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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

HELENA DIVISION

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

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

ARGUMENT

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

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

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

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

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

. Standing.

The Plaintiffs reiy upon the case of Martin v. Voinovich, 340 F. Supp. 1175 (S.D. Ohio 1993) in contending that it would e appropriate to certify this action as a class action.[1] That case also contains a thorough discussion of standing requirements. There, the court stated:

> Article III of the U.S. Constitution restricts the judicial power of federal courts to cases and controversies. Flast v. Cohen, 392 U.S. 83, 94 (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

[1] 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.

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

In order to allege sufficient injury for purposes of Article III, *plaintiffs must have suffered an injury in fact--an invasion of a legally protected 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).

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

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

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

'Defendants would note that Plaintiffs have not even 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.

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

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

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

> No qualified individual with a disability shall, by reason of such a disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. 12132.

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

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

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

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

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

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

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

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

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

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

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

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

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

(Order at 2.)

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

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

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

Memorandum at 12.

It then concluded:

> In Helen L., the defendant argued that it could not make home care available to a disabled plaintiff who had been placed in a nursing home, because of the state's asserted inability to transfer the necessary funds from its nursing home program to its home care program within that fiscal year. The court rejected this justification, because the plaintiff's demand did not require a public entity to make "fundamental alterations" in its programs or assume an "undue burden" in 'order to comply with the integration regulation under the ADA. Id. at 336-38. Emphasizing that the program was already in existence and was less expensive than the nursing home program, the court required the defendant to make attendant home care services under the existing home care program available to the plaintiff.
>
> I find the Third Circuit's reasoning plausible and consistent with the purpose of the ADA. The defendants' memorandum concedes that the analysis of Helen L. can stand "if community placement is a 'reasonable accommodation' on the part of defendants." I agree. The holding in Helen L. is limited and does not endorse or require broad relief of the kind defendants fear. *Helen L. does not support the imposition of court-ordered relief that would require "transferring millions of dollars from* institutions *to the community"* (id. at 73) or otherwise fundamentally altering the state's programs.

(Emphasis added.)

Here, however, that is precisely the sort of court-ordered elief that Plaintiffs seek. They ask this Court to preclude efendants from reconstructing the hospital and to instead take hatever steps would be necessary to ensure that there is a ufficient development of and expansion of community based care o provide any patient who could benefit from a community based etting to be placed in such a setting. Presumably, that would equire the Defendants to not issue bonds to reconstruct the ospital but to instead devote resources of a similar amount to reate or expand such community based care. This Court is ithout authority to do so.

CONCLUSION

For the above stated reasons, Defendants request that artial judgment on the pleadings be issued on an expedited asis. This Court should issue an order declaring that: 1) Plaintiffs are not and will not be entitled to an order of his Court declaring unlawful the issuance of bonds and the ortgage loan transactions between Defendants to finance the reconstruction of Montana State Hospital (MSH); (2) Plaintiffs ire not and will not be entitled to an order of this Court enjoining the Montana Health Facility Authority (MHFA) from issuing bonds to finance the reconstruction of MSH; (3) Plaintiffs are not and will not be entitled to an order of this Court enjoining MHFA and the Department of Public Health and Human Services (DPHHS) from entering into a mortgage loan agreement to finance the reconstruction of MSH; and (4)

laintiffs are not and will not be entitled to an order of this ourt directing DPHHS to make modification in its existing ystem of mental health services that would constitute a undamental alteration of the nature of the services, programs r activities provided.

DATED this 4th day of October, 1996.

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I caused a true and accurate copy of

3 the foregoing Defendants' Reply Brief in Support of Motion for

4 Partial Judgment on the Pleadings to be mailed to:

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