that must be addressed to build system capacity **before** large numbers of individuals can be transitioned into community settings. This is concerning because North Carolina already has a serious shortage of Direct Service Professionals ("DSPs") in the workforce. The schedules in the Order do not afford the time needed to develop this necessary workforce, nor do they recognize that our community systems currently lack capacity to support a rapid influx of people with significant disabilities. The benchmarks, if enforced at this time,

without building capacity first, will further overburden the current system of care, leaving fewer options for people with disabilities.

Additionally, without a stay, DHHS will be required to change its planning and redirect its human and financial resources to focus on compliance with the Court's Order, rather than ongoing implementation of the Olmstead Plan. This will immediately and irreparably harm DHHS, as more than 3 years and thousands of hours of work will be upended.

For these reasons, and as further described below, Defendants have no choice but to appeal the Remedies Order,[2] and to ask the Court to stay enforcement of parts of that Order pending that appeal.

DEFENDANTS MOVE TO STAY ENFORCEMENT OF BENCHMARK 1, BENCHMARK 2, AND THE ASSOCIATED REPORTING OBLIGATIONS FOR THE DURATION OF THE APPEAL

Defendants respectfully ask the Court to stay two provisions of the Remedies Order: Benchmark 1 and Benchmark 2, and the reporting requirements associated with both. *See* Order, Sec. III.A, III.B and III.D. Unless a stay of enforcement is entered at this time, Defendants, some people with disabilities, and providers, will suffer irreparable harm before the appeal can run its course.

Benchmark 1 directs Defendants to divert new and transition existing individuals with intellectual and other developmental disabilities ("I/DD") away from institutional settings and into community-based settings. Order, at III.A. In the final bullet, the Order provides that Defendants

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[2] As noted in the Notice of Appeal, filed contemporaneously, Defendants are appealing both the Order entered February 4, 2020 (granting partial summary judgment to Plaintiffs and denying summary judgment to the State Defendants) and the Order entered November 2, 2022 (Remedies Order). However, for purposes of this motion, the State asks only for a limited stay of parts of the Remedies Order.

"shall ensure a cessation on new admissions to institutional settings" after January 1, 2028.[3] Benchmark 1 also provides a schedule by which Defendants must divert or transition a total of 3,000 individuals by January 1, 2031. Defendants are deeply concerned about these requirements and the impact they will have.

Benchmark 2 requires Defendants to reduce the Registry of Unmet Need from 16,314 down to zero by July 1, 2032. Order, at III.B. The first requirement towards meeting the July 1, 2023 directive is just seven months away, when the State must reduce the Registry to 14,683. *Id.* Defendants are deeply concerned about the Registry Reduction requirement, as there is neither current funding to support new Innovations Waiver Slots, nor will the State be able to operationalize 1,631 waiver slots by the deadline of July 1, 2023 (plus divert or transition another 100 individuals with I/DD by Jan. 1, 2024, under Benchmark 1). Even under a scenario where DHHS is doing everything it can to meet these requirements within seven months, compliance is not reasonably achievable at this time.

Because they are connected to Benchmark 1 and Benchmark 2, the State also seeks to stay the quarterly reporting requirements set forth in Section III.D of the Order. By March 15, 2023, the Order requires the State to provide its first quarterly report to the Court and to Plaintiffs, which must track the State's compliance with Benchmark 1 (diversion and transition numbers) and Benchmark 2 (registry numbers).

Defendants are not seeking to stay the remaining portions of the Remedies Order, to the extent they impose requirements independent of Benchmark 1 and Benchmark 2 and reporting thereupon. Specifically, the State does not seek to stay Benchmark 3, which requires the State to

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[3] The "Cessation of New Admissions" requirement is not limited to individuals with I/DD, which was the focus of the Complaint. Order, Sec. III.A.

report by January 9, 2023 on certain data relating to Direct Support Professionals, including historic data on service hours, staffing shortages, and current efforts to establish a professional credentialing process for DSPs. Order, at III.C. Unlike Benchmark 1 and Benchmark 2, the provisions in Benchmark 3 do not irreparably harm the State or its disabled population, and the State is not seeking to stay it.

