IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

FRANKLIN BENJAMIN, et al,	**:**	
Plaintiffs	**:**	**NO. 1:09-cv-1182-JEJ**
	:	
v.	**:**	**(JUDGE JONES)**
	:	
DEPARTMENT OF PUBLIC WELFARE,	**:**	**Filed by ECF**
COMMONWEALTH OF PENNSYLVANIA	**:**	
and ESTELLE B. RICHMAN,	**:**	**Class Action**
Defendants	**:**	

BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT

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PROCEDURAL HISTORY

Plaintiffs, five individuals with mental retardations who reside at three state-operated intermediate care facilities for persons with mental retardation (ICFs/MR), and a class of over 1200 similarly situated, seek community residential services in lieu of institutional care. The legal predicates for the amended complaint are Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132 (claim A) and its regulations, and section 504 of the Rehabilitation Act (§ 504), 29 U.S.C. § 794 (claim B) and its regulations.

On September 2, 2009, with the concurrence of defendants, this Court granted Plaintiffs' Motion to Certify a Class. On September 24, 2009, defendants filed a motion to dismiss both claims. This brief is submitted in support of that motion.

STATEMENT OF FACTS

For purposes of this motion only, defendants assume the following facts to be true.

All five named plaintiffs and class members are persons with mental retardation who receive residential care and services at ICFs/MR operated by defendants. All are clinically eligible for community placement, i.e., given sufficient funding to create community placements, defendants would discharge them to community placements.

STATEMENT OF QUESTIONS INVOLVED

1. Whether Claim A under Title II of the Americans with Disabilities Act and its regulations states a claim for relief?

2. Whether Claim B under section 504 of the Rehabilitation Act and its regulations states a claim for relief?

ARGUMENT

I. CLAIM A FAILS TO STATE A CLAIM FOR RELIEF.

Under the contemporary standards for sufficiency of a complaint under Fed. R. Civ. P. 8,

> only a complaint that states a plausible claim for relief survives a motion to dismiss . . . . Determining whether a complaint states a plausible claim for relief will . . . be a context specific task that requires the reviewing court to draw on its judicial experience and common sense . . . [W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged -- but it has not "show[n]" -- "that the pleader is entitled to relief."
> Fed.Rule Civ. Proc. 8(a)(2)

Ashcroft v. Iqbal, ___ U.S. ___, ___, 129 S.Ct. 1937, 1950 (2009). Claim A fails this test. Because the facts pleaded here "do not permit the court to infer more than the possibility of misconduct," id., Claim A must be dismissed.

Claim A, a claim for community care in lieu of institutional care under Title II of the ADA, is governed by Olmstead v. L.C., 527 U.S. 581, 119 S.Ct. 2176 (1999). See also Frederick L. v. Dep't of Public Welfare, 422 F.3d 151 (3d Cir. 2005) (Frederick II); Frederick L. v. Dep't of Public Welfare, 364 F.3d 487 (3d Cir. 2004) (Frederick I). In its plurality opinion, the Olmstead Court explained:

> [U]nder Title II of the ADA, States are required to provide community-based treatment for persons with mental disabilities when [1] the State's treatment professionals determine that such placement is appropriate, [2] the affected persons do not oppose such treatment, and [3] the placement can be reasonably accommodated, taking into

> account the resources available to the State and the needs of others with mental disabilities.

527 U.S. at 606, 119 S.Ct. at 2190.

The amended complaint here satisfies the first two elements of the three Olmstead cumulative elements required for relief, but fails to do so for the third element -- it gives no plausible account of how the relief it seeks can be granted without simply allowing plaintiffs to jump the queue. Plaintiffs acknowledge the existence of a waiting list for community care. Amended Complaint ¶ 62. They further allege that those living in the community who are on the emergency and critical waiting lists are given community placement priority over those, such as plaintiffs, who are receiving institutional care. Id. ¶¶ 62, 63. This prioritization is wholly compatible, however, with the requirements of Olmstead, which allows that "the needs of others with mental disabilities be taken into account." 527 U.S. at 606, 119 S.Ct. at 2190. Plaintiffs' situation is not "emergency" or "critical," and so their claim to community care must yield to claims of those whose situation is "emergency or critical."

