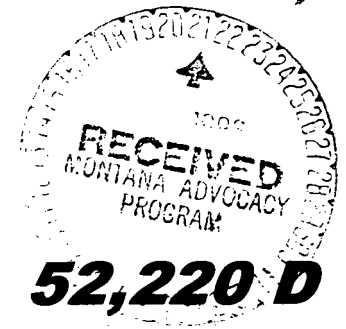


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SHIRLEY SMALL, et al., )  
 Plaintiffs, ) Cause No. CV-96-49-14-CCL  
 v. ) DEFENDANTS' BRIEF IN  
 STAT3 OF MONTANA, et al., ) SUPPORT OF MOTION FOR  
 Defendants. ) PARTIAL JUDGMENT ON  
 ) THE PLEADINGS  
 )

Defendants have moved this Court for partial judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c). This motion is made because there is no genuine issue of material fact with respect to the matters at issue in this motion as they are set out in the pleadings. Defendants request that this motion and their motion to deny class certification be considered on an expedited basis to allow the letting of the construction bids, issuance of revenue bonds, and execution of a mortgage loan agreement to go forward in a timely manner.

The Defendants request partial judgment on the pleadings and ask this Court to specifically declare that Plaintiffs are



1 not and will not be entitled to an order of this Court: (1)  
2 declaring unlawful the issuance of bonds and the mortgage loan  
3 transaction between Defendants to finance the reconstruction of  
4 Montana State Hospital (MSH); (2) enjoining the Montana Health  
5 Facility Authority (MHFA) from issuing bonds to finance the  
6 reconstruction of MSH; (3) enjoining MHFA and the Department of  
7 Public Health and Human Services (DPHHS) from entering into a  
8 mortgage loan agreement to finance the reconstruction of MSH;  
9 or (4) directing DDHHS to make any modification in its existing  
10 system of mental health services that would constitute a  
11 fundamental alteration of the nature of the services, programs,  
12 or activities provided.

13

14

#### BACKGROUND

15 Defendants incorporate by reference the background  
16 provided in Defendants' Brief in Support of Motion to Deny  
17 Class Certification.

18

19

#### ARGUMENT

20 The heart of the contentions set forth by Plaintiffs as a  
21 basis for requesting the declaratory and injunctive relief  
22 which is the subject of this motion is the Plaintiffs'  
23 conjecture and speculation that all persons who are currently  
24 receiving mental health treatment in Montana or who may someday  
25 be receiving such treatment will be denied appropriate  
26 treatment if the State of Montana constructs a licensed and

27

1 accredited hospital on the campus of Montana State Hospital at  
2 Warm Springs.

3 Plaintiffs ask this Court to interfere with the  
4 legislative prerogative of the Montana legislature to go  
5 forward to build a licensed and accredited hospital for those  
6 patients who need care in such a structured and secure setting  
7 for some period of time and to interfere with the legitimate  
8 discretionary decisions of the executive branch state agency  
9 that is charged with carrying out the function of providing  
10 mental health treatment to those who need it in this state.

11 plaintiffs speculatively assert that the patients they  
12 wish to have certified as a class are "at risk" of  
13 inappropriate and unnecessary admissions and continued  
14 confinement in order for DPHHS to generate revenue to pay for  
15 the costs of reconstruction of MSH and that they therefore may  
16 be subjected to "institutional confinement based upon the need  
17 of DPHHS to generate revenue" rather than "upon their treatment  
18 needs." (Compl. at ¶ 58.) This is the sole basis that exists  
19 for the requested relief. However, Plaintiffs are careful to  
20 base their request only on the allegation that some patients  
21 may be "unnecessarily" placed in such a facility for treatment.  
22 In doing so, they implicitly admit that for some patients at  
23 some times, -a hospital placement is or will be the most  
24 integrated, least restrictive setting appropriate for  
25 treatment.

26 Plaintiffs bring this action based on nothing more than  
27 the speculative belief that, as in the movie "The Field of

1 Dreams": "If you build it, they will come" (and--apparently--be  
2 kept inappropriately). They base the request for the relief at  
3 issue in this motion on the notion that if the hospital is  
4 built, patient rights will necessarily be violated because some  
5 patients may be unnecessarily housed at the facility at some  
6 time. Therefore, the State of Montana should not be allowed to  
7 build a licensed and accredited facility for the patients who  
8 need care in such a setting. That logic and reasoning must  
9 fail.

