UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
VICINAGE OF CAMDEN

TERESITA CAREY, by and through her guardian, Jim Carey, et al.,	HON. RENEE MARIE BUMB, U.S.D.J.
Plaintiffs,	
v.	Civil Action
CHRISTOPHER CHRISTIE, Governor of the State of New Jersey, et al.,	Civil Action No. 1:12-cv-02522
Defendants.	

BRIEF ON BEHALF OF DEFENDANTS, CHRISTOPHER CHRISTIE, GOVERNOR OF THE STATE OF NEW JERSEY, ET AL., IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT UNDER FED. R. CIV. P. 12(b)

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PRELIMINARY STATEMENT

Plaintiffs reside and receive services at Vineland Developmental Center, an institution operated by the New Jersey Department of Human Services, Division of Developmental Disabilities. In May 2011, the State announced a plan to close Vineland to further efforts to transition individuals with developmental disabilities to more integrated community settings. In December 2011, however, this plan was halted when the New Jersey Legislature created the Task Force on the Closure of State Developmental Centers. The Task Force was charged with evaluating all State developmental centers to make binding recommendations to the State Legislature for the closure of at least one of these institutions.

In its final report, which was issued in August 2012, the Task Force made binding recommendations to the Department of Human Services to close two developmental centers, Woodbridge Developmental Center and North Jersey Developmental Center, within the next five years. The Task Force concluded that Vineland Developmental Center should not be closed. Thus, there are no plans to close Vineland Developmental Center at this time.

In the amended complaint, Plaintiffs seek to prevent or impose conditions on their discharges from Vineland, should such discharges ever occur. That is, despite there being no plans to close Vineland or to transfer Plaintiffs to community settings,

Plaintiffs ask the court to issue an advisory opinion setting conditions on Plaintiffs' theoretical transfers.

The amended complaint should be dismissed because it is not ripe for disposition. The court should not adjudicate whether Defendants must offer Plaintiffs services at Vineland Developmental Center, nor whether any alternate placements Defendants may offer Plaintiffs may be appropriate, when Defendants have no plans to close Vineland or to transfer Plaintiffs, and have not offered Plaintiffs alternate residential placements. Indeed, these events may not occur as Plaintiffs predict or may not occur at all.

Moreover, even if the court decides to adjudicate Plaintiffs' claims, the complaint should be dismissed because Plaintiffs do not state a cause of action upon which relief can be granted. First, the Americans with Disabilities Act and Rehabilitation Act do not prohibit Defendants from offering Plaintiffs services in more integrated settings, regardless of Plaintiffs' preference for care in a particular institution. These statutes forbid discrimination in the form of unjustified institutionalization, and not de-institutionalization. Second, the Medicaid Act does not give Plaintiffs a right to receive services at a particular institution, like Vineland Developmental Center, but only allows them to choose an institutional level of services. Finally, the court should abstain from hearing Plaintiffs' due process claims because Defendants have an administrative and

judicial appeal process to judge the appropriateness of offers of residential placement, should such offers ever be made. The court should defer to this process, rather than attempting to adjudicate the appropriateness of particular offers of placements to particular individuals in class action litigation.

PROCEDURAL HISTORY

On April 27, 2012, Plaintiffs filed a complaint against Defendants alleging that their potential transfers from Vineland Developmental Center would violate the Americans with Disabilities Act, the Rehabilitation Act, the Medicaid Act, and the Due Process Clause of the 14th Amendment.

On May 10, 2012, Plaintiffs sent forms to Defendants requesting that they waive service of the complaint. Defendants executed the waiver of service forms, and their time to answer, move or otherwise respond to the complaint was set to expire on July 9, 2012.

On July 3, 2012, Defendants filed an application for a Clerk's extension of the time period to respond to the complaint by 14 days. On July 5, 2012, this extension was granted, extending the time to respond to the complaint to July 23, 2012.

