

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

WAKE COUNTY

17 CVS 6357

SAMANTHA R., by her Guardian, TIM R.,)
MARIE K., by her guardian, EMPOWERING)
LIVES GUARDIANSHIP SERVICES, LLC,)
CONNIE M., by her guardian CHARLOTTE)
R., JONATHAN D., by his guardian)
MICHAEL D., MITCHELL T., by his)
guardian, BETSY S., MICHAEL A. and)
DISABILITY RIGHTS NORTH CAROLINA,)

**RESPONSE TO PLAINTIFFS’
MOTION TO MODIFY ORDER**

Plaintiffs,)

v.)

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

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,)

Hearing Set for Aug. 2 at 3:15 p.m.

Defendants.)

NOW COME Defendants, by and through undersigned counsel, and respectfully submit this response to *Plaintiffs’ Motion to Modify Order* (filed May 30, 2023). As demonstrated forth below, Plaintiffs’ motion asks the Court to reconsider an issue that already has been raised, argued and resolved by the Court. It should be denied on that basis alone. Moreover, this case is on appeal, and the parties agreed to participate in mediation before the Court of Appeals on August 22, 2023. Therefore, the motion should be denied (or at least deferred) pending the resolution of that mediation.

BACKGROUND

On February 4, 2020, the Court granted Plaintiffs’ motion for partial summary judgment on one statutory claim, and denied Defendants’ motion for summary judgment on all claims. *See* Order (Feb. 4, 2020). By Order signed on October 31, 2022 and entered on November 2, 2022,

the Court granted injunctive relief to Plaintiffs. *See* Order (Nov. 2, 2022) (“Injunction”). Defendants have appealed both of these orders. *See* Notice of Appeal (Nov. 29, 2022).

On November 29, 2022, Defendants filed a Motion to Stay Enforcement of certain provisions of the Injunction for the duration of the appeal. On February 8, 2023, the Court granted the motion to stay. *See* Order (Feb. 8, 2023).

On May 30, 2023, Plaintiffs filed the instant motion. The motion seeks an order under Rule 62(c) modifying the Injunction to “eliminate the 2028 cessation date for new long-term admissions to private Intermediate Care Facilities (ICFs).” *See* Motion at 1. The alleged basis for the motion is that “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.*, at ¶ 2. The motion has been set for hearing on August 2, 2023 at 3:15 p.m.

Plaintiffs’ Motion is focused on the Order of November 2, 2022. Motion at ¶ 1. Defendants believe that Plaintiffs also intended to address the Order entered February 10, 2023. *See* Order Clarifying/Correcting Order Entered Nov. 2, 2022 (Feb. 10, 2023). That second order made clear that the operative language is, “After January 1, 2023, Defendants shall ensure a cessation on new admissions **of individuals with IDD** to institutional settings. This cessation on new admissions does not apply to or bar the use of institutional settings for respite or long term stabilization.” Order at 2 (emphasis in original).

Plaintiffs’ Previous Rule 62(c) Motion

Plaintiffs have already made this same Rule 62(c) motion, and the Court has already considered it. On January 17, 2023, responding to Defendants’ Motion to Stay Enforcement pending appeal, Plaintiffs made the same Rule 62(c) motion that they are making again here. *See* **Ex. 1** (Plaintiffs’ Response to Motion to Stay, dated Jan. 17, 2023, excerpts), at 19-21. In that

filing, like here, Plaintiffs asked “that the Court modify the Order pursuant to Rule 62.” As here, Plaintiffs requested that the language, “After January 1, 2023, Defendants shall ensure a cessation on new admissions to institutional settings” be changed to, “After January 1, 2023, Defendants shall ensure a cessation on new admissions of people with I/DD to **public ICFs and Adult Care Homes.**” *Id.* at *21 (changing “institutional settings” to “public ICFs and Adult Care Homes”). Plaintiffs also proposed that additional language be inserted. *Id.* (second proposed bullet, providing that the parties collaborate with all interested stakeholders to develop a proposal to comply with *Olmstead*). There, as here, the basis for the Rule 62(c) modification was to “allay community fears and facilitate needed reforms....” *Id.* at *21.

As Plaintiffs noted, their Rule 62(c) motion on January 17, 2023 mirrored the informal proposal Plaintiffs had made to Defendants in an email dated November 18, 2022. *Id.* at *20 and Attachment 6. It likewise mirrored a draft, proposed motion that Plaintiffs sent to Defendants on November 29, 2022. *Id.* at 20 and Defs’ Ex. D.

Defendants responded to Plaintiffs’ Rule 62(c) arguments on February 2, 2023. *See Ex. 2* (Defs’ Reply on Motion to Stay Enforcement of Order Entered Nov. 2, 2022, excerpts), at 11-12. As explained there, Defendants did not (and do not) agreed with Plaintiffs’ proposed modification to the Injunction.