10  
11 STANDARD OF REVIEW

12 Wright & Miller, Federal Practice & Procedure, (1990),  
13 § 1368, at 517-19, indicate that the standard of review of a  
14 Fed. R. Civ. P. 12(c) motion for judgment on the pleadings is  
15 as follows:

16 The federal courts have followed a fairly  
17 restrictive standard in ruling on motions for  
18 judgment on the pleadings. Although the motion may  
19 be helpful in disposing of cases in which there is  
20 no substantive dispute that warrants proceeding  
21 further, thereby easing crowded trial dockets, hasty  
22 or imprudent use of this summary procedure by the  
23 courts violates the policy in favor of ensuring to  
24 each litigant a full and fair hearing on the merits  
25 of his claim or defense. The importance of this  
26 policy has made federal judges unwilling to grant a  
27 motion under Rule 12(c) unless the movant clearly  
establishes that no material issue of fact remains  
to be resolved and that he is entitled to judgment  
as a matter of law. In considering a motion for  
judgment on the pleadings, the trial court is  
required to view the facts presented in the light  
most favorable to the nonmoving party.

28 Rule 12(c) also provides that in the event that matters  
29 outside the pleadings are presented to the court and not

1 excluded from consideration during the course of briefing and  
2 arguing a motion for judgment on the pleadings, the motion  
3 shall be treated as a motion for summary judgment pursuant to  
4 Rule 56. There, too, the standard of review is that judgment  
5 must be granted if the moving party establishes that there are  
6 no genuine issues of material fact.

7  
8 **I. FEDERAL AND STATE LAW DO NOT REQUIRE A STATE TO PROVIDE  
9 MENTAL HEALTH TREATMENT IN A COMMUNITY BASED SETTING.**

9 Plaintiffs seek to enjoin the Defendants from issuing  
10 revenue bonds to pay for a new hospital building, seek to  
11 prevent Defendants from entering into a mortgage loan agreement  
12 and, ask this Court to order development of community based  
13 treatment programs for the proposed class--which they would  
14 have include every person who currently or at some point in the  
15 future will receive mental health care. There is no genuine  
16 issue of material fact on these issues. They are purely legal  
17 issues to be decided by the Court. The law is clear that  
18 Plaintiffs are not entitled to the relief at issue in this  
19 motion.'

20  
21 It should also be noted that Plaintiffs allege in the  
22 complaint that under the proposed managed care contract the  
23 Defendants will enter into, that the managed care organization  
24 will be required to purchase a set number of days at MSH and  
25 MMHNCC, regardless of clinical need, and that they will be  
26 required to make guaranteed payments sufficient to cover the  
27 annual bond payments. They contend that that is illegal  
discriminates against the patients who are not treated in the  
community, and will result in unnecessary institutionalization  
and segregation- of every person receiving inappropriate  
treatment at those facilities. (Compl. at ¶¶ 11, 12.)  
Plaintiffs seek an injunction to prohibit DPHHS from "entering  
into any managed care contract that discriminates against  
Plaintiffs and the Plaintiff class in the provision of services  
and protections." (Compl. at ¶ 79.)

1 Here, it is imperative for this Court to note that  
2 Plaintiffs are careful to not assert that no mental patients  
3 should ever be housed at a state hospital for treatment.<sup>2</sup> It  
4 is also important for this Court to recognize that Plaintiffs  
5 could not prevail on the instant claims even if they could  
6 prove that no patients now or in the future would ever be in  
7 need of hospital treatment. That is because they cannot  
8 establish a real and imminent threat of inappropriate  
9 placements given the legal check guards in place under  
10 Montana's commitment laws and the ability of any individual who  
11 feels he or she is being inappropriately treated to seek a  
12 remedy through either those procedures or by an action under  
13 the Rehabilitation Act of 1973 or the ADA.

14 Certainly the parties have differing beliefs regarding the  
15 number of core patients and the number of available beds which  
16 will be needed in a setting such as the contemplated new  
17 hospital. The Defendants have undertaken self evaluation and  
18 have hired outside consultants to ~~at~~tempt to estimate what  
19 types of care will be needed and the number of patients who  
20 will need it. Plaintiffs have publicly stated that they  
21 **believe chat** significantly fewer such beds will be needed.