On July 13, 2012, Plaintiffs filed a motion for admission of Attorney Thomas B. York Pro Hac Vice to represent Plaintiffs in this matter. On July 26, 2012, the court granted this motion.

On July 23, 2012, Defendants filed a motion to dismiss Plaintiffs' complaint. Plaintiffs filed opposition to this motion on August 6, 2013.

On August 10, 2012, Defendants filed a letter supplementing their motion to dismiss, which explained that the Task Force on the Closure of State Developmental Centers made binding recommendations that Woodbridge Developmental Center and Vineland Developmental Center, and not Vineland Developmental Center, be closed within five years.

On September 21, 2012, Plaintiffs filed motions for the admissions of Attorney Cordelia M. Elias and Attorney Donald B. Zaycosky Pro Hac Vice to represent Plaintiffs in this matter. On October 3, 2012, the court granted these motions.

On September 25, 2012, the court administratively terminated Defendants' motion to dismiss for reasons set forth on the record during a September 20, 2012 phone conference.

By Order dated December 7, 2012, the court granted Plaintiffs leave to file an emended complaint by January 11, 2013.

On January 11, 2013, Plaintiffs filed an amended complaint.

On January 24, 2013, Defendants filed an application for a Clerk's extension of the time period to respond to the amended complaint by 14 days. On January 25, 2013, this extension was

granted, extending the time to respond to the complaint to February 8, 2013.

Defendants now file a motion to dismiss the amended complaint.

STATEMENT OF FACTS

The New Jersey Department of Human Services (DHS), Division of Developmental Disabilities (DDD) provides services to eligible individuals with developmental disabilities. N.J.S.A. 30:6D-23 et seq. These services include "care management, diagnosis, evaluation, treatment, personal care, day care, domiciliary care, special living arrangements, training, education, vocational training, recreation, counseling of the person with the disability and his family, information and referral services and transportation services." N.J.S.A. 30:6D-25.

DDD provides both community-based and institutional residential services.[1] It operates a Medicaid Home and Community-Based Services Waiver (waiver program) to fund residential and other services in the community. See N.J.S.A. 30:6D-42.1. The

[1] Although DDD funds residential services, it maintains a lengthy waiting list for these services because its resources are not sufficient to meet the needs of the class of beneficiaries. See N.J.A.C. 10:46C-1.1 et seq.; J.D. v. Div. of Developmental Disabilities, 329 N.J. Super. 516, 522 (App. Div. 2000)(With competing claims for limited financial resources, DDD "is faced with the daunting and unenviable task of attempting to provide for a large number of clients with inadequate funding for placement of all those in need of services."). Plaintiffs are not on the waiting list because they already receive residential services from DDD and have not requested a community placement.

waiver program, which is approved by the Center for Medicare and Medicaid Services, allows DDD to waive certain Medicaid Act requirements to obtain Medicaid funding for home and community based services, which would otherwise be provided in an institution. 42 U.S.C. 1396n(c). DDD serves the vast majority of eligible individuals in the community.

DDD also operates seven developmental centers, which provide an institutional level of care. See N.J.S.A. 30:1-7. Plaintiffs reside and receive services at one of these facilities, Vineland Developmental Center (Vineland or Vineland Developmental Center). See Amended Complaint at ¶¶4-10.

In May 2011, DDD announced a plan to close Vineland Developmental Center to further its efforts to transition eligible individuals from institutions to the community. See Complaint at ¶60. These efforts are consistent with the United States Supreme Court's holding in Olmstead v. L.C., 527 U.S. 581, 587 (1999), in which the Court found that, under Title II of the ADA, a State must transition an individual from an institution to the community if the State's treating professionals have determined that the person can be served in the community and the person does not oppose community placement or show justification for why it need not under the ADA "fundamental alterations" provisions.

