



February 10, 2025

### **Plaintiffs' Comments on Defendants' *Samantha R.* January 15, 2025 Quarterly Report**

Below are Plaintiffs' comments on Defendants' January 15, 2025 *Samantha R.* Quarterly Report for the period July 1, 2024 – September 30, 2024.<sup>1</sup> The parties met on January 27, 2025 to discuss Plaintiffs' questions regarding certain data in the Report. At that time, Plaintiffs also shared general comments regarding the January 2025 Quarterly Report. On February 3, 2025, Defendants supplied to Plaintiffs an updated report reflecting changes in reporting discussed during the January 27, 2025 meeting. Citations are to the revised report.

#### Background

The Consent Order has two primary features. The first is a set of benchmarks for progress toward ensuring that individuals currently living in settings defined as "institutional" who would like to leave are provided an avenue for transitioning to community-based services. To meet these benchmarks, Defendants must actively and effectively build service capacity in the community. The second is a set of reporting requirements designed to provide the parties and the Court with information necessary to measure the continued unmet needs in the I/DD community for purposes of determining progress toward compliance with *Olmstead* principles and/or for developing future remedial orders and benchmarks.

Defendants are required to produce quarterly reports over a period of approximately two years that contain information to assess Defendants' compliance with the Consent Order, as well as data to guide further remedies. The January 15, 2025 Report covers the period from July 1, 2024 – September 30, 2024. The next report is due April 15, 2025.

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<sup>1</sup> Defendants entitled their report "Inclusion Connects Quarterly Report," based on the Inclusion Connects branding DHHS has adopted for I/DD services. Plaintiffs believe that it would be more transparent to label the report as a quarterly report specifically connected to the Consent Order in *Samantha R. et al. v. NC, et al.* Plaintiffs have also suggested to Defendants that the actual data being reported in connection with the quarterly reports should be in a more accessible format. The Consent Order specifies that the data being reported must be made "readily available on the NC DHHS website and in accessible formats." *Consent Order*, p. 19. That obligation is not met through a 21-page report which contains commentary and matters outside the scope of the Consent Order quarterly reports. Defendants indicated a desire to report the required data in a dashboard or similar format, which would be an important step toward full accessibility of the applicable data.

## General Comments

The January 2025 Report provides valuable information regarding the status of the Innovations Waiver Waiting List, the number of individuals assessed for and/or receiving 1915(i) services, and data on transitions and other measures. In some key areas (e.g., utilization rates, unmet needs) there are significant gaps that have serious implications for the ability of the parties and the Court to assess progress and prepare to address remaining remedial needs. The Report also reflects a failure to meet most benchmarks.

Defendants have been forthright about the gaps in data and collaborative in discussing the status of reporting and related issues. The parties' January 27, 2025 meeting was useful in refining some issues. For example, Plaintiffs indicated that the report contains commentary and matters outside of the scope of the Consent Order, does not immediately identify itself as a report connected to the *Samantha R. et al. v NC, et al.*, and should be written and organized in a more accessible format. The data reporting should be more transparent and easier to access because the quarterly report format does not isolate the Consent Order reporting data, apart from the appendix. Defendants agreed and proposed adding a data dashboard online to make it easier for the disability community to access the core information. In addition, Defendants made reporting changes in response to concerns raised by Plaintiffs (e.g., reporting specific numbers under 11, rather than reporting those numbers as <11). *January 2025 Report*, p. 2.

## Benchmark Compliance

**Benchmark 1.A** requires the transition of 78 individuals from institutional settings to community-based services for the fiscal year ending June 2025. *Consent Order*, p. 9. Defendants do not appear to be on track to meet this Benchmark.

- a. Defendants report 12 transitions during the period being reported (July-September 2024), which is the first fiscal quarter of the applicable year. The number who were age 18 or older was 8. Projecting from this period, it does not appear that transitions are occurring at a pace to meet the Benchmark of 78 for the fiscal year ending June 2025. The "cumulative" number being reported (83) covers all of the prior fiscal year, as well as the first fiscal quarter of the current fiscal year. *January 2025 Report*, p. 8. This is not applicable data in assessing this Benchmark, which encompasses the fiscal year ending 2025 only (i.e., July 1, 2024 – June 30, 2025).
- b. The transitions being reported appear to relate only to the Money Follows the Person (MFP) program for transitioning individuals with I/DD. *January 2025 Report*, pp. 7-8. The Consent Order requires that Defendants meet this Benchmark through any and all applicable programs, including but not limited to MFP. *Consent Order*, p. 9. Extending efforts beyond MFP is important because historically there have been a total of 68 MFP "slots" for I/DD per year. In addition to being insufficient to meet the current Benchmark of 78 transitions, the current number of MFP slots will not be sufficient for this Benchmark in future years,

where the number of transitions is to increase to 83 (in 2026) and 88 (in 2027). The parties discussed this discrepancy during the January 27, 2025 call. Defendants indicated an intention to report non-MFP data going forward.

- c. Defendants reported qualitative information related to IV.1.h regarding successful and unsuccessful transitions. *January 2025 Report*, p. 8. Specifically, Defendants reported top barriers to transitions as well as top placements for transitions. The Consent Order does not detail the types or quantity of information to be shared; this may be an area for future clarification so that the best use can be made of this requirement.

**Benchmark 1.B** required the assessment of 3,000 individuals with I/DD for 1915(i) services by June 2024. *Consent Order*, p. 11. While the data is not transparent because disability type was not initially reported with regard to 1915(i) assessments, **it appears Defendants met this Benchmark as to the 3,000 assessments.** *January 2025 Report*, p. 12.