The heard these Rule 62(c) issues on February 3, 2023. *See Motion at ¶ 10 and Motion Attachment B* (excerpts from the transcript of the hearing). On February 9, 2023, the Court granted Defendants’ Motion to Stay. *See Order* (Feb. 9, 2023). On the same date, the Court entered an order to clarify/correct the Injunction, to further specify that Benchmark 1 pertained only to individuals with intellectual or developmental disabilities (“I/DD”). *See Order*

Clarifying/Correcting Order Entered Nov. 2, 2022 (Feb. 9, 2023). The Court did not grant Plaintiffs' Rule 62(c) motion pertaining to the cessation of admissions provision in Benchmark 1.

Mediation in the Court of Appeals on August 22, 2023

The appeal remains pending. Shortly after the appellate record was settled, on June 22, the parties jointly elected and requested mediation before the Court of Appeals. Mediation has been scheduled to take place on Tuesday, August 29, 2023 before Judge Tobias S. Hampson. *See Ex. 3* (mediation confirmation dated July 19). The parties are required to submit Mediation Statements to Judge Hampson not later than Tuesday, August 22, 2023. *See id.* (mediation confirmation dated July 19). Defendants' opening merits brief, if needed, is due September 5, 2023.

LEGAL STANDARD ON A MOTION FOR RECONSIDERATION

Motions for reconsideration are disfavored. Rule 54(b) provides that, “[i]n the absence of entry of ... a final judgment, any order ... which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is subject to revision” Rule 54(b). Rule 62(c) allows a court to modify an injunction while an appeal is pending. However, while motions for reconsideration are within the trial court’s discretion, “most courts have adhered to a fairly narrow set of grounds on which to reconsider their interlocutory orders and opinions.” *W4 Farms, Inc. v. Tyson Farms, Inc.*, No. 16 CVS 1112, 2017 WL 4751155, at *2, 2017 NCBC LEXIS 99, at *4–5 (N.C. Super. Ct. Oct. 19, 2017); *see also RF Micro Devices, Inc. v. Xiang*, No. 1:12CV967, 2016 WL 3199506, at *1, 2016 U.S. Dist. LEXIS 74550, at *3–4 (M.D.N.C. June 8, 2016). *Id.* These grounds include:

- (1) the discovery of new evidence,
- (2) an intervening development or change in the controlling law, or
- (3) the need to correct a clear error or prevent a manifest injustice.

Id. (quoting *RF Micro Devices*, at *1-2). “To allow motions to reconsider offhandedly or routinely would result in an unending motions practice.” *Id.* at *2. (quoting *Wiseman v. First Citizens Bank & Tr. Co.*, 215 F.R.D. 507, 509 (W.D.N.C. 2003)).

ARGUMENT

Plaintiffs’ motion should be denied, or at least deferred, for three independent reasons.

First, Plaintiffs’ motion asks the Court to reconsider an issue that was already raised, litigated, heard and resolved earlier this year. Because there is no valid reason to reconsider that same issue, the motion should be denied.

As described above, Plaintiffs already made a Rule 62(c) motion to modify the “cessation of admissions” bullet in Benchmark 1 of the Injunction. *See Ex. 1*, Plaintiffs’ Response to Defendants’ Motion to Stay, dated Jan. 17, 2023, at 19-21. Plaintiffs’ January 2023 motion raised the same issue, made the same arguments, and requested the same relief, as the instant motion. Both seek to change the term “institutional settings” to “public ICFs and Adult Care Homes.” Both motions argue that this proposed change is needed to address community concerns.

There is no material difference between Plaintiffs’ January 2023 motion and this motion. Nor does Plaintiffs’ new motion point to “(1) the discovery of new evidence, (2) an intervening development or change in the controlling law, or (3) the need to correct a clear error or prevent a manifest injustice,” as courts typically require for reconsideration. *W4 Farms, Inc.*, 2017 WL 4751155, at *2, 2017 NCBC LEXIS 99, at *4–5. Paragraph 2 of the Motion states that concerns have been expressed “[s]ince the entry of the Order” granting the injunction, Motion at 2, but this was also true in January 2023. *Compare Ex. 1* at 19-20 (acknowledging “fear in the disability community”). Likewise, Paragraph 4 acknowledges that families have expressed concerns about the cessation requirement. This also is not new, and was raised in January 2023. *Id.* at *21

(referring to the “fears of those families who like their loved one’s ICF placement”). Finally, Paragraph 7 refers to focus groups that DRNC conducted in April 2023. While community engagement appears to be a positive development, this paragraph does not indicate that any “new evidence” or any “intervening development or change” justifies the re-litigation of an issue the Court already resolved. There is no valid basis to re-open repetitive motions practice or reconsider this issue. *DirectTV*, 366 F. Supp. 2d at 317 (“To allow motions to reconsider offhandedly or routinely would result in an unending motions practice”).