On December 14, 2011, however, the Vineland closure plan was halted when the New Jersey Legislature created the Task Force

on the Closure of State Developmental Centers (the Task Force). See Complaint at ¶71; see also Certification of Gerard Hughes at ¶2, Exhibit A, Senate No. 2928, Chapter 143 P.L. 2011.[2] The task force was charged with performing a "comprehensive evaluation of all of the State developmental centers [to] provide recommendations for the closing of developmental centers." Exhibit A at ¶2. The law required the Task Force to submit a report to the Legislature detailing "its closure recommendations, including, if applicable, a targeted date for closure of each developmental center recommended for closure, and make such other recommendations as the task force deems appropriate." In creating the Task Force, the Legislature noted that "[t]he State operates more developmental centers than necessary to support a declining population of individuals with developmental disabilities, which has decreased by approximately 1,200 individuals, or 33 percent, since 1998." Id. at ¶1(d). It found that "[i]t is important for the State to affirm its commitment to provide individuals with developmental disabilities who are institutionalized with the opportunity to live in the community, consistent with the Olmstead v. L.C. decision, and to realign fiscal, staffing, and operational resources to

[2] In considering a motion to dismiss, the court may consider documents referenced in the complaint and matters of public record. Pittsburgh v. W. Penn Power Co., 147 F.3d 256, 259 (3d Cir. 1998); Keystone Redevelopment Partners, LLC v. Decker, 631 F.3d 89, 95 (3d Cir. 2011). Senate No. 2928, Chapter 143 P.L. 2011 is a public law and is referenced in the complaint.

support community living." Id. at ¶1(f). The Task Force's recommendations are binding on DHS. Id. at ¶4.

On August 1, 2012, after a thorough review of each developmental center pursuant to five criteria mandated in the enabling statute, the Task Force issued its final report. See Amended Complaint at ¶72; see also Certification of Gerard Hughes at ¶3, Exhibit B, The Task Force's Final Report. It made binding recommendations to DHS to close two developmental centers, Woodbridge Developmental Center and North Jersey Developmental Center, within the next five years. Id. at p.3. The Task Force concluded that Vineland Developmental Center should not be closed. Ibid. While recognizing that Vineland had previously been identified for closure, "the Task Force expressed concern that the provider infrastructure in [Vineland's] region was not as robust as in the northern part of the state and that closing Vineland may have a significant adverse impact on the local economy in Cumberland County...." Ibid. Thus, there are no plans to close Vineland Developmental Center at this time.

Because the State has not yet decided to close Vineland Developmental Center, and Plaintiffs do not wish to move from Vineland, Defendants are not considering Plaintiffs for community placement at this time and have not offered them alternate residential placements. See Certification of Eloise Hawkins at ¶4-10, Exhibit C, Individual Habilitation Plan of T.C. at p.8-9;

Exhibit D, Individual Habilitation Plan of K.C. at p.9-10; Exhibit E, Individual Habilitation Plan of C.D. at p.7-8; Exhibit F, Individual Habilitation Plan of L.G. at p.9; Exhibit G, Individual Habilitation Plan of D.H. at p.7; Exhibit H, Individual Habilitation Plan of P.I. at p.9; Exhibit I, Individual Habilitation Plan of B.S. at p.8-9.[3] Indeed, Plaintiffs' Individual Habilitation Plans explicitly note their families' and guardians' opposition to community placement, and indicate that Plaintiffs are "not being considered for community placement at this time." Ibid.

If Vineland someday closes, and if Defendants someday offer Plaintiffs other residential placements, then Plaintiffs will have the right to appeal the appropriateness of any prospective placements. See N.J.A.C. 10:46B-5.1. Any appeals will be transmitted to the Office of Administrative Law (OAL) for a hearing. See N.J.A.C. 10:46B-5.1; N.J.A.C. 10:48-2.1. After a hearing, the Administrative Law Judge will issue a decision, which shall be adopted, rejected, or modified by the Assistant

[3] Plaintiffs' Individual Habilitation Plans are referenced in the Amended Complaint at ¶65-66. These documents are not attached to Defendants' publically-filed motion to dismiss because they contain medical and personal information. Defendants file a motion to seal these documents in conjunction with their motion to dismiss, and will file Plaintiffs' Individual Habilitation Plans under seal if the motion is granted. Plaintiffs are identified by name in the publically-filed complaint. Consequently, Defendants cannot file redacted versions of the Individual Habilitation Plans because, even if identified by only initials, Plaintiffs' identities in the documents would be readily identifiable.