22 However, the contemplated construction is not taking  
23

---

24 In fact, while the guaranteed bed days provision, was  
25 contemplated as a proviso for the managed care contracts,  
26 Defendants have dropped that provision from the proposed  
contract. (Answer at ¶ 9.) There will be no requirement for  
a guaranteed number of bed days.

27 <sup>2</sup>Although Plaintiffs do contend that all-members of the  
proposed Plaintiff class could be served in the community.  
(Compl. at ¶ 57.)

1 available resources away from community treatment programs.  
2 Instead, it will be financed with currently nonexistent revenue  
3 bonds--nor from a general fund appropriation or general  
4 obligation bonds. Bonds will be issued and bond insurance will  
5 be obtained.

6 The bond issuers and insurers are the entities that must  
7 evaluate from a business perspective the reliability of the  
8 estimated need for beds and determine--in their opinion--the  
9 degree of risk involved with this project and, concurrently,  
10 whether bonds will be issued and, if so, the interest rate at  
11 which they will be issued. Even if Plaintiffs' most dire  
12 predictions come true and no one is in need of the facility,  
13 that does NOT mean that patients will be placed there  
14 inappropriately in spite of that. It may simply mean that the  
15 State of Montana and the bond issuers and bond insurers made a  
16 bad business decision.

17 However, as noted, the State of Montana has taken  
18 considerable time and effort to gather relevant information on  
19 the types of patients who will need care in such a facility in  
20 the future and the length of time such care will be needed that  
21 all of these parties are willing to go forward in issuing and  
22 insuring the bonds based on their determination that this  
23 project is a good business proposition. The bond issuers and  
24 bond insurers have provided a secondary check on that decision.

25 Here, it is important to note that Plaintiffs are very  
26 careful to not assert that the ADA or any other state or  
27 federal constitutional or statutory provision requires that the

1 mentally ill be deinstitutionalized and treated exclusively in  
2 community based settings. That is because they cannot do so.  
3 The law is well established and it does not require a state to  
4 provide care to the mentally ill in a community based setting.  
5 That has been recognized under the federal constitution, state  
6 constitutions and statutory schemes, the Rehabilitation Act of  
7 1973, and the Americans with Disabilities Act (ADA).<sup>3</sup> Where

**B**

**9**

10 'This issue may well also be res judicata in the instant  
11 case and may implicate the federal abstention doctrine. The  
12 Plaintiffs in the instant action are represented by the same  
13 attorneys who represented the plaintiff class in Ihler v.  
14 Chisolm, et al., Lewis and Clark County Cause No. ADV-88-383  
15 That case is currently still pending before the Hon. Dorothy  
16 McCarter. In her decisions and orders of January 23, 1991 (at  
17 pp. 31-33) and March 6, 1991, she considered and rejected the  
18 plaintiffs' claim that they were entitled to community based  
19 care under state and federal law. She specifically considered  
20 and relied upon federal cases analyzing both the federal  
21 constitution and the Rehabilitation Act of 1973. In those  
22 orders, she held that neither federal nor state law mandates  
23 that the State of Montana and its officials develop community  
24 treatment facilities to provide services to patients who do not  
25 require the more restrictive environment of the State Hospital.  
26 Federal circuit courts that have considered the ADA in light of  
27 its legislative history, have consistently held that Act should  
be interpreted consistently with the Rehabilitation Act on this  
and other points. Those cases are cited and discussed below

There may also be an issue of res judicata with all of the  
criminal or civil involuntary commitments at the state  
hospital. Patients can be voluntarily admitted to the hospital  
pursuant to Mont. Code Ann. § 53-21-111 and can leave upon no  
more than five days' notice. However, patients who are  
involuntarily committed are placed at the hospital only after  
the court considers the relevant criminal issues (in a criminal  
commitment), or considers the available less restrictive  
treatment options in the community (in a civil commitment).

In the criminal commitments, the courts have issued  
commitment orders based upon the factors at issue in the  
criminal proceedings. See Mont. Code Ann. tit. 53 ch. 14.

In the civil commitments and recommitments, the courts are  
allowed by law to issue a commitment order to the state  
hospital only after the court considers what alternatives are  
available, what alternatives are investigated, and why the  
investigated alternatives were not deemed suitable. Mont. Code  
Ann. §§ 53-21-127 and -128.