Second, the motion should be denied or deferred in light of the current procedural posture of this case, and mediation is imminent. Defendants filed a Notice of Appeal on November 29, 2022. All appellate deadlines have been met, and the appeal remains pending. On June 22, 2023, the parties jointly requested mediation before the Court of Appeals. This will be the first time that the parties have pursued mediation of this matter. Mediation is set for Tuesday, August 29, 2023 before COA Judge Tobias S. Hampson. Pre-mediation submissions are due on August 22. *See Ex. 3* (mediation confirmation dated July 19). The mediation will take place before Defendants’ opening merits brief will be filed in the Court of Appeals, if needed, by September 5, 2023. *Id.*

Defendants respectfully request that the Court allow the parties to mediate the disputed issues before Judge Hampson, including the precise wording of the “cessations of admissions” requirement in Benchmark 1. Mediation will be a more effective way to address these issues. It will allow the parties to discuss the inter-related aspects of the Injunction and summary judgment orders, not just the narrow cessation provision Plaintiffs addressed in the motion. Put simply, with mediation just weeks away, it does not make sense to grant this motion at this time.¹

¹ After this Motion was filed, the parties agreed to mediate in the Court of Appeals, and counsel for Defendants proposed that the instant motion be stayed pending mediation. Plaintiffs’

Based on the procedural arguments above, the Court may decide to deny or defer deciding the motion until after the mediation. However, if the Court considers the motion on its merits, there is a third reason it should be denied. Defendants continue to maintain that it is contrary to the spirit of *Olmstead* to remove options currently available to individuals with I/DD. *Olmstead*, and the State's *Olmstead* planning, call for creating options for community placement for those who make that informed choice. *See* **Ex. 1** at 19 ("this case is about giving people with I/DD an option to choose community placement if that's what they want"); *see also* Motion at ¶ 5 ("Plaintiffs seek to ensure that all individuals with I/DD have a true, informed choice of place of residence"). Any requirement like the "cessation of admissions" provision in the Injunction removes options and eliminates choices that some individuals with I/DD and some families prefer. *Id.* at *21 (Plaintiffs acknowledge that some families want to keep their loved one's current placement, and fear having that option removed from them).

Because respecting personal choice is integral to appropriate *Olmstead* planning, Defendants strongly believe that the "cessation of admissions" provision raises serious issues for individuals with I/DD and their families, for North Carolina's healthcare system, and for the State's ongoing *Olmstead* planning. This is especially true in the current economic climate. The State (and the country) currently face a major, ongoing workforce shortage of Direct Care Professionals, and a serious lack of affordable available housing. Community-based options

counsel did not agree. However, it is inefficient to litigate this motion when mediation is imminent. Also, modifying the Injunction while the appeal is pending would raise a number of procedural issues. For example, if the Court modified the Injunction, Defendants might be required to file a new Notice of Appeal. This might require Defendants to perfect a second, parallel appeal before the Court of Appeals, at least until the separately-tracked appeals could be administratively consolidated. The COA record would need to be supplemented. Two pending appeals could affect the current briefing schedule in the COA. Also, in the trial court, Defendants might be required to file a new motion to stay enforcement of the new court order, for the duration of the appeal. All of this can be avoided if the motion is deferred.

cannot adequately be expanded, nor can deinstitutionalization rapidly be achieved, until and unless these critical issues can be mitigated. DHHS has dedicated a substantial portion of the State's *Olmstead* planning to focus on these economic limitations to expanding capacity in communities.² The Department remains committed to this critical work. However, against these economic barriers, it is contrary to *Olmstead* to remove choices from individuals with I/DD. Worse yet, deinstitutionalizing too aggressively, and requiring individuals to leave preferred residential settings they have chosen, before adequate community capacity is built, could become a health and safety crisis for the State's most vulnerable citizens.

Plaintiffs' proposal is to "ensure a cessation of new admissions of individuals with I/DD to ... Adult Care Homes." Motion at 4 (modified as per Order of Feb. 10, 2023). Defendants cannot properly evaluate the merit (if any) of DRNC's proposed modification because Defendants have not had the opportunity to consult with interested stakeholders. This would include close consultations between individuals with I/DD and their families, the service providers who support individuals and their families, and DHHS representatives. The Motion at ¶ 7 shows that DRNC held listening sessions with families and individuals with I/DD who would like to remain in his or her their current private ICF setting. However, the Motion does not show that DRNC has met with families and individuals who prefer to live in Adult Care Homes, nor did Plaintiffs indicate they have engaged with representatives of Adult Care Homes about its proposal. In contrast, the State's *Olmstead* planning works with stakeholders to expand choices. Such consultations with stakeholders including industry representatives are integral to the State's *Olmstead* planning efforts. Without that engagement, Plaintiffs' proposal, if accepted, may create the same fears and

² For example, DHHS proposed and the General Assembly approved wage increases for Direct Support Professionals in December 2021. DHHS has proposed additional wage increases, and this is being considered in the current budget negotiations.

concerns that DRNC heard from families in the ICF community when the Injunction was first entered. But this time, it may be individuals, families and operator of Adult Care Homes who will be alarmed by Plaintiffs' request to eliminate choice.