* * *

Defendants reiterate that North Carolina remains fully committed to the State's residents with disabilities, to their families, to the *Olmstead* decision and its emphasis on self-determination, personal choice, and options to receive services in the setting of their choice. A stay of the Remedies Order, if granted, does not let the State off the hook, or disadvantage the disability community. Quite to the contrary, during the time period of the appeal, North Carolina and DHHS will continue working as hard as they can to implement the Olmstead Plan, and to increase the availability and capacity of community systems needed to shift from institutions to communities where people with disabilities have improved biopsychosocial outcomes and no longer seek institutional levels of care because there is not community based options or when they are in crisis.

LEGAL STANDARD

After a notice of appeal has been filed, Rule 62(a) authorizes a trial court to stay execution of an interlocutory order or final judgment in an action for an injunction, as here. Rule 62(d) authorizes a trial court to stay execution of an order, subject to the automatic stay exceptions in Rule 62(a). In determining whether to grant a discretionary stay pending appeal, trial courts focus on prejudice or irreparable harm to the moving party should a stay not be issued. *130 of Chatham, LLC v. Rutherford Elec. Membership Corp.*, No. 14 CVS 711, 2014 WL 3809066, at *3 (N.C. Super. July 31, 2014); *Home Indem. Co v. Hoechst Celanese Corp.*, 128 N.C. App. 113, 117–19, 493 S.E.2d 806, 809–10 (1997).

Pursuant to Rule 62(e), where an appeal is taken by the State or a State agency, and the trial court issues a stay pending appeal, "no bond, obligation, or other security shall be required from the appellant."

ARGUMENT

I. THE COURT SHOULD STAY BENCHMARK 1 AND BENCHMARK 2 (AND RELATED REPORTING REQUIREMENTS) FOR THE DURATION OF THE STATE'S APPEAL.

Respectfully, the State requests that the Court stay the provisions of its Remedies Order that, if enforced at this time, pending appeal, will have an immediate negative impact upon the State, the I/DD system of care by which it provides services and supports for its most vulnerable citizens, and most importantly, the people with disabilities and families who will be negatively affected by the order.

Defendants are deeply concerned that Benchmark 1 (cessation of all new admissions coupled with diverting/transitioning 3000 individuals from institutions to community settings) and Benchmark 2 (reducing the registry from 16,314 down to zero, thereby rapidly adding thousands of individuals to community settings), if enforced, will have serious negative consequences in the immediate future. Benchmark 1 and Benchmark 2 impose affirmative obligations that are overly aggressive and too fast, given the existing crisis-level shortage of Direct Service Professionals and available, accessible, affordable, inclusive housing in North Carolina. *See* Notice of Filing (Nov. 30, 2022), **Ex. A** (Affidavit of Dave Richard, DHHS), ¶¶ 6-8. Defendants are concerned that these obligations are not reasonably achievable and that their pursuit will disrupt the State's efforts to make meaningful progress on their underlying goals. At the same time, the obligations will threaten and harm the stability of North Carolina's community-based ICFs, thereby taking away choice and negatively affecting thousands of individuals who have explored all other community-based services, and yet have needs that require more support than the current system (and their

families) can provide. *Id.*

While it is understandable that some advocates want the State's de-institutionalization efforts to move aggressively, the desire for speed is not a compelling reason to impose obligations that are not reasonably or realistically achievable. Defendants' concerns – too much, too soon, creating major problems for disabled individuals – exactly mirror the warnings expressed by Plaintiffs' expert witness in this case. That expert warned about the dangers of forcing a State to move too rapidly to make systems changes:

> Question: And then "timelines for implementation," I think that's pretty self-explanatory. But can you explain what you mean by that?
>
> Answer: Yes. If the numbers are large, the timelines -- you have to be -- for budgetary purposes, you have to be relatively practical and realistic about when you can actually deliver it.
>
> **So some plans, if they are too ambitious, they fall over, in essence.** They don't meet their targets because they -- they weren't well thought through. So it's -- from a -- you know, from an administrative program and development point of view, **you want to be very realistic about the outcomes and the timeliness of them.**
>
> Because if people are waiting for something that's not in place, you know, you're creating a kind of mistake to move people into it at that point. So for people that operate these services and systems, having a plan just makes a lot of sense.

