

10-4-98

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COUNSEL FOR STATE OF MONTANA

RECEIVED

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA NATIONAL CLEARING HOUSE
FOR LEGAL SERVICES, INC.
HELENA DIVISION

11	SHIRLEY SMALL, et al.,)	
12)	Cause No. CV-96-49-H-CCL'
13	Plaintiffs,)	
14	v.)	DEFENDANTS' REPLY BRIEF
15	STATE OF MONTANA, et al.,)	IN SUPPORT OF MOTION FOR
16)	PARTIAL JUDGMENT ON
17	Defendants.)	THE PLEADINGS

17 Defendants have moved this Court for partial judgment on
18 the pleadings pursuant to Fed. R. Civ. P. 12(c). The
19 Plaintiffs have responded by introducing exhibits. Defendants
20 ask that this Court not consider those exhibits since they are
21 not relevant to the issues presented in this motion.

23 ARGUMENT

24 Defendants have noted in their opening brief that the
25 heart of the Plaintiffs' case is the notion that if bonds are
26 issued to reconstruct the hospital at MSH and such
27 reconstruction occurs, it will serve as an impetus to place

1 patients at that treatment facility--and Plaintiffs are asking
2 this Court to assume that such placements would be
3 inappropriate and would per se be a segregated setting
4 violative of the ADA. Plaintiffs speculatively allege that
5 individuals "might" be then placed or kept at the hospital
6 inappropriately because of this financial Incentive.

7 It is critically important for this Court to note,
8 however, that Plaintiffs were careful in the Complaint and to
9 avoid contending that no patients should be treated in such a
10 facility. Plaintiffs still do not make such a contention.
11 Instead, they are careful to base their requests for relief and
12 for denial of the requested partial judgment on the allegations
13 that some patients could at some time be inappropriately placed
14 or kept in the new hospital facility if there is a financial
15 incentive to have patients in the facility in order to pay off
16 the bonds. Plaintiffs then mischaracterize the Defendants'
17 position by stating that Defendants assert that "if some
18 persons need to be institutionalized at MSH or MMHNCC at some
19 time, then all persons within these institutions may be
20 'confined at all times." Finally, they speculatively contend
21 that issuance of the bonds for reconstruction will somehow
22 "divert" state resources from "appropriate and more cost
23 effective community treatment services into state institutional
24 services that are less effective and unnecessary."

25 Plaintiffs arguments must fail. First, the entire basis
26 for requesting injunctive relief with regard to issuance of the
27 bonds and reconstruction of the hospital is so speculative that

1 ven the authority provided by Plaintiffs holds they have no
2 tanding to file such a request for relief. Plaintiffs ignore
3 he fact that remedies exist which would address any
4 nappropriate placement in the future at such time that a claim
5 ecame ripe for consideration. Second, and most importantly,
6 laintiffs have provided no authority that stands for the
7 roposition that the Defendants cannot provide a secure
8 ospital setting for those persons who are in need of such
9 care.

10
11 a. Standing.

12 The Plaintiffs rely upon the case of Martin v. Voinovich,
13 340 F. Supp. 1175 (S.D. Ohio 1993) in contending that it would
14 be appropriate to certify this action as a class action.' That
15 case also contains a thorough discussion of standing
16 requirements. There, the court stated:

17 Article III of the U.S. Constitution restricts the
18 judicial power of federal courts to cases and
19 controversies. Flast v. Cohen, 392 U.S. 83, 94
20 (1968). Plaintiffs must allege they have sustained
or are immediately in danger of sustaining some
direct injury as a result of the challenged statute
or official conduct. O'Shea v. Littleton, 414 U.S.
488, 494 (1974). "Past exposure to illegal conduct
does not in itself show a present case or

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'That case does not provide a basis for certifying this
action since the allegations there were that the defendants had
refused to include goals in the plaintiffs habilitation plans
for independence or integration into the community after
recommendations had been made for such placements. There was
no need for the court there to conduct an individualized
assessment of the appropriate **placement** and treatment of each
patient to determine whether the patient's placement should be
changed. There was only the need to determine whether such
goals should be included in a patient's habilitation plan after
a recommendation is made for community placement.