DHHS believes that Adult Care Homes may be appropriate settings for certain individuals with I/DD, in some circumstances, based on the person's needs and informed choice. The State already uses several screening tools and pre-admission processes to determine whether an Adult Care Home is an appropriate setting for an individual with I/DD who wishes to move there. For example, before an individual is admitted to a Medicaid-funded facility, she must be assessed through the Preadmission Screening and Resident Review Process – known as "PASRR."³ This federally-mandated screening tool evaluates the individual so she can live in an appropriate setting for her medical needs. For Adult Care Homes, the Referral Screening Verification Process ("RSVP") is used to screen all Medicaid-eligible individuals who are being considered for admission.⁴ RSVP can be used to divert an individual away from an Adult Care Home where that setting will not meet her needs. In addition, under the Department's Transitions to Community Living Initiative ("TCLI"), LME/MCOs regularly engage with individuals currently living in Adult Care Homes, to provide education about potential community-based options, if preferred.⁵ These initiatives are in place so that individuals with I/DD (and families) can make informed

³ Information about PASRR is found at [https://medicaid.ncdhhs.gov/pasrr-provider-education-training/download?attachment#:~:text=PASRR%20is%20a%20federally%20mandated,to%20intellectual%20disability%20\(RC\).](https://medicaid.ncdhhs.gov/pasrr-provider-education-training/download?attachment#:~:text=PASRR%20is%20a%20federally%20mandated,to%20intellectual%20disability%20(RC).)

⁴ Information about RSVP is found at <https://www.ncdhhs.gov/rsvp-faq-11-3-22-2/open>.

⁵ Information about In-Reach/ Transition and Diversion from Adult Care Homes is found at <https://www.ncdhhs.gov/tcl-manual-ir-transition-and-diversionrev-11-14-2022pdf/open>

choices about where to live, including in some circumstances the choice to live in an Adult Care Home.

In short, Defendants believe that Plaintiffs' motion and proposal can only properly be evaluated following appropriate community engagement, and in light of all of the intertwined issues discussed above regarding personal choice.

CONCLUSION

For the reasons above, Defendants respectfully submit that the Court should deny the motion or alternatively defer any ruling until the mediation set for August 29, 2023 has concluded.

Respectfully submitted, this the 27th day of July 2023.

JOSHUA H. STEIN
Attorney General

/s/ Michael T. Wood

Michael T. Wood
Special Deputy Attorney General
N.C. Bar No. 32427

N.C. Dept. of Justice
P.O. Box 629
Raleigh, NC 27602
Phone: 919-716-0186
Fax: 919-716-6758
Email: MWood@ncdoj.gov

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served the foregoing *RESPONSE TO PLAINTIFFS' MOTION TO MODIFY ORDER* to Plaintiffs' counsel of record via email on this the 27th day of July, 2023.

Lisa Grafstein, Esq.
lisa.grafstein@disabilityrightsnc.org
Emma Kinyanjui, Esq.
emma.kinyanjui@disabilityrightsnc.org
Disability Rights NC
3724 National Drive, Suite 100
Raleigh, NC 27612

Emily Maus, Esq.
Emily.Maus@dbr.com
Drinker Biddle & Reath LLP
1500 K Street, N.W., Ste. 1100
Washington, DC 20005

Jerry Hartman, Esq.
JerryHartman@mac.com
Drinker Biddle & Reath LLP
1177 Avenue of the Americas, 41st Floor
New York, NY 10036

Karen A. Denys, Esq.
Karen.Denys@dbr.com
Drinker Biddle & Reath LLP
105 College Road East
P.O. Box 627
Princeton, NJ 08542

/s/ Michael T. Wood

Michael T. Wood
Special Deputy Attorney General

Exhibit 1

STATE OF NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
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.)