See Notice of Filing, **Ex. C** (Deposition excerpt of Plaintiffs' expert Michael Kendrick, Ph.D.) at 42-43 (emphasis added).

Here, even the initial dates for Benchmark 1 and Benchmark 2 are very likely unachievable at this time, even in a scenario where DHHS is doing everything it reasonably can to comply. Without a stay, uncertainty about the Remedies Order and the State's ability to comply with it create undue fear and frustration for individuals with disabilities, their families, and also for owners of ICFs and ACHs.

A. Neither Benchmark 1 nor Benchmark 2 Can Reasonably Be Achieved Before the Direct Support Professional Crisis, and the Housing Crisis, are Addressed.

The State is facing multiple serious system limitations and economic conditions that impact its ability to achieve compliance with the Remedies Order. North Carolina has a serious workforce shortage of Direct Support Professionals ("DSPs") and nurses qualified to work with its most severely disabled citizens, including those with I/DD. *See* **Ex. A** (D. Richard Aff.), ¶¶ 6-8. The Remedies Order itself, in Benchmark 3, acknowledges that the DSP crisis is a genuine problem and that steps must be taken "for increasing access to Direct Support Professionals." *See* Order, Sec. III.C, at 8 (directing the parties to compile, share and discuss relevant data on the DSP crisis). The scarcity of qualified workers is deeply concerning – but not unique to North Carolina. In fact, there is a nationwide shortage of qualified DSP workers. Of course, the State must have a sufficient number of qualified DSPs in place and ready to work before large numbers of disabled individuals can safely move into the community settings in which these additional DSPs will be needed. *Id.*, ¶¶ 8-9.

Likewise, affordable, accessible, inclusive housing is severely limited in North Carolina (and elsewhere) right now. With supply severely limited, at this time North Carolina does not have sufficient available houses, apartments and other community settings to accommodate a large and rapid influx of people with disabilities.

Both Benchmark 1 and Benchmark 2, independently, if enforced at this time, will immediately increase the number of people with severe disabilities who will need placement in community settings. However, put simply, the system of community services and supports is not ready for this influx. **Ex. A** (D. Richard Aff.), ¶¶ 6-8. Moving too fast and too soon will only exacerbate the scarce supply and growing demand problem -- before there are enough qualified DSP workers and appropriate community housing options available. *Id.*, ¶ 11. To put it in

economic terms, the mandatory schedules in the Remedies Order will immediately and aggressively increase the short-term demands on the community system, at the same time that current demand exceeds the available supply of both DSPs and housing. That is a recipe for failure and frustration.

Long-term planning is needed, and groundwork must be laid, before large numbers of individuals can begin to be transitioned into community settings. *Id.*, ¶ 10. To date, the State already has taken aggressive action to address the DSP workforce shortage.[4] These steps are absolutely necessary to build system capacity – but these efforts will take time to bear fruit. *Id.*, ¶ 10. Realistically, the DSP shortage is very likely to get worse before it can get better, especially as the State is doing everything it reasonably can to divert and transition individuals into community settings (where they will need even more DSPs). This again is the "cart before the horse" problem, and a primary reason that the Remedies Order if implemented will only exacerbate the shortage and supply crisis. *Id.*, ¶ 11.

B. Benchmark 1 (Cessation of New Admissions) Will Strain the System and Create Hardships for Individuals and Families.

In addition to the overarching economic and systemic concerns expressed above, the Cessation requirement creates additional serious problems for the State's system and its citizens with disabilities. Because this provision immediately affects North Carolinians, a stay of

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[4] The State's Olmstead Plan places a priority on building system capacity, increasing rates of pay for DSPs, and initiating a credentialing process – all of which must be in place before the State can reduce institutions. That planning already has borne fruit. Working closely with the General Assembly, in 2022 DHHS took several important steps to address the goals of the Olmstead Plan. For example, funding was secured for 1,000 additional Innovations Waiver slots. A recurring appropriation of $210 million was authorized; this raised the hourly rate for Innovation service by $2.10, allowing for wage increases for many DSPs. Rates were increased by over $4/hour for In Home Personal Care Services (PCS), also allowing for wage increases for many DSPs. Additionally, new investments for priority commitments in the Olmstead Plan have been proposed for fiscal years 2023/2024.