The Supreme Court, the Third Circuit, and common sense, foreclose the relevance here of plaintiffs' various fiscal claims. See Amended Complaint ¶¶ 3, 53, 58, 61. Plaintiffs fail to take into account transition costs, i.e., the costs of simultaneously running institutions while creating community programs, see Williams v. Wasserman, 164 F. Supp. 2d 591, 637 (D. Md. 1991), and the

difference between the marginal cost of care at an institution versus the average cost of care at institutions that still operate. See Olmstead, 527 U.S. at 604 n.15; 119 S.Ct. at 2189 n.15; Frederick I, 364 F.2d at 497. The Third Circuit has already rejected plaintiffs' notion that Olmstead can require that funding be shifted from one appropriation line to another. Id.

Given that plaintiffs acknowledge the existence of a waiting list for community services, and in light of plaintiffs' failure to allege a plausible case that the relief they seek would not simply allow them to jump the queue for community services, the question of the existence or nonexistence of a "comprehensive, effectively working plan" for deinstitutionalization, Olmstead, 527 U.S. at 606-607, 119 S.Ct. at 2189, is simply irrelevant. Under the "common sense" and "plausibility" pleading standard of Iqbal, Claim A must be dismissed. Indeed, because the Third Circuit already has recognized that defendants have the objective of community placement as soon as fiscally feasible, Frederick II, 422 F.3d at 153, and because the Supreme Court has declared that "officials of the State must be presumed to have a high degree of competence in deciding how to discharge their governmental responsibilities," Frew v. Hawkins, 540 U.S. 431, 442, 124 S. Ct. 899, 906 (2004) (emphasis added), Claim A must be regarded as highly implausible.

And because "language in a regulation…may not create a right that Congress has not," Alexander v. Sandoval, 532 U.S. 275, 291, 121 S.Ct. 1511, 1522 (2001), plaintiffs' reliance on ADA regulations is to no avail.

II. CLAIM B UNDER SECTION 504 OF THE REHABILITATION ACT FAILS TO STATE A CLAIM FOR RELIEF.

Federal courts have routinely rejected claims for deinstitutionalization of persons with mental disabilities under section 504 of the Rehabilitation Act. See Phillips v. Thompson, 715 F.2d 365 (7th Cir. 1983) (deinstitutionalization not required by section 504) (per Posner, J.); Kentucky Ass'n for Retarded Citizens v. Conn, 674 F.2d 582 (6th Cir. 1982) (class of individuals with mental disabilities did not have right to treatment in the least restrictive environment possible; section 504 does not prohibit institutionalization of individuals with mental disabilities); Connor v. Branstad, 839 F. Supp. 1346 (S.D. Iowa 1993) (individuals in facilities for people with mental disabilities do not have right under section 504 to community-based treatment services); Sabo v. O'Bannon, 586 F. Supp. 1132 (E.D. Pa. 1984) (no cause of action where complaint alleged that section 504 was violated because a person with mental disabilities was denied placement in a residential, non-institutional facility).[1]

[1] Section 504 has been amended since these cases were decided, but, with the exception of 29 U.S.C. § 794(d), which is relevant for reason described supra, the amendments are of no consequence here. See 29 U.S.C.A. § 794 (Historical and Statutory Notes 2008).

Plaintiffs do not have a right to community care under section 504 (claim B). Section 504 is simply not a deinstitutionalization statute. While in some contexts "the protections found in [Title II of] the ADA and in the Rehabilitation Act are interpreted similarly," Doe v. County of Centre, 242 F.3d 437, 446 (3d Cir. 2001), the Third Circuit has recognized that section 504 is "practically a dead letter as a remedy for segregated public services." Helen L. v. DiDario, 46 F.3d 325, 331 (3d Cir. 1995) (citation and internal quotation marks omitted). Moreover, Congress itself clearly indicated that ADA/504 equivalence is limited to the employment provisions of the ADA (Title I), and not Title II (public services), when it enacted subsection (d) of section 504, 29 U.S.C. § 794(d), which provides for ADA/504 equivalence solely in Title I (employment) cases. See Pub. L. 102-569, § 506.[2]

[2] Sandoval, supra, here, as in the case of the ADA, deprives section 504 regulations of the force plaintiffs attribute to them.

CONCLUSION

For the reasons set forth above, claims A and B should be dismissed.

Respectfully Submitted,

Date: September 24, 2009

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