**RESPONSE TO DEFENDANTS’
MOTION TO STAY
ENFORCEMENT OF ORDER
ENTERED NOV. 2, 2022**

TABLE OF CONTENTS

INTRODUCTION..... 3

STATEMENT OF THE CASE..... 4

ARGUMENT..... 4

I. The Denial of a Stay is Within the Court’s Discretion and Is Warranted Because of Defendants’ Longstanding Failure to Fix the Problem or Accept Accountability, and the Ongoing Serious Harms to People with IDD..... 4

II. Since the State’s Appeal Will Not Change the Need for a Remedy, a Stay is Merely Delay for its Own Sake.	6
III. Defendants’ Arguments for a Stay Are Identical to Arguments they Have Made for Years and Reflect a Continued Insistence that Plaintiffs and the Court Should Just Leave the State Alone to Carry Out its (Chronically Non-Specific) Plans.	6
A. <u>In Arguing Benchmarks 1 and 2 Cannot Be Achieved, Defendants Reject the Benchmarks They Proposed, and Do Not Offer Any New Alternative Benchmarks or Accountability Measures.</u>	7
B. <u>Defendants’ Failure to Comply with Benchmark 1 Will Keep People Institutionalized (Or at Risk for Institutionalization) Against Their Will for the Duration of the Appeal.</u>	8
C. <u>Defendants’ Request to Stay Benchmark 2 (the Innovations Waiver Waitlist Provision) Seeks an Indefinite Delay that Harms People Who Have Already Waited a Decade or More.</u>	10
IV. The Order Provides Time for Needed Long-Term Reforms; Plaintiffs Propose One Modification to the Order to Facilitate Sustainable Progress.	12
A. <u>The Order Provided a Means for Defendants to Carefully Reduce Reliance on Institutional Settings Over Time Through Voluntary Transitions.</u>	12
B. <u>Defendants Previously Expressed the Need and Desire to Reform the ICF System by Improving Quality, Converting Some Providers to Community-Based, and Addressing “Cherry Picking.”</u>	13
C. <u>Defendants Have Abandoned Their Prior Convictions Rather Than Undertake Needed Work to Transform a System That Is Failing So Many People.</u>	15
a. Defendants Have Raised and Amplified Fears Among Families About Loved Ones Being Made Homeless by the Court’s Order, In Reckless Disregard for the Consequences.	16
b. Defendants’ Deference to the Concerns of Private Facility Operators Is Improper and Violates Clear Statutory Duties to People with I/DD.	18

D. Plaintiffs Believe It Would Benefit the Disability Community and the Ultimate Aims of this Action to Modify the Injunction and Require Collaborative Resolution of Issues Surrounding Private ICFs..... 19

CONCLUSION 22

CERTIFICATE OF SERVICE 24

INTRODUCTION

A stay of the Court’s injunctive Order is not warranted and would be deeply counterproductive. In the nearly three years since the Court’s Order declaring Defendants to be in violation of the Persons with Disabilities Protection Act, Defendants have failed to show a serious intent to implement a comprehensive and effective remedy. Each stage of this case has produced only new and increasingly strident insistence on the state’s prerogatives. In the meantime, thousands of people with intellectual and developmental disabilities (I/DD) are made to wait.

As the Court previously determined, Defendants have failed to produce the remedy that they promised after the Court’s February 2020 ruling finding them in violation of the rights of North Carolinians with I/DD. The February 2020 ruling itself was based on Defendants’ decades of failed promises to address the growing harms to people with I/DD. Defendants, in their Motion and supporting brief, continue to argue that progress toward serving people with I/DD is too hard to achieve on a ten-year timetable, while insisting that they are working on the *Olmstead* plan that the Court already determined is inadequate. (Defendants’ Memorandum in Support of Motion to Stay Enforcement (Defs.’ Br.) pp. 9-10.) A stay is not warranted and would in fact merely reinforce the state’s continuing resistance to accountability; Defendants’

choose to live outside institutional settings, Defendants have decided to focus on supporting the “business plans” of ICFs and ACHs. However, DHHS’ obligation is to people with disabilities, and not to the providers of services. *See Cedarbrook Residential Ctr., Inc. v. N.C. HHS*, No. 36A22, 2022 N.C. LEXIS 1101, at *63 (Dec. 16, 2022) (“A careful analysis of the statutory provisions [governing adult care homes] . . . indicates that those provisions are intended to protect the *residents* of adult care facilities rather than the facility owners or operators.”)

Defendants also argue that “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.” *Id.* As noted above, closures and homelessness would not be an act of God or a natural disaster; they would be a product of Defendant DHHS’ failure to carry out its statutory function.

A misguided idea of Defendant DHHS’s role has been a chronic impairment to achieving compliance. Historically, the state has lacked the political and executive will to effectuate needed reforms. (Deposition of Holly Riddle, p. 120:14-25; Deposition of Trish Farnham, p. 25:17-19.) Defendants’ submissions in support of their Motion to Stay simply confirms the institutional bias in the current system and suggests that it remains deeply engrained.

D. Plaintiffs Believe It Would Benefit the Disability Community and the Ultimate Aims of this Action to Modify the Injunction and Require Collaborative Resolution of Issues Surrounding Private ICFs.