Commissioner for DDD. See N.J.A.C. 10:48-7.1(d). Plaintiffs may then appeal the Assistant Commissioner's decision to the Superior Court of New Jersey, Appellate Division. See N.J.A.C. 10:48-7.1(d); N.J. Ct. R. 2:2-3(a)(2).

Plaintiffs' amended complaint seeks declaratory relief placing conditions on their theoretical transfers from Vineland, and effectively enjoining Defendants from closing Vineland Developmental Center, should the State choose to do so.[4] As set forth below, the amended complaint should be dismissed because it is not ripe for adjudication and fails to state a claim upon which relief may be granted.

STANDARD OF REVIEW

When considering a motion to dismiss for failure to state a claim upon which relief can be granted, the reviewing court must accept all well pleaded allegations in the complaint as true and view them in the light most favorable to the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); Mortensen v. First Fed. Savings and Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977). A court will not, however, accept bald assertions, unsupported conclusions, unwarranted inferences, or sweeping legal conclusions cast in the

[4] Although Plaintiffs do not explicitly request that the Court enjoin the State from closing Vineland, the relief they seek would have that effect because it would disallow Plaintiffs' transfers from Vineland without their guardians' consent and would afford Plaintiffs the option to choose services at Vineland. See Amended Complaint at ¶94(c) and ¶95(b)(ii).

form of factual allegations. Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997). The court may also consider the documents attached to, or specifically referenced in, the complaint, and matters of public record. See Pittsburgh v. W. Penn Power Co., 147 F.3d 256, 259 (3d Cir. 1998); Keystone Redevelopment Partners, LLC v. Decker, 631 F.3d 89, 95 (3d Cir. 2011). Plaintiffs cannot prevent the court from relying on documents on which its claim is based by failing to attach them or failing to explicitly cite them. In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1426 (3d Cir. 1997). The court may consider any document which is "integral to or explicitly relied upon in the complaint" as part of a motion to dismiss without converting it to a motion for summary judgment. Ibid.

ARGUMENT

POINT I

PLAINTIFFS' CLAIMS ARE NOT RIPE BECAUSE DEFENDANTS HAVE NO PLAN TO CLOSE VINELAND DEVELOPMENTAL CENTER OR TO TRANSFER PLAINTIFFS TO ALTERNATE RESIDENTIAL PLACEMENTS.

Plaintiffs' claims hinge on a litany of contingencies. They assert that, first, Defendants may someday close Vineland Developmental Center; second, if Vineland closes, Defendants may offer Plaintiffs residential placements in the community rather than in institutional settings; and, third, Defendants' offers of placement may be so substandard that they violate Plaintiffs' due process rights. Notwithstanding their lack of merit, which will be

discussed infra, Plaintiffs' claims are not ripe for disposition because Defendants have no plan to close Vineland or to transfer Plaintiffs to other residential placements. The complaint should be dismissed under Fed. R. Civ. P. 12(b)(1) because it cannot be adjudicated at this time.

To have standing, Plaintiffs must show that they have suffered an actual or imminent injury, and not one that is conjectural or hypothetical. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992). "A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" Texas v. United States, 523 U.S. 296, 300 (1998)(citing Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568, 581 (1985)). "Ripeness requires [a court] to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." Id. at 300-01. A case must involve "a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." Presbytery of N.J. v. Florio, 40 F.3d 1454, 1463 (3d Cir. 1994)(quoting North Carolina v. Rice, 404 U.S. 244, 246 (1971)). A federal court's jurisdiction can only be invoked when a plaintiff presents a ripe controversy. Ibid. (citing Warth v. Seldin, 422 U.S. 490, 499 (1975)).