1 controversy regarding injunctive relief . . . if
2 unaccompanied by any continuing, present adverse
effects."

3 In order to allege sufficient injury for purposes of
4 Article III, *plaintiffs must have suffered an injury*
5 *in fact--an invasion of a legally protected*
6 *interest, which is (a) concrete and particularized,*
and (b) actual or imminent, not conjectural or
hypothetical. *Lujan v. Defenders of Wildlife,*
U.S. ___, 112 S. Ct. 2130 (1992).

7 (Emphasis added.) 840 F. Supp. at 1187.

8 Here, Plaintiffs fail to state a case or controversy and
9 have no standing to bring the instant request for injunctive
10 relief. This entire action is based upon conjecture and
11 speculation that at some point in the future someone might be
12 inappropriately be placed or retained in a setting that is not
13 the most integrated setting appropriate to that patient's
14 needs.

15 If, at some point in the future, some patient or group of
16 patients contends that are actually being injured and the
17 injury is concrete and particularized and is actual or
18 imminent, not conjectural or hypothetical, remedies exist which
19 can be sought at that time. However, since Plaintiffs have no
20 such standing now, they are not entitled to the relief
21 requested. This request for injunctive relief preventing
22 reconstruction of the hospital should be dismissed.²

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26 'Defendants would note that Plaintiffs have not even
27 alleged that they as individuals would benefit from community
placements which currently exist and are available but which
they are being denied based solely upon their disabilities.
Where that is the case, it is unlikely that they can pursue
relief under the ADA even as individuals.

1 B. Defendants May Properly Reconstruct Montana State Hospital
2 for Patients In Need of that Level of Care and Security.

3 Defendants would note that Plaintiffs deliberately
4 misstate Defendants' arguments and positions. Defendants do
5 not contend that "if some persons need to be institutionalized
6 at some time, then all persons within these institutions may be
7 confined at all times." (Plaintiffs' brief at 2-3.) Rather,
8 Defendants contend that some patients will always require the
9 level of care and security afforded by a state hospital for
10 some period of time. Therefore, it is not inappropriate or a
11 violation of any state or federal constitutional or statutory
12 provision to provide such a level of care. While Plaintiffs
13 may disagree with the numbers of patients who Defendants
14 estimate will need that level of care in the future, that,
15 again, is not a basis for this Court to assume jurisdiction and
16 to enjoin building of such a facility; nor is any disagreement
17 that Plaintiffs may have over legislative priorities in
18 providing services to various competing groups of disabled
19 individuals provide a basis upon which this Court may act.

20 The language of the ADA and the regulations promulgated
21 under it upon which Plaintiffs rely upon provide that:

22 No qualified individual with a disability shall, by
23 reason of such a disability, be excluded from
24 participation in or be denied the benefits of the:
25 services, programs, or activities of a public
26 entity, or be subjected to discrimination by any
27 such entity.

28 42 U.S.C. 12132.

29 A public entity shall administer services,
30 programs and activities in the most integrated
31 setting appropriate to the needs of qualified
32 individuals with disabilities.

1 28 C.F.R. 35.130(d). That language qualifies the right to
2 community based care. It must be provided only if
3 institutional care is unnecessary and only to persons who are
4 qualified, (and can benefit) from care in the community.

5 Here, Plaintiffs implicitly admit that some persons are in
6 need of the level of care and security that can only be
7 provided in a hospital setting. However, they then, in effect,
8 ask this Court to deny the protections of the ADA to those
9 patients. They ask that Defendants be prohibited from
10 constructing a licensed, accredited facility to meet the needs
11 of the number of patients that Defendants have estimated need
12 such care--even though such a setting is necessary and in a
13 setting appropriate to the needs of such patients.