Plaintiffs have never requested closure of institutions generally, or private ICFs specifically, because this case is about giving people with I/DD an option to choose community placement if that's what they want. However, Defendant DHHS’s response to the Order has created fear in the disability community, and divided those who urgently need change from those who are concerned about change. For this reason, Plaintiffs believe – and previously proposed to

the Defendants -- that the Order may be modified to ensure that reform in the private ICF context happens with full transparency and engagement of all stakeholders.

As noted above, Defendants' previous position has been that (1) there are too many ICFs and (2) some tend to "cherry pick" and serve those without high needs and (3) some are not high quality. *See, supra*, Section IV.B. Consequently, there is significant basis for Defendants to actively and urgently engage in addressing the known deficits in the ICF system. To address the quality and overreliance issues – while respecting the concerns of those whose family members are residing in ICFs they like – Plaintiffs proposed that the parties actively engage the community in discussions designed to develop sustainable, consensus solutions.

Specifically, on November 18, 2022, Plaintiffs proposed to Defendants that the 2028 cessation on new long-term admissions be replaced by a provision requiring the parties to actively engage with the community to address the issue of quality and integration of private ICFs. (**Attachment 6:** Email from Counsel for Plaintiffs to Counsel for Defendants, dated November 18, 2022.) This proposal was the result of Defendants' repeated statements that the cessation on admissions was the sole basis upon which they were considering an appeal – an appeal that threatened to inject further delay in a case that is all about the State's failure to take timely action on a known cause of deeply consequential harm to thousands of people.

Having heard nothing, counsel for Plaintiffs sent a draft motion to stay to counsel for Defendants on November 29, 2022, proposing to agree on a substitute term in lieu of an appeal. (Defs.' Exhibit D filed November 30, 2022.) During a call later that day, Defendants reporting their intent to appeal, which they did the next day. Defendants never engaged in a substantive discussion of the proposal referenced in this section.

Plaintiffs' proposal was designed to address the fears of those families who like their loved one's ICF placement, while requiring Defendants and providers to engage with the community and with Plaintiffs in addressing issues of quality and over-reliance.

There need not be an all-or-nothing approach based on pitting groups with different desires against each other. A stay is not needed to enable Defendants to engage in the needed reforms over the next six years. However, it is apparent that Defendants' success in stoking fear will impair its own ability to carry out the reforms it has advocated for in the past.

Rule 62(c), under which Defendants have sought a stay, permits the Court to modify its own Order pending appeal. To allay community fears and facilitate needed reforms, and consistent with the previous proposal to Defendants, Plaintiffs suggest that the Court modify the Order pursuant to Rule 62, replacing the following provision of the Order:

- 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.

with:

- After January 1, 2028, Defendants shall ensure a cessation on new admissions of people with I/DD to public ICFs and Adult Care Homes. This cessation on new admissions does not apply to or bar the use of institutional settings for respite or short-term stabilization.
- With regard to private ICFs, the Parties are directed to develop a plan to ensure compliance with *Olmstead* principles and informed choice. The Parties are directed to engage in good faith efforts to ensure that those who choose to remain in or enter congregate settings such as private ICFs or group homes have access to settings that are high quality, as integrated into the community as possible, and offer the greatest degree of individual independence as possible. The Parties are directed to include all interested parties in developing a sustainable plan for compliance with *Olmstead* principles and informed choice, including but not limited to: individuals with I/DD; providers of ICF, group home, or community-based services; interested family members; advocates for the integration of individuals with I/DD in the community; and state and local agency staff. By January 1, 2024, the Parties shall report to the Court on the status of their efforts to develop a joint proposal consistent with this provision. The Court will make such further orders as appropriate.

Defendants have unwisely, and improperly, chosen to support the *status quo* rather than engage in the hard work of transforming the I/DD system. Permitting the *status quo* to continue during appeal sends a signal that those with the most influence over Defendants will prevail even against the agency's own better judgment. A stay would be counterproductive. The above modification would require reforms to proceed.

CONCLUSION

The Court has permitted Defendants time to address the urgent needs identified in this case. The response has been to continue to admire the problem – engaging in an ongoing reflection but failing to get past the barriers and difficulties of operating a system that Defendants are specifically charged with operating. In the meantime, the waiting has continued, and the list of those waiting has grown. Defendants' Motion to Stay is a continuation of the State's refusal to accept accountability and take effective action and should be denied.

Plaintiffs respectfully request that the Court deny Defendants' Motion to Stay, or limit the relief provided pursuant to Rule 62(c) to the modification proposed above. Delay regarding the other provisions of the Order would perpetuate the harms that the Order sought to end.

This 17th day of January, 2023.