In Texas v. United States, supra, 523 U.S. at 297–98, the Texas Legislature enacted a scheme whereby local school boards would be accountable to the state for student achievement. Texas required pre-clearance from the Federal government before it implemented changes affecting voting because it was a covered jurisdiction under § 5 of the Voting Rights Act of 1965. Id. at 298–99. The state sought pre-clearance that its accountability scheme did not have any effect on voting. Id. at 299. The Attorney General did not object to the scheme, itself, but cautioned that implementation of certain provisions of the scheme could result in a violation of Section 5, which would require pre-clearance. Ibid. The provisions at issue allowed the state to appoint a master or a management team to oversee a school district's operations. Id. at 298–99. Texas sought a declaratory judgment from District Court that Section 5 did not apply to the subject provisions, but the court ruled that the matter was not ripe. Id. at 299.

The Supreme Court affirmed the District Court's ruling. Texas v. United States, supra, 523 U.S. at 302. It noted that whether Texas would appoint a master or management team was contingent on several factors: first, a school district must fall below standards; second, the State must impose sanctions lesser than a master or management team; and third, the State would appoint a master or management team only if these lesser sanctions

were ineffective and only to the extent necessary. Id. at 300. While Texas asked the Court to rule that under no circumstances could the imposition of these sanctions constitute a change affecting voting, the Court remarked that it "[did] not have sufficient confidence in [its] powers of imagination to affirm such a negative." Id. at 301. The Court found that the matter was not ripe for dispute, noting that the "determination of the scope of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of judicial function." Id. at 301 (citing Longshoreman v. Boyd, 347 U.S. 222, 224 (1954)).

In the instant matter, the court cannot adjudicate Plaintiffs' claims because they hinge on a series of contingencies that have not yet occurred, and may not occur at all. Defendants have no plan to close Vineland Developmental Center. The Task Force recommended that DHS close two other developmental centers, Woodbridge and North Jersey, within five years. See Certification of Gerard Hughes at ¶3, Exhibit B, The Task Force's Final Report at p.3. The Task Force explicitly recommended that Vineland not be closed, finding that "the provider infrastructure in [Vineland's] region was not as robust as in the northern part of the state and that closing Vineland may have a significant adverse impact on the local economy in Cumberland County...." Ibid. Thus, there are no plans to close Vineland Developmental Center at this time.

Likewise, Defendants are not planning to transfer Plaintiffs to other residential facilities because Plaintiffs' guardians have indicated that Plaintiffs wish to stay at Vineland. See Certification of Eloise Hawkins at ¶4-10, Exhibit C, Individual Habilitation Plan of T.C. at p.8-9; Exhibit D, Individual Habilitation Plan of K.C. at p.9-10; Exhibit E, Individual Habilitation Plan of C.D. at p.7-8; Exhibit F, Individual Habilitation Plan of L.G. at p.9; Exhibit G, Individual Habilitation Plan of D.H. at p.7; Exhibit H, Individual Habilitation Plan of P.I. at p.9; Exhibit I, Individual Habilitation Plan of B.S at p.8-9. Plaintiffs' Individual Habilitation Plans, which are referenced in the amended complaint, explicitly note their families' and guardians' opposition to community placement, and indicate that Plaintiffs are "not being considered for community placement at this time." Ibid. In fact, the treatment team of one Plaintiff does not even feel that this individual is capable of living in the community at this time. See Certification of Elosie Hawkins at ¶9, Exhibit H at p.9.