Benchmark 1 is appropriate pending the State's appeal.

Personal choice and self-determination are the hallmarks of *Olmstead.* Indeed, these principles are central components of the State's Olmstead Plan and its ongoing implementation efforts. However, the Cessation requirement actually *takes choice away* from individuals with disabilities and families. No longer will an individual be permitted to live in an Intermediate Care Facility, or an Adult Care Home, even if this is his or her preferred setting. The Order if enforced will take that choice away from the individual and family. This is deeply concerning to the State, which is committed to creating opportunities and new options for individuals with I/DD, not taking choice away.

While the Cessation requirement officially becomes effective after January 1, 2028, it has an immediate adverse effect today on individuals with disabilities, their families, and providers. **Ex. A** (D. Richard Aff.), ¶ 6. Like any business, ICFs and ACHs have a business model that depends on maximizing utilization of capacity, either by adding new residents when beds are empty and/or providing services to existing residents. The Cessation requirement directly undermines the viability of those business plans. DHHS is concerned that ICFs and ACHs, recognizing that no new admissions will be permitted starting in 2028, may close their doors earlier than this, which may result in current residents being forced out and having no place to live. In this respect, the Cessation requirement affects current residents today. *Id.* The requirement creates uncertainty, confusion and fear about long-term planning.

1. Families and stakeholders are immediately affected, and concerned today.

Since entry of the Remedies Order on November 2, multiple families and other stakeholders have contacted DHHS to express their deep concerns about its effect on the system as a whole, and also upon themselves. *See* **Ex. A** (D. Richard Aff.), ¶ 9; *see also* **D. Richard Aff.**

Exs. 1-10 (emails received by DHHS). These families and providers have expressed pressing concerns about the Cessation of New Admissions requirement.

- From a father of an 18-year old living in an ICF in Wake County:

  I am deeply concerned about the implications of the Order, not only for my daughter, but for our family, and our community.... I attended the recent Disability Rights NC Town Hall and came away with an even greater concern about the impact of the Order....

  Financially, **the ruling to stop new admissions at ALL ICFs by 2028 will have a disastrous, erosive impact now, in 2028 and beyond.** Currently-operating smaller ICFs will be unable to invest in their current operations, knowing that there is no real "future" for these homes, and homes will gradually fall into decay as the population dwindles. As children and young adults pass away, the funding sources will shrink, any type of "scale" that a smaller ICF operator might have will diminish and they will become financially unstable - and be shut down....

  I'll conclude by saying that Parents should have some input into the CHOICE of care for their loved ones.

- From a woman whose brother lives in an ICF:

  Causing this facility to close will uproot him from his family and normal routine.... This action affects individuals with medically complex needs.... We should NOT stop admissions to these institutions in 2028. Just because the order has some merits, does not mean it is a finished product. Remove the part where it says people will no longer have the choice to live in an institution starting in 2028. Don't pretend that you can just go forward and put out the fires as they arise. Start with an order that is fair. Go from there.

- From a woman whose brother wants to remain in his current ICF group home:

  While I support the order increasing the number of innovation slots, thus eliminating the waiting list, and the requirement to resolve the Direct Support Professional worker shortage, **I do not agree with stopping admissions to community ICF homes by the year 2028. Limiting admissions in this way ultimately will force the closure of a valuable component of the array of services supporting certain individuals' ability to remain in and participate in their home communities....**

  Placing a child at [an ICF group home] is a difficult and thoughtful decision for any parent to make, yet parents have chosen placement there because they feel it is appropriate for their children and facilitates those children continuing to participate in the life of their family and community. A community-based ICF group home is a choice that should not be taken away from the family's array of choices.

The court order as it stands will threaten and harm the stability of North Carolina's community-based ICF's. It most certainly will be harmful to the residents who call [her brother's ICF] home. I support a broad spectrum of I/DD services, and closing the doors to proven and integral community services is not acceptable.

- From the father of a 17 year old with severe physical and intellectual disabilities, who wants to remain in his current ICF group home:

  Although the Order says it is not their intent to shutter ICFs which may be used for short-term transitional needs, **it will change the nature of these facilities and may actually jeopardize their economic viability**, thus removing them as an option not only for future residents as the Order mandates, but for current residents like [my son] who wish to stay at [this ICF facility] ....