1 that is the case--and where there remains a need (as publicly  
2 recognized by all the parties) for an appropriately licensed  
3 and accredited hospital for treatment of some mentally ill  
4 patients at times they require such a secure setting for  
5 treatment--there is no legal basis for enjoining the Defendants  
6 from issuing revenue bonds and from entering into a mortgage  
7 loan agreement to construct such a facility.

8 Numerous courts have recognized Congress's intention to  
9 interpret the ADA consistently with the Rehabilitation Act of  
10 1973. The ADA was drafted as a means of extending the coverage  
11 of the Rehabilitation Act of 1973 to nongovernmental employees  
12 and receivers of services (whereas the Rehabilitation Act had  
13 extended protections to only those employees of employers  
14 receiving federal funds and to persons who received services  
15 that were federally funded).

16 The courts that have considered the applicability of cases  
17 decided under the Rehabilitation Act to ADA suits have  
18 consistently held such cases to be persuasive and authoritative  
19 in light of the legislative history. See, e.g., Helen L. v.  
20 DiDario, 46 F.3d 325, 329-32 (3rd Cir. 1995); Easlev by Easlev  
21 v. Snider, 36 F.3d 297, 300-01 (3rd Cir. 1994); Messier v.  
22 Southbury Trainina Sch., 916 F. Supp. 133, 140-41 (D. Conn.  
23 1996) ; Stillwell v. Kansas City, Mo. Bd. of Police Comm'rs, 872  
24 F. Supp. 682, 686 (W.D. Mo. 1995); Peoples v. Nix, No. 93-5892,  
25 1994 WL 423856, at 3 (E.D. Pa. 1994); Medical Soc'y of New  
26 Jersev v. Jacobs, 1993 WL 413016, at \*4-6 (D.N.J. 1993); Easlev  
27 v. Snider, 841 F. Supp. 668, 672 (E.D. Pa. 1993); Conner v.

1 Branstad, 839 F. Supp. 1346, 1357 (S.D. Iowa 1993); Howard v.  
2 Department of Social Welfare, 655 A.2d 1102, 1105-06 (Vt.  
3 1994). Neither Act requires community based care for the  
4 mentally ill.

5 In Helen L. v. DiDario, supra, the Third Circuit held that  
6 where a mere line item transfer of funds would allow the State  
7 of Pennsylvania to provide attendant home health care services  
8 to a paraplegic who owned her own home and lived there with her  
9 two children and who required minimal assistance--in lieu of  
10 providing full time care in a nursing home at a significantly  
11 greater expense--the administrative change did not constitute  
12 a substantial modification to the state's 'health care Program.  
13 It ordered the funds to be provided to the existing program to  
14 allow the plaintiff to leave the nursing home where she had  
15 been treated against her will for five years. 46 F.3d at 338

16 The Helen L. court then noted that the defendants there  
17 had attempted to defeat the plaintiff's **claim** by characterizing  
18 it as a claim for community care or deinstitutionalization.  
19 The court stated: "[That is] something which the ADA does not  
20 require," citing Pennhurst State Sch. & Hosp. v. Halderman, 451  
21 U.S. 1, 24 (1981) ("Deinstitutionalization is something that  
22 involves "massive " change in a state's programs and is not  
23 required.") 46 F.3d at 336, n.22.

24 In Jackson v. Ft. Stanton Hosp. & Training Sch., 964 F.2d  
25 380, 991 (10th Cir. 1992), the Tenth Circuit Court of Appeals  
26 held that the constitution did not preclude a treatment team  
27 from considering the availability or unavailability of

1 community services in making a recommendation regarding  
2 transfer of developmentally disabled persons to a community  
3 setting.' see also S.H. v. Edwards, 860 F.2d 1045 (11th Cir.  
4 **1988**); Lelsz v. Kavanaugh, **807** F.2d 1243, **1251** (5th Cir. 1987);  
5 Society for Good Will to Retarded Children v. Cuomo, **737** F.2d  
6 **1239** (2d. Cir. 1984) (mentally retarded have no federal  
7 constitutional right to community based treatment).