In sum, Plaintiffs' claims are hypothetical and do not present a ripe dispute. The court should not adjudicate whether Defendants are required to offer institutional care to Plaintiffs at Vineland or another developmental center when Plaintiffs are not slated to move anywhere. Indeed, if Vineland someday closes, Defendants may very well offer Plaintiffs an institutional level of

services that Plaintiffs find acceptable. Likewise, the court cannot possibly decide whether an offer of placement is so deficient that it violates an individual's due process rights when the offer does not yet exist and may never exist. Therefore, Plaintiffs' amended complaint, which seeks an advisory opinion from the court setting conditions on their theoretical transfers from Vineland, should be dismissed because it is not ripe for adjudication.

POINT II

PLAINTIFFS' ADA AND REHABILITATION ACT CLAIMS SHOULD BE DISMISSED BECAUSE THESE LAWS DO NOT REQUIRE DEFENDANTS TO SERVE INDIVIDUALS IN INSTITUTIONS.

Plaintiffs attempt to turn the Americans with Disabilities Act (ADA) and the Rehabilitation Act on their heads by asserting that the laws require Defendants to serve Plaintiffs in a particular developmental center. The ADA and Rehabilitation Act are anti-discrimination laws which require States to serve individuals with disabilities in the least-restrictive environment appropriate to their needs. The statutes do not compel a State to serve individuals in institutions because providing services in a more integrated community setting, even against an individual's wishes, is not discriminatory.[5] Therefore, Plaintiffs have not

[5] Defendants do not concede that they will serve Plaintiffs in community settings against Plaintiffs' wishes in the event Plaintiffs are ever transferred, as Plaintiffs predict.

stated viable claims under the ADA and Rehabilitation Act, and their complaint should be dismissed under Fed. R. Civ. P. 12(b)(6).

The ADA provides "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. §12101(b)(1). In enacting the ADA, Congress found that "historically, society has tended to isolate and segregate individuals with disabilities," and that discrimination "persist[ed] in such critical areas as ... institutionalization." 42 U.S.C. §12101(a)(2) and(3). "The ADA stepped up earlier measures to secure opportunities for people with developmental disabilities to enjoy the benefits of community living." Olmstead, supra, 527 U.S. at 599.

Title II of the ADA, under which Plaintiffs attempt to bring their claims, concerns public services. 42 U.S.C. §12131 et seq. Title II provides that:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such 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.

Congress instructed the Attorney General to issue regulations implementing Title II of the ADA. See 42 U.S.C. §12134(a). These regulations require States to "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). Their preamble defines "most integrated setting" to mean a "setting that enables individuals with disabilities to interact with non-disabled individuals to the fullest extent possible." 28 C.F.R. pt. 35, App. A, p.450 (1998). In promulgating these regulations, "the Attorney General concluded that unjustified placement or retention of persons in institutions, severely limiting their exposure to the outside community, constitutes a form of discrimination based on disability prohibited by Title II." Olmstead, supra, 527 U.S. at 597.

Similar to the ADA, Section 504 of the Rehabilitation Act provides that:

> [n]o otherwise qualified individual with a disability in the United States, . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.
>
> 29 U.S.C. §794(a).

"The language and implementing regulations of the ADA and RA are virtually the same." Frederick L. v. Dep't of Pub. Welfare of the Commonwealth of Pennsylvania, 364 F.3d 487, 490, fn.2 (3d. Cir. 2004). Accordingly, the Third Circuit has "construed [the laws] in light of their close similarity of language and purpose." Id. at

491 (citing Helen L. v. DiDario, 46 F.3d 325, 330-32 (3d Cir. 1995)).

"The ADA and RA's anti-discrimination principles culminate in their integration mandates, which direct states to 'administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.'" Frederick L., supra, 364 F.3d at 491(citing 28 C.F.R. § 35.130(d)); see also 28 C.F.R. § 41.51(d). Where appropriate, "the ADA and RA favor integrated, community-based treatment over institutionalization." Frederick L., supra, 364 F.3d at 491-92.