  We do not want to impede progress as outlined in much of the Order, but as it is currently written we feel the impact to ICFs would be a big step backward.

- From a father whose daughter wants to remain in her current ICF home:

  We now are very concerned that this ruling could, when new admissions to ICFs are prohibited, lead to the possibility that [my daughter's ICF] cannot afford to keep its residential services open, forcing us to find an alternative living arrangement for [my daughter]. A group home is not appropriate for her; we and all her caregivers determined that over two decades ago. A community-based ICF was the right choice for her then, and still is.

- From a doctor who works with I/DD patients:

  If group homes are not allowed to admit anyone after 6 years, they may be forced to close. Without new admissions, eventually there will be less individuals in the home thus decreasing the funds available for the home to function.... We cannot take services away from those who thrive in a group home setting. We also must consider what happens to these individuals when the family members that they live with die. If there are no new admissions to group homes, where will these individuals live? I am asking that the state try and find a way to assist those living in the community without taking away from those living in group homes.

- From a representative of a rehabilitation center:

  [The Cessation Requirement] will eventually lead to the elimination of a service options that are necessary for individuals with the most profound disabilities.... I honestly believe their health and safety would be placed at significant risk if these dependable community-based facility options were [eliminated].

- From a representative of an ICF:

Although there are parts of this order that we and DRNC may agree on, the portion to close NC Community ICF's is one that will be a disaster to thousands with whom we are charged with protecting.

- From a representative of an ICF:

  The current order will destabilize the entire ID service system while closing much needed community ICF's leaving no community service for those with severe and profound medical or behavioral needs. ICF's are vital for individuals that need that level of service. Where will they go? Who will take care of them?

- From a representative of a service provider:

  These issues have long been pressing and great strides have been made to address them, but the timeline and demand for ultimate closure of ICFs has the potential to destabilize our entire system. This court order potentially removes much needed community ICF's which would be catastrophic for those with severe and profound medical and/or behavior needs as they would have limited or no community service option.

  The aggressive nature of this ruling and the timelines associated place an immense and unrealistic burden on our state's healthcare system and economy regardless of how you view the citizens whose lives will be disrupted and/or endangered.

See D. Richard Aff., ¶ 9 and Notice of Filing, **Exs. 1-10** (excerpts from de-identified emails sent to DHHS leadership since entry of the Remedies Order on Nov. 2, 2022). The concerns expressed above by families and providers echo the concerns Defendants have expressed throughout this litigation (*i.e.*, Plaintiffs seek to move too aggressively and demand fundamental alterations to systems established over decades; concerns about making rapid changes without involving stakeholders; concerns about respecting self-determination and preserving choices for individuals, which are the hallmarks of *Olmstead;* concerns about taking away individual choices by shuttering facilities).

2. DRNC is concerned about the Cessation Requirement, and even proposed a "pause" or modification.

Publicly, Plaintiff DRNC has acknowledged the concerns expressed by families and other stakeholders about the Cessation requirement (which DRNC advocated to be included in the

Remedies Order). DRNC even publicly offered to "pause" this requirement to work with DHHS on alternatives to shuttering ICFs and preserving individual choice. In a statement on November 23, DRNC explained:

> As we understand it, your concern is that ICFs will be forced to close if they are not able to fill beds after January 1, 2028. The issue is that providers have said they will have to close if some people choose to leave an ICF because they cannot afford to keep locations open when not all of the beds are filled under the current operating/payment system....
>
> **[W]e have proposed a pause while we work this issue out alongside the community, providers, and the state.**

Id. ¶ 3 (emphasis added).

> The bottom line is that we don't want anyone to be forced to leave a setting they want to stay in, and will work with the community and the state to ensure that people retain the choice about this very personal decision....
>
> We suggested that, rather than appeal because of this issue, the state work with us to make sure all settings are high quality and allow for the maximum amount of integration. If the state is willing to do that, **we can pause the part of the Order that people are concerned about.**

Id., ¶ 1 (emphasis added). *See* Notice of Filing, **Ex. B** (DRNC Statement).