14 Plaintiffs provide absolutely no authority that it is
15 somehow illegal to reconstruct such a facility for the patients
16 who need that level of care. They do, however, ask this Court
17 to second guess the need for such a facility based upon their
18 own dispute over the numbers of patients that will need to be
19 served in such a setting in the future. That is not
20 appropriate and there is no legal authority for this Court to
21 do so. Here, Defendants are acting within their proper
22 authority to: reconstruct this hospital facility. They are
23 engaging in no illegal conduct. Defendants are entitled to
24 judgment on the issues of their right to issue the bonds and
25 reconstruct the hospital.

26
27

1 **C. It Is Appropriate to Segregate Persons for Treatment When**
2 **It Is Necessary to Do So or When More Integrated Settings**
3 **Do Not Exist.**

4 Plaintiffs cite much law and provide copies of unpublished
5 authority for this Court's review. None of it stands for the
6 proposition that it is illegal for Defendants to go forward to
7 reconstruction Montana State Hospital and to provide such a
8 setting as a benefit to patients who need such care.
9 Additionally, none of the cases cited by Plaintiffs undercut
10 Defendants' positions that: (1) there is no state or federal
11 constitutional or statutory right to community based treatment;
12 and (2) there is no state or federal constitutional or
13 statutory provision which requires the Defendants to create or
14 expand community based, programs.

15 Plaintiffs assert that because they are mentally ill, they
16 are per se "qualified" individuals within the meaning of the
17 ADA and are entitled to care in an integrated, community based
18 setting: This argument fails. One is qualified for particular
19 community based services or treatment under the ADA only if
20 that is the "most integrated treatment setting appropriate to
21 the needs" of the patient. To the extent that Plaintiffs do
22 not deny that some patients will need treatment and care at a
23 level of care and security provided by the hospital, they
24 cannot contend that all members of the proposed class are
25 "qualified" within the meaning of the ADA. Plaintiffs' own
26 authority recognizes that only unnecessary segregation is
27 illegal discrimination against the disabled. Helen L., 46 F.3d
325, 343 (3rd Cir. 1995).

1 Additionally, it is clearly permissible for a state to
2 deny community based care programs to individuals who cannot
3 benefit from them and are therefore not qualified for those
4 programs or services. Easley v. Snider, 36 F.3d 297, 305-06
5 (3rd Cir. 1994). There, the court recognized that there is
6 nothing in the ADA or the Rehabilitation Act which requires any
7 benefit extended to one category of handicapped person also be
8 extended to all other categories of handicapped persons, citing
9 Travnor v. Turnae, 485 U.S. 535, 548 (1987). Here, Defendants
10 may properly extend the benefit of a licensed, accredited
11 hospital facility to those who need care in such a setting.
12 Defendants are not, however, required to invest the same amount
13 of resources into creating or expanding community based
14 programs for the persons who do not need care in such a
15 facility.

16 Plaintiffs raise no contention that the persons in the
17 state hospital are flatly denied evaluation and consideration
18 for placement in available community based settings. There is
19 no allegation that Defendants apply any policy or practice of
20 refusing to consider persons for care in the community based
21 upon their diagnoses. Cf. Messier v. Southbury Training
22 School, 9.16 F. supp. 133, 142 (D. Conn. 1996). Rather,
23 **Plaintiffs** merely complain that there do not currently exist as
24 many community based treatment services as they could
25 beneficially use.

26 Even if that is true, it provides no basis for enjoining
27 reconstruction of the hospital facility. Defendants are not

1 required to forego such construction to instead develop and
2 expand community programs for those who can benefit from care
3 in the community. In fact, they are not required to develop or
4 expand community programs at all.

5 The law relied upon by Plaintiffs does not support their
6 contention that it is illegal under the ADA for Defendants to
7 reconstruct Montana State Hospital. In Wyatt v. Hanan, United
8 States District Court, Middle District of Alabama, Cause No.
9 3195-N, March 6, 1995, the court specifically agreed that the
10 ADA does not require the "unqualified and indiscriminate
11 deinstitutionalization and community placements" for mentally
12 ill and mentally retarded persons. Rather, the court noted
13 that it requires only that a public entity integrate qualified
14 disabled persons with the non-disabled "to the fullest extent
15 appropriate for the disabled and reasonable for the public
16 entity." There, the court held that:

17 If for a disabled patient and an institution this
18 meant community based placement, then that would be
19 required, and if for a patient and an institution it
20 meant institutionalization, then that would be
21 appropriate.