8 in Dempsev v. Ladd, **840** F.2d 638  
9 (9th Cir. 1987), the Ninth Circuit considered and rejected the  
10 contention that the Rehabilitation Act required mixing of  
11 various treatment populations in order to constitute the least  
12 restrictive and most appropriate placement. It also held that  
13 a patient is not entitled to the treatment placement of his  
14 choice. The Ninth Circuit was specifically unwilling to read  
15 section 504 to require a state to extend special consideration  
16 to the patient's placement desires since to do so would  
17 unreasonably interfere in an area of state agency discretion  
18 and could possibly jeopardize other valid program goals. 940  
19 F.2d at 640-41. There, the court noted that:

20 There are many nondiscriminatory reasons, including  
21 economy, morale, menu planning, security and the  
22 like which might commend specialized facilities for  
23 specialized treatment and the court should not usurp  
the agencies' power to make placement choices unless  
there is clear proof of actual discriminatory  
treatment.

24 840 F.2d at 640.

25

26 'In other words, the state was not required to create  
27 community based care for each person who could benefit from  
such care. Rather, it could legitimately look at the resources  
already available in deciding the most appropriate, least  
restrictive placement to treat the patient.

1           In Phillips v. Thomason, 715 F.2d 365, 368 (7th Cir.  
2 1983), the Seventh Circuit considered the requirements of that  
3 Act and held that it does not create a duty to develop less  
4 restrictive community residential settings for the  
5 developmentally disabled.

6           In Kentucky Ass'n for Retarded Citizens, Inc. v. Conn, 674  
7 F.2d 582 (6th Cir. 1982), the Sixth Circuit held that  
8 Rehabilitation Act of 1973 does not prohibit all  
9 institutionalization of mentally retarded individuals since the  
10 least restrictive environment for some severely and profoundly  
11 retarded persons may well be institutionalization. 674 F.2d at  
12 585. There, **the court** held that the State of Kentucky could  
13 properly rebuild and upgrade its institutional facilities  
14 without violating the Rehabilitation Act of 1973. It  
15 specifically recognized that for some patients, a hospital  
16 based setting would be the least restrictive environment  
17 appropriate for treatment. 674 F.2d at 585.

18           In Messier v. Southbury Training School, supra, 916 F.  
19 Supp. at 140-42, the United States District Court for the  
20 District of Connecticut held that a state institution for  
21 persons with mental retardation is prohibited under both the  
22 Rehabilitation Act and the ADA from refusing to consider  
23 certain residents for possible community placement based merely  
24 upon the degree of their disabilities. However, there, the  
25 court **expressly** recognized that neither section 504 nor the ADA  
26 confers a right to community placement (citing Helen L.,  
27 supra). 516 F. Supp. at 140.

1           Some courts have held that the Rehabilitation Act and the  
2 ADA provide protection from discrimination against the disabled  
3 only when measured against how nondisabled individuals are  
4 treated. For example, in Wolford by Mackev v. Lewis, 860 F.  
5 Supp. 1123, 1134 (S.D.W. Va. 1994), the federal district court  
6 ruled that the "even handed treatment" requirement of section  
7 504 of the Rehabilitation Act does not require an affirmative  
8 obligation to expand existing programs. Rather, it held that  
9 section 504 ensures only that disabled individuals receive the  
10 same treatment as those who are not disabled, citing Johnson by  
11 Johnson v. Thomason, 971 F.2d 1487, 1494 (10th Cir. 1992),  
12 cert. denied U.S. , 113 s. Ct. 1255 (1993), and P.C. v.  
13 McLaughlin, 913 F.2d 1033, 1041 (2d Cir. 1990). See also  
14 Duo-vette ex rel. Duouette v. Dupuis, 582 F. Supp. 1365, 1369  
15 (D.N.H. 1984) (there is no requirement that all disabled  
16 persons be provided the same benefits as long as they receive  
17 "evenhanded treatment" in relation to the nondisabled).

18           In Kartin v. Voinovich, 840 F. Supp. 1175, 1191 (S.D. Ohio  
19 1993) , the plaintiffs conceded that the Rehabilitation Act did  
20 not create a right to community based care. 840 F. Supp. at  
21 1191, n.19. The court then held that even if the court found  
22 that the state had violated section 504 of the Rehabilitation  
23 Act because it had excluded developmentally disabled persons  
24 from community based care programs solely on the basis of the  
25 severity of their disabilities, it would be premature to say  
26 the court would order the defendants to expand or create new  
27 programs. It might, instead, simply order defendants to

1 administer the existing residential community services program  
2 in a nondiscriminatory manner by providing community housing  
3 without regard to disability from the date of judgment  
4 forward.<sup>5</sup>

5 There is no cause of action stated under either the  
6 Rehabilitation Act or the ADA where a plaintiff is not being  
7 denied service solely by reason of his handicap. See, e.g.,  
8 Gieskino v. Schrafer, 672 F. Supp. 1249 (W.D. Mo. 1987) ;<sup>6</sup> Clark  
9 v. Cohen, 613 F. Supp. 684, 693 (D. Pa. 1985); Flowers v. Webb,  
10 575 F. Supp. 1450, 1456 (E.D.N.Y. 1963).