DISABILITY RIGHTS NORTH CAROLINA



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



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

LAW OFFICE OF JERRY HARTMAN
By: Jerry Hartman
3607 Whispering Lane
Falls Church, VA 22041
ghartmanlaw@gmail.com

ATTORNEYS FOR PLAINTIFFS

Exhibit 2

STATE OF NORTH CAROLINA
WAKE COUNTY

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

FILED

2023 FEB -2 P 2: 22

SAMANTHA R., by her Guardian, TIM R.,
MARIE K., by her guardian, EMPOWERING
LIVES GUARDIANSHIP SERVICES, LLC, C.S.C.
CONNIE M., by her guardian CHARLOTTE
R., JONATHAN D., by his guardian BY _____
MICHAEL D., MITCHELL T., by his
guardian, BETSY S., MICHAEL A. and
DISABILITY RIGHTS NORTH CAROLINA,

DEFENDANTS' REPLY TO
PLAINTIFFS' RESPONSE TO
MOTION TO STAY
ENFORCEMENT OF ORDER
ENTERED NOV. 2, 2022
(REMEDIES ORDER)

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,

(Case Designated Under Rule 2.2
and assigned to Judge Baddour.)
Hearing set for Fri, Feb 3 at 9:30am

Defendants.

Defendants, by and through undersigned counsel, submit this reply to Plaintiffs' response (dated Jan. 17, 2023) to Defendants' *Motion to Stay Enforcement of the Order entered November 2, 2022* (filed Nov. 30, 2022).

INTRODUCTION

Plaintiffs have characterized the Remedies Order as "historic."¹ DRNC projects that **18,750** new jobs will be needed over ten years for Defendants to comply with the Remedies Order.² One healthcare journal projected the cost of compliance with Benchmark 1 and Benchmark 2 "will

¹ See <https://disabilityrightsn.org/.../we-hear-you-talk-to.../> (Nov. 24, 2022) (screenshot of a Facebook page), referring to "[t]he historic" Samantha R ruling" A copy is also attached to Defendants' 1/27/23 Notice of Filing as Ex. 1.

² See DRNC Fact Sheet & FAQs: Samantha R. v North Carolina (Nov. 2, 2022), at 2-3, available at <https://disabilityrightsn.org/news/fact-sheet-faqs-samantha-r-v-north-carolina/> . A copy is also attached to Defendants' 1/27/23 Notice of Filing as Ex. 2.

While acknowledging the problems the cessation requirement has created, Plaintiffs nevertheless oppose Defendants' motion to stay. Instead, and although they did not file a Rule 62(c) motion, Plaintiffs now propose that the Court modify the cessation requirement, rather than stay it. *See* Pl. Resp., at 21 (outlining two new bullets to modify the final bullet in Benchmark 1). Defendants have carefully reviewed Plaintiffs' proposal, and oppose it, in part. Defendants agree that part of Plaintiffs' proposed modification makes good sense, and Defendants therefore agree with the clarifications set forth in the first bullet point, only. However, Defendants cannot and do not agree with Plaintiffs' second bullet point, and object to that portion of the proposed modification.

1. DRNC's First Bullet, to Clarify the Requirement.

DRNC's response (at 21) proposes to modify the cessation language to clarify (1) that it applies only to individuals with I/DD (not all individuals) and thereby is properly focused on the subject matter of the Complaint in this case (individuals with I/DD), and (2) that the cessation requirement will apply only to two specific types of settings: public ICFs and Adult Care Homes. Plaintiffs' proposed modification is as follows:

After January 1, 2028, Defendants shall ensure a cessation on new admissions of people with I/DD to public ICFs and Adult Care Homes. This cessation on new admissions does not apply to or bar the use of institutional settings for respite or short-term stabilization.

Pl. Resp. at 21, first bullet.

Defendants agree with DRNC's proposed first bullet. It would be sensible to clarify that the cessation requirement applies only to individuals with I/DD. Further, it would improve the Order to limit its application to two specific types of settings – public ICFs, such as the State's three Developmental Centers, and Adult Care Homes. This proposed modification, if accepted by

the Court, would likely alleviate some, but not all, of the fear and confusion in the community about ICFs. Defendants therefore agree with DRNC's first bullet (but not its second bullet) as a modification to the current cessation requirement.¹⁰

2. DRNC's Second Bullet, to Add New Requirements.

Defendants do not agree with DRNC's second proposed modification to the Remedies Order. Pl. Resp. at 21, second bullet. DRNC's second bullet pertains to private ICFs, and purports to establish a process by which the parties are directed to work together, while also seeking input from all interested community members and stakeholders, to develop a joint proposal by which individuals with I/DD would be permitted to reside in certain private ICFs. *Id.* Defendants do not agree to this second bullet, for the following reasons.