Benchmark 1.B further requires that Defendants provide assessments for 1915(i) within 90 days of receiving a request for assessment from an individual with I/DD. *Consent Order*, p. 11. **Defendants do not currently have the data to track this aspect of Benchmark 1B.** *January 2025 Report*, p. 12.

Benchmark 1.B also required, by June 30, 2024, the transition to 1915(i) services of individuals on the Innovations Waiver Waiting List who are receiving a specific category of services called (b)(3). *Consent Order*, p. 12. **Defendants did not meet this aspect of Benchmark 1B.**

- a. The January 2025 Report indicates: "In collaboration with CMS, DHHS has extended the LME/MCO transition deadline to December 31, 2024." *January 2025 Report*, p. 12. Defendants did not seek any modification of the Consent Order, which specified that the transitions were to occur by June 30, 2024.

**Benchmark 2.A** requires that Defendants (through their contractors) ensure that the utilization rate for the Community Living and Supports (CLS) Waiver service is at least 82% by June 2024 and 85% by June 2025. *Consent Order*, p. 14. The purpose of this Benchmark is to promote and measure greater availability of Direct Support Professionals (DSPs). Requiring an increase in the utilization rate is meant to prompt greater support (e.g., pay, training) for DSPs, making it easier for those with approved services to have those services delivered. **Defendants did not meet the 2024 Benchmark, and it does not appear that Defendants are on track to meet the 2025 Benchmark.**

- a. Defendants have not reported the utilization rate as of June 2024, and it is Plaintiffs' understanding that this is because the data was not being collected for that period. However, it would appear that the utilization rate as of June 2024 was lower than 82% because the overall rate for the period July 1, 2024 – September 30, 2024 was under 50%. Per Defendants' comments at the parties' meeting regarding the January 2025 report, there may be discrepancies in

reporting that may account for significant variations. Nevertheless, the 82% threshold was only achieved by one of the four managed care entities (now called Tailored Plans). Two reported utilization rates of 40% or less.

- b. As with the prior report, Defendants have failed to collect or report data showing the number of units of CLS not utilized **due to lack of provider availability. This is a core data point for assessing unmet needs and the extent to which the ongoing DSP shortage is being addressed.** It is imperative that the Tailored Plans be required to track this data in a way that isolates the cause of unbilled authorized hours. This is already a statutory requirement. N.C. Gen. Stat. § 122C-117.

### Reporting Gaps

As with the prior quarterly report, there are significant gaps in key data:

- a. As noted above, lack of data collection regarding DSP utilization is undermining a core purpose of the Consent Order – to allow for an assessment of unmet needs and to enable the parties and the Court to determine additional remedial measures. It is critical that the remainder of the reports made pursuant to the Consent Order reflect DSP utilization data, including the data showing how many units of CLS were not utilized due to lack of provider availability.
- b. Similarly, Defendants are required to report on unmet needs experienced by those receiving 1915(i) services but are not currently collecting that data. *January 2025 Report*, p. 15. As indicated in Plaintiffs’ comments to the prior quarterly report, **this information is critical to the development of a better understanding of the unmet need and therefore a clearer picture of the remaining remedial efforts required.** Defendants have indicated that they are working on determining a way to assess the unmet needs of individuals on the Innovations Waiver waiting list. *January 2025 Report*, p. 15. However, the scope of this reporting measure is not limited to individuals on the waiting list, but all individuals receiving 1915(i) services. It is unclear whether Defendants are developing a process for gathering the full scope of needed information.
- c. Defendants report that the number of individuals diverted from institutionalization during the applicable quarter is 3 and that the number eligible for diversion was 7. *January 2025 Report*, p. A-1. Given the broad definition of “diversion” articulated in the Report, there is an apparent need to determine whether Tailored Plans are reporting this data accurately. In addition, there appears to be a need to better define who is “eligible for diversion” in the context of reporting requirements. Based on the parties’ meeting, Defendants also view this as an area for improvement.

### Continued Concerns

**The January 15 Report raises continued concerns regarding compliance with existing Benchmarks. As with the prior quarterly report, the January 15 Report is missing core**

**information needed to assess compliance and to ensure that gaps in services are remedied through future compliance or orders.**

Key takeaways from the January 2025 Quarterly Report:

- Defendants do not appear to be on track to meet the transitions benchmark.
- Defendants are far off the benchmark requiring a utilization rate of at least 82% for DSPs providing a core Innovations Waiver service by June 2024, and 85% by June 2025. *January 2025 Report*, pp. 18 and A-2. Two MCOs reported utilization rates under 50%, although it is unclear if the data collection is producing accurate information.
- Defendants are not yet tracking how many hours of services individuals are losing access to because of a lack of available providers. *January 2025 Report*, pp. 18 and A-2. This is key data for assessing progress on DSP availability.
- Defendants did not meet the benchmark requiring transition from (b)(3) services to 1915(i) services for those on the Innovations Waiver Waiting List by June 2024. *January 2025 Report*, p. 12. While it does appear that nearly all transitions occurred by the end of December 2024, Defendants unilaterally changed the Consent Order deadline for compliance to December 2024 without notice or any request for amendment of the Consent Order.
- Defendants are not tracking the unmet needs of individuals receiving 1915(i) services who still have unmet needs. *January 2025 Report*, p. 15. This is core data needed during this remedial phase.