11 In Conner v. Branstad, supra, 839 F. Supp. 1346, the Iowa  
12 federal district court specifically held that neither the  
13 Rehabilitation Act nor Title II of the ADA mandate the  
14 deinstitutionalization of mentally and physically disabled  
15 persons. Accordingly, there the residents in state facilities  
16 certified as intermediate care facilities for the mentally  
17 retarded who sought habilitation in community-based setting  
18 were held to have failed to state a claim under the ADA. 839  
19 F. supp. at 1355-57.

20 in Sabo v. O'Bannon, 586 F. Supp. 1132, 1137 (E.D. Penn.  
21 1984), the court considered allegations that the state violated  
22 the Rehabilitation Act of 1973 by failing to develop a  
23 treatment plan for a mildly retarded adult in lieu of  
24

25 <sup>5</sup>I.e., a "first come-first serve" waiting list, perhaps.

26 <sup>6</sup>In Giesking, the court also held that no due process  
27 Liberty interest required the state to place a voluntarily  
(confined individual in an appropriate community living  
arrangement even after a professional recommendation was made  
that he be so placed. 672 F. Supp. at 1355-66.

1 institutionalization and by placing him in a state hospital,  
2 rather than in either a state intermediate care facility or in  
3 a community living arrangement. It held that plaintiff had  
4 failed to state a cause of action under the Rehabilitation Act.  
5 while the Act prohibits a handicapped person from being denied  
6 benefits he would otherwise receive on the basis of the  
7 handicap, the court held that it does not mandate any type of  
8 affirmative action by the state. 586 F. Supp. at 1136-37.

9 in Garrity v. Gallen, 522 F. Supp. 171 (D.N.H. 1981), the  
10 ~~distribe~~ court held that the Rehabilitation Act could not be  
11 construed so broadly as to require deinstitutionalization of  
12 residents. 522 F. Supp. at 209, 213. There, the court did  
13 hold that state officials had violated the Act by denying to  
14 certain individuals the benefit of an individual service plan  
15 and by making placements and disbursing services based on the  
16 generalized assumption that certain groups were unable to  
17 benefit. However, the court also held that there was no  
18 substantive due process right to habilitation in the least  
19 restrictive environment, i.e., community placement. 522 F.  
20 supp . at 213-14.

21 state courts have also considered the issue of community  
22 based care. In Matter of J.S., 880 P.2d 976 (Wash. 1994) (en  
23 banc), the Washington Supreme Court held that patients being  
24 involuntarily confined in the state hospital did not have due  
25 process right to be removed to less restrictive facilities even  
26 upon finding that such treatment would be in the best interest  
27 of the patient. 880 P.2d at 981-82.

1           In Williams v. Secretary of Executive Office, 609 N.E.2d  
2 447 (Mass. 1993), the Massachusetts Supreme Court held that the  
3 state agency providing mental health services was not obligated  
4 under the ADA to make services available to persons with  
5 different or complicating disabilities simply by treating  
6 individuals with a single disability. 609 N.E.2d at 453. It  
7 held that the focus of the ADA is to address discrimination in  
8 relation to nondisabled persons, rather than to eliminate all  
9 differences in levels or portions of resources allocated and  
10 services provided to individuals with differing types of  
11 disabilities. 609 N.E.2d at 454.

12           There, the court held that there was no violation of the  
13 ADA where community placement was denied based upon the lack of  
14 availability. 609 N.E.2d at 454-55, nn.6, 7. It also held  
15 that a mental health agency may constitutionally provide  
16 differential services and treatment. No discharge services or  
17 particular residential placements was required by either the  
18 state or federal constitution. 609 N.E.2d at 457.  
19 Additionally, since there is no duty to provide services to  
20 individuals absent custody, it was not inappropriate for the  
21 state agency providing services to the mentally disabled to  
22 allocate community placements of mentally disabled individuals.  
23 609 N.E.2d at 457-58.