First, DRNC's second bullet appears to be nothing more than what Defendants already are doing as part of its Olmstead planning. As part of its ongoing planning, Defendants are directly engaged with all interested parties (including but not limited to: individuals with I/DD; providers of ICF, group home, or community-based services; interested family members; advocates for the integration of individuals with I/DD in the community; and state and local agency staff), to address the many interconnected issues associated with a shift from institutional care to community-based care. It is surprising that Plaintiffs are proposing to modify the court order to direct Defendants to do what they have been doing in earnest for more than 4 years – *Olmstead* planning on de-institutionalization. The proposal is especially curious, given that Plaintiffs have regularly criticized the State's *Olmstead* planning as moving too slowly and failing to result in in the type

¹⁰ Defendants note that they filed a Notice of Appeal on Nov. 30, 2022 pertaining to the Court's orders of February 4, 2020 (summary judgment order) and November 2, 2022 (remedies order). Defendants expressly reserve all of their appeal rights, and waive none of them, by agreeing in part with Plaintiffs' proposed modifications to the Remedies Order. Even if the Court accepts the modification in Plaintiffs' first bullet, it would address only part of Defendants' concerns.

of measurable benchmarks that Plaintiffs have demanded (including the problematic cessation requirement). Since DHHS's Olmstead planning team already works closely with DRNC (and all interested community stakeholders) on all aspects of its planning, Defendants do not believe this proposal has any value. To the contrary, Defendants oppose this second bullet because it would appear to amplify DRNC's voice over the voices of other stakeholders (owners and providers), via the Court Order, thereby giving DRNC undue influence or even veto power over the Olmstead team.

Second, in their proposed modification, Plaintiffs seek an order directing the parties to consult with "providers of ICF, group home, or community-based services" about *Olmstead* principles and informed choice. *See* Pl. Resp. at 21, second bullet. At the same time, their Response criticizes Defendants for listening to the concerns expressed by owners of ICFs about the cessation requirement (*i.e.*, that the cessation requirement, if not stayed, could impair the economic viability of ICFs, take away choices and negatively affect the system), and asserting that these constitute irreparable harms that justify a stay. *See* Pl. Resp. at 17 ("Defendants have decided to focus on supporting the 'business plans' of ICFs and ACHs;" "DHHS's obligation is to people with disabilities, and not to the providers of services.") This critique suggests Plaintiffs will not be interested in working with owners of ICFs and group homes on viable, sustainable solutions to build community systems. This is another reason Defendants do not agree to the modification proposed in Plaintiffs' second bullet.

Put simply, Defendants do not believe that DRNC's vague proposal will have any effect other than to elevate DRNC's voice over other important stakeholders that already inform the State's collaborative *Olmstead* process. To date, DRNC has not shown willingness to work cooperatively with the State's decisionmakers on Olmstead issues. Defendants therefore disagree with and object to Plaintiffs' proposed modification, second bullet. Instead, for the reasons already

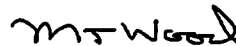
explained, Defendants respectfully ask the Court to stay enforcement of its Remedies Order for the duration of the appeal.

CONCLUSION

For the reasons demonstrated in the briefs, a stay of enforcement of Benchmark 1 and Benchmark 2, and the related reporting requirements, for the duration of the appeal is necessary to prevent immediate and irreparable harm to Defendants, to the State's healthcare system, to certain individuals with I/DD, and to providers.

Respectfully submitted, this the 27th day of January 2023.

JOSHUA H. STEIN
Attorney General



Michael T. Wood
Special Deputy Attorney General
N.C. Bar No. 32427

N.C. Dept. of Justice
P.O. Box 629
Raleigh, NC 27602
Phone: 919-716-0186
Fax: 919-716-6758
Email: MWood@ncdoj.gov

Exhibit 3

From: [Coats, Lisa A](#)
To: [Lisa Grafstein](#); [Emma Kinyanjui](#); [Wood, Michael](#)
Subject: Mediation-COA23-521 S.R. v. NCDHHS
Date: Wednesday, July 19, 2023 11:43:16 AM
Attachments: [image001.png](#)
[image002.png](#)
[image003.png](#)
[image004.png](#)
[image005.png](#)

Dear Counsel:

This confirms the scheduled appellate mediation of the above-referenced case for **Tuesday, August 29, at 10:00 a.m.** at the North Carolina Court of Appeals. The attorneys and representatives for each party will need to attend the mediation.

Judge Hampson further requests that you each provide a Mediation Statement at least seven days prior to the mediation. You may send it to me by email. The statement should include: 1) a brief recitation of the circumstances giving rise to the litigation; 2) a clear list of the issues to be resolved by the mediation or appeal; 3) a summary of the legal positions of the parties; 4) the present posture of the appeal; and 5) any suggested solutions for the settlement of the appeal. **Please limit the mediation statement to no more than five pages.**

Should you have any questions, please feel free to contact me at (919) 831-3770 or by email.



Lisa Coats
Executive Assistant
The Honorable Tobias S. Hampson
North Carolina Court of Appeals
O 919-831-3770
F 919-831-3615

Justice for all
www.NCcourts.org