22 (Order at 2.)

23 In Williams v. Wasserman, United States District Court for
24 the District of Maryland, Cause No. CCB-94-980, Memorandum of
25 July 31, 1996, the court specifically declined to suggest that
26 there is any constitutional right to community-based treatment
27 (pp. 5-6) and then went on to thoroughly discuss both Section
28 504 of the Rehabilitation Act and the ADA at pp. 6-15,
29 including whether a handicapped person is "qualified" for

1 particular services and whether a state must create or expand
2 services in the community to make them available. That court
3 then stated:

4 In short, while the -ADA does not place an
5 affirmative obligation on the state to create or
6 fundamentally alter a program of community-based
7 treatment options, the ADA does oblige the
8 defendants to make those options available to
9 otherwise qualified individuals without regard to
10 the severity or particular classification (e.g.,
11 TBI, NRDD) of their disabilities.

12 Memorandum at 12.

13 It then concluded:

14 In Helen L., the defendant argued that it could not
15 make home care available to a disabled plaintiff who
16 had been placed in a nursing home, because of the
17 state's asserted inability to transfer the necessary
18 funds from its nursing home program to its home care
19 program within that fiscal year. The court rejected
20 this justification, because the plaintiff's demand
21 did not require a public entity to make "fundamental
22 alterations" in its programs or assume an "undue
23 burden" in order to comply with the integration
24 regulation under the ADA. Id. at 336-38.
25 Emphasizing that the program was already in
26 existence and was less expensive than the nursing
27 home program, the court required the defendant to
28 make attendant home care services under the existing
29 home care program available to the plaintiff.

30 I find the Third Circuit's reasoning plausible and
31 consistent with the purpose of the ADA. The
32 defendants' memorandum concedes that the analysis of
33 Helen L. can stand "if community placement is a
34 'reasonable accommodation' on the part of
35 defendants." I agree. The holding in Helen L. is
36 limited and does not endorse or require broad relief
37 of the kind defendants fear. Helen L. does not
38 support the imposition of court-ordered relief that
39 would require "transferring millions of dollars from
40 institutions to the community" (id. at 73) or
41 otherwise fundamentally altering the state's
42 programs.

43 (Emphasis added.)

1 Here, however, that is precisely the sort of court-ordered
2 relief that Plaintiffs seek. They ask this Court to preclude
3 Defendants from reconstructing the hospital and to instead take
4 whatever steps would be necessary to ensure that there is a
5 sufficient development of and expansion of community based care
6 to provide any patient who could benefit from a community based
7 setting to be placed in such a setting. Presumably, that would
8 require the Defendants to not issue bonds to reconstruct the
9 hospital but to instead devote resources of a similar amount to
10 create or expand such community based care. This Court is
11 without authority to do so.

12 13 CONCLUSION

14 For the above stated reasons, Defendants request that
15 a partial judgment on the pleadings be issued on an expedited
16 basis. This Court should issue an order declaring that:
17 (1) Plaintiffs are not and will not be entitled to an order of
18 this Court declaring unlawful the issuance of bonds and the
19 mortgage loan transactions between Defendants to finance the
20 reconstruction of Montana State Hospital (MSH); (2) Plaintiffs
21 are not and will not be entitled to an order of this Court
22 enjoining the Montana Health Facility Authority (MHFA) from
23 issuing bonds to finance the reconstruction of MSH; (3)
24 Plaintiffs are not and will not be entitled to an order of this
25 Court enjoining MHFA and the Department of Public Health and
26 Human Services (DPHHS) from entering into a mortgage loan
27 agreement to finance the reconstruction of MSH; and (4)

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CERTIFICATE OF SERVICE

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

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DATED: October 4 1996 Kenneth A. Keady