24           In the Matter of W.M., 252 Mont. 225, 229, 828 P.2d 378,  
25 381 (Mont. 1992), the Montana Supreme Court considered and  
26 rejected the contention that a statutory preference for  
27 community placement over institutionalization of

1 would fundamentally alter the nature of the service,  
2 program, or activity.

3 **468** F.3d at 336 (emphasis added).

4 Courts have held that a "reasonable accommodation" is one  
5 which does not **impose** an undue financial or administrative  
6 burden or necessitate a substantial alteration in the program  
7 **at issue.** See Naihason v. Medical College of Pennsylvania, 926  
8 F.2d 1368, 1383-85 (3d Cir. 1991); Harris v. Thiuen, 941 F.2d  
9 1495, 1527 n.48 (11th Cir. 1991). A "reasonable accommodation"  
10 does not require the creation of a new program or the expansion  
11 of an existing program. Doe v. Colautti, 592 F.2d 704, 709  
12 (3rd Cir. 1979); Wolford v. Mackey v. Lewis, supra, 860 F.  
13 Supp. at 1134-35;

14 Additionally, under both the Rehabilitation Act and the  
15 ADA, it is proper to deny a handicapped person access to a  
16 program for which he is not "otherwise qualified" because he  
17 does not have the ability to benefit from the program. Easley  
18 v. Easley v. Snider, supra, 36 F.3d at 301-06; see also State  
19 ex rel. McCormick v. Burson, 894 S.W.2d 739, 747 (Tenn. App.  
20 1994). In Easley, the Third Circuit recognized that it is  
21 appropriate for the government to design a program for a  
22 particular class of handicapped. See also, Travnor v. Turnage,  
23 485 U.S. 535, 549 (1988) ("There is nothing in the  
24 Rehabilitation Act that requires any benefit extended to one  
25 category of handicapped persons also be extended to all other  
26 categories of handicapped persons."); Martin v. Voinovich,  
27 supra, 840 F. Supp. at 1191

1           **Here**, as a matter of law, Plaintiffs cannot prevail on the  
2 matters at issue in this motion. The State of Montana is not  
3 required to develop new or additional community based programs.  
4 It is not illegal for the State of Montana to enter into a  
5 mortgage loan agreement and to issue revenue bonds to pay for  
6 the construction of a new state hospital. The Plaintiff is not  
7 entitled to the relief that they seek. No state or federal  
8 constitutional or statutory provision requires the community  
9 based care that they seek to have this Court order Defendants  
10 to develop.

11           The Defendants are entitled to the relief requested: This  
12 Court should issue an order which specifically declares that  
13 Plaintiffs are not and will not be entitled to an order of this  
14 Court: (1) declaring unlawful the issuance of bonds and the  
15 mortgage loan transaction between Defendants to finance the  
16 reconstruction of Montana State Hospital (MSH); (2) enjoining  
17 the Montana Health Facility Authority (MHFA) from issuing bonds  
18 to finance the reconstruction of MSH; (3) enjoining MHFA and  
19 the Department of Public Health and Human Services (DPHHS) from  
20 entering into a mortgage loan agreement to finance the  
21 reconstruction of MSE; or (4) directing DDHHS to make any  
22 modification in its existing system of mental health services  
23 that would constitute a fundamental alteration of the nature of  
24 the service, program, or activity provided.

25           If these six individually-named Plaintiffs contend that  
26 their rights are being violated by their current mental health  
27 placements, that is a matter for this Court to consider

1 separately and on a case by case basis since individualized  
2 determinations will be necessary. It is not appropriate to  
3 certify this action as a class action. Even if that were not  
4 the case, however, it would be no basis for this Court to issue  
5 an injunction preventing the Defendants from entering into the  
6 mortgage loan agreement or from issuing bonds. A facility like  
7 the contemplated facility will always be needed to treat some  
8 patients for some period of time.

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1 CONCLUSION

2 For the above stated reasons, Defendants request that  
3 partial judgment on the pleadings be issued on an expedited  
4 basis.

5 DATED this 20th day of August, 1996.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Defendants' Brief in Support of Motion for Partial Judgment on the Pleadings to be mailed to:

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DATED: August 20, 1996      *Harold A. Hadley*