Consistent with its public comments about a "pause," DRNC even drafted a proposed joint motion to pause and modify the 2028 cessation requirement, to allow the parties to collaborate on alternatives. *See* Notice of Filing, **Ex. D** (DRNC draft of proposed joint motion to modify the order). DRNC's draft acknowledged, "Since the entry of the Order, providers of private ICF services and family members of those living in private ICFs have raised concerns regarding the potential consequences of the 2028 cessation on current residents." *Id.*, ¶ 2. Families "have expressed concern that private ICFs could close, leaving residents without a suitable placement if other alternatives have not been sufficiently developed by 2028." *Id.*, ¶ 4. To address these concerns, DRNC proposed to modify the cessation requirement. *Id.*, ¶¶ 6-8.

On November 29, counsel for the respective parties discussed DRNC's proposed joint

motion. Defendants explained why they cannot support it (i.e., DRNC's proposal only addresses one aspect of Defendants' concerns about the cessation requirement but in no way addresses Defendants' other concerns about Benchmark 1 and Benchmark 2 as expressed herein; also, the 30 day time period to appeal runs this week). Defendants explained they have no alternative but to notice an appeal and move for a stay. DRNC responded it may need to oppose the motion to stay and the appeal.

For all of these reasons, the State respectfully asks the Court to stay enforcement of Benchmark 1, including but not limited to its Cessation of New Admissions Requirement, pending appeal.

C. Benchmark 2 (Rapid Reduction of the Registry of Unmet Need) Will Strain the System.

Defendants are also deeply concerned about the Registry Reduction requirement, and respectfully request that it be stayed pending appeal. Benchmark 2 obligates the State to reduce the Registry of Unmet Need from 16,314 down to zero by 2032. *See* Order, at III.B. The first interim milestone is July 1, 2023, just seven months away, by which the State must have reduced the Registry by 1,631, down to 14,683. DHHS does not believe that these requirements are reasonably achievable, even assuming best efforts. *See* **Ex. A** (D. Richard Aff.), ¶ 11.

The first problem is that the Registry of Unmet Needs is expected to increase in coming years. *Id.*, ¶ 11. This increase is not due to any fault or failing by the State Defendants; to the contrary, this increase is due to demographics and other factors beyond the State's control. For example, the universe of people with disabilities is growing each year. In part, this is due to births, increased life span as well as people moving to North Carolina. *Id.* Also, the State is seeing increases in the rates of autism. Additionally, DHHS is aware that certain populations, including individuals in rural areas and non-white individuals, currently are underrepresented on the Registry

and in the Waiver. *Id.* To address this historical undercount, DHHS and the LME-MCOs have worked and continue to work to add members who are potentially eligible for the Innovations Waiver to the Registry, even if the individual does not have an emergent service need. This is to ensure that people have access to services when their needs change. All of this means the Registry is going to increase.

Therefore, while there were 16,314 people on the Registry at the time the Remedies Order was entered, the State knows that this number will be going up. This makes it increasingly difficult for the State, with each passing year, to achieve compliance with the interim numbers specified for 2023, 2024, 2025, and so on. DHHS does not believe it can reasonably comply with the requirement to reduce the number of people on the Registry to 14,683 by July 1, 2023, seven months away.[5] *See* **Ex. A** (D. Richard Aff.), ¶ 12.

The second problem with Benchmark 2 is that it overlaps with and therefore potentially exacerbates the "supply and demand" problems associated with Benchmark 1, addressed above. These two requirements are inter-related, and pushing for too much, too soon, before community systems are ready to accommodate this large influx of individuals with disabilities, undermines both requirements. Overly aggressive systems change is a recipe for failure. *See* Notice of Filing, **Ex. C** (Deposition excerpt of Plaintiffs' expert Michael Kendrick, Ph.D.) at 42-43 (emphasis

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[5] It is incorrect to believe that every person on the Registry is lacking the services she needs, or that she will be deprived of services until a Waiver slot becomes available. Much to the contrary, the Registry does not represent people who do not receive the services they need. For example, DHHS knows that certain individuals currently receive CAP-C or CAP-DA services, ICF services, or ICF "In Lieu Of" services. At the same time, these individuals also may remain on the Registry – despite receiving very good non-Waiver services. Likewise, when Tailored Plans go live in 2023, individuals will start receiving Medicaid Section 1915(i) services, but also may remain on the Registry. This underscores that the Registry is a complicated issue. Reducing the number of people on the Registry does not automatically mean that more people will start receiving services.

added). Benchmark 1 and Benchmark 2 together will create unsustainable strains on the State's already over-taxed community support system. *See* **Ex. A** (D. Richard Aff.), ¶¶ 5-6 There will become a time when specific, numeric targets and timelines like the ones in the Remedies Order may make sense. However, until and unless the groundwork has been laid, the DSP workforce is bolstered and ready, and appropriate housing is developed and available, both Benchmarks are not realistically achievable. *Id.*, ¶¶ 7-10.

Last, the State is also greatly concerned that Benchmark 2 requires a Registry of zero by July 1, 2032. *See* Order, III.B, final bullet. DHHS does not believe this provision is realistic or reasonably achievable. **Ex. B** (D. Richard Aff.), ¶ 11. In fact, a goal of zero may well be unachievable in any State, given scarce resources and shifting demographics, unless individuals receiving other related services can be considered to be not actively waiting for an Innovation slot.[6]

For all these reasons, respectfully, the Court should stay enforcement of Benchmark 2 and each of its numeric goals pending the State's appeal.

D. Unless a Stay is Entered, Three Years of DHHS Planning Will be Upended, Which Irreparably Harms Defendants.

Finally, Defendants respectfully submit that a stay is appropriate, pending appeal, to avoid upending more than three years of planning, by dozens of representatives and consultants, that resulted in the Olmstead Plan (published in January 2022), plus more than eleven months of work implementing that Plan. **Ex. B** (D. Richard Aff.), ¶ 13. Without a stay, there would be immediate, irreparable harm to Defendants.

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[6] Nor is a "zero" waiting list required under federal law. Olmstead requires "a waiting list that move[s] at a reasonable pace," but certainly does not demand a system with no waiting list at all. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 605-06 (1999) (a State may support a "fundamental alteration defense" and rebut a discrimination claim under the integration mandate if "it had a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated").

If DHHS changes its planning and redirects its human and financial resources to focus on the Order, rather than continuing its implementation of the Olmstead Plan, the costs would be great. Momentum on its Olmstead Plan would be slowed or diverted, and certain priority initiatives would be jeopardized, despite best efforts. The following lists just some of the many key initiatives that would be negatively affected, absent a stay:

- Timely implementation of the Department's Housing Strategic Plan, which is an essential foundation to increasing inclusive community living options for individuals with I/DD and other disabilities (exacerbated by the potential closures of small and specialty private ICFs/ID). This includes without limitation:
    - By December 31, 2023, increasing by 12 percent the number of Innovations beneficiaries with I/DD utilizing Supported Living levels 2 and 3 to assist individuals with living in their own home in the community.
    - By December 31, 2023, working in partnership with the LME/MCOs, increasing by five percent the number of individuals with TBI receiving Supported Living services to support greater independence in the community.
    - Transferring or diverting 750 additional Transition to Community Living (TCL) participants into community supported housing, including 450 from Adult Care Homes.
- Implementation of the Medicaid Traumatic Brain Injury Waiver;
- Expediting enhancement of the array of high-quality, community-based services and supports to address the needs of children and families, and thereby reduce the number of children and youth admitted to in-state and out-of-state Psychiatric Residential Treatment Facilities (PRTFs).

Ex. A (D. Richard Aff.), ¶ 13.

For all these reasons, a stay for the duration of the appeal is necessary to prevent this immediate and irreparable harm to Defendants.

CONCLUSION

For the reasons demonstrated above, the Court should stay its enforcement of the portions of the Remedies Order identified above, including the provisions relating to Benchmark 1 and Benchmark 2. The Court also should stay the quarterly reporting requirements specified in III.D to the extent they pertain to Benchmarks 1 and 2. Pursuant to Rule 62(e), the State Defendants are not required to post a bond in connection with a stay of enforcement.

Respectfully submitted, this the 30th day of November 2022.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served the foregoing *DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO STAY ENFORCEMENT OF ORDER ENTERED NOV. 2, 2022 (REMEDIES ORDER)* to Plaintiffs' counsel of record via email and U.S. First Class Mail on this the 30th day of November 2022.

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