In Olmstead, supra, 527 U.S. at 587, the Supreme Court, in a plurality opinion, found that under Title II of the ADA, specifically, 42 U.S.C. §12132, and 28 C.F.R. 35.130(d), if a State's treating professionals have determined that a person can be served in the community and the person does not oppose community placement, then the State is responsible to make such placement or show justification for why it need not under the ADA "fundamental alterations" provisions. The Court found that recognition of "unjustified institutional isolation" of persons with disabilities as discrimination reflects two judgments: first, placing individuals who can benefit from community settings in institutions perpetuates unwarranted assumptions that they are incapable or unworthy of participating in community life; and, second,

"confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contracts, work options, economic independence, educational advancement, and cultural enrichment." Id. at 600-01.

In ruling that qualified individuals should receive services in the community, the Court "emphasize[d] that nothing in the ADA or its implementing regulations condones termination of institutional settings for persons unable to handle of benefit from community settings." Olmstead, supra, 527 U.S. at 601-02. "Title II provides only that 'qualified individuals with a disability' may not 'be subjected to discrimination.'" Ibid. (citing 42 U.S.C. § 12132).

Plaintiffs seize on this qualifying language in Olmstead to allege that their hypothetical transfers from Vineland Developmental Center to more-integrated community settings would violate the ADA and Rehabilitation Act. See Complaint at ¶78, 81. Plaintiffs misinterpret these laws. The Court in Olmstead stated that nothing in the ADA condones the transfer of unwilling individuals from institutions to the community. Olmstead, supra, 527 U.S. at 601-02. It did not, however, indicate that the ADA prohibits such transfers.

The ADA and Rehabilitation Act forbid discrimination against qualified individuals with disabilities; they do not impose a standard of care on the services that a State chooses to provide.

See Olmstead, supra 527 U.S. at 603, fn.14. Thus, the issue in this case regarding Plaintiffs' ADA and Rehabilitation Act claims is not whether their potential transfers are desired, but whether they are discriminatory. Offering services in a more-integrated setting is not discrimination under the ADA and Rehabilitation Act. These laws forbid "unjustified institutionalization," and not de-institutionalization, because the former "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life" and "severely diminishes he everyday life activities of individuals." Id. at 600-01.

Plaintiffs' transfers from Vineland to the community, should they ever occur, would not be discriminatory. Indeed, the services Plaintiffs wish to maintain at a developmental center are only offered to individuals with developmental disabilities. Thus, any transfer of Plaintiffs from Vineland to the community would not be a denial of benefits by reason of Plaintiffs' disabilities, an essential component of an ADA and Rehabilitation Act claim. That is, Defendants would not be excluding Plaintiffs from services that non-disabled individuals receive, but rather offering them services in a "setting that enables individuals with disabilities to interact with non-disabled individuals to the fullest extent possible." 28 C.F.R. pt. 35, App. A, p.450 (1998). Accordingly, even if Plaintiffs claims were ripe, they fail to state a cause of action under the ADA or Rehabilitation Act.

Likewise, Plaintiffs' claim that the ADA entitles them to "receive recommendations from treating professionals as to whether community placement is the most appropriate to their needs" is without merit.[6] See Amended Complaint at ¶87. The ADA does not impose on Defendants a duty to assess individuals for community placement, but rather the Supreme Court in Olmstead ruled that a treatment team's assessment that an individual could safely reside in the community was a condition of eligibility for community placement. Id. at 602. Thus, while an individual who desires community placement could conceivably argue that his treatment team's failure to recommend the same thwarted his right under the ADA to receive services in the community, the ADA, itself, does not require such assessments.

Moreover, Plaintiffs' complaint that the their treatment teams' recommendations are unfairly influenced by Defendants policies, see Amended Complaint at ¶65-66, does not state a claim upon which relief can be granted. First, even if Plaintiffs' treatment teams have opined that Plaintiffs are capable of living

[6] Notably, all of the Plaintiffs have received annual assessments regarding their appropriateness for and desire for community placement as documented by their individual habilitation plans, which are referenced in the Amended Complaint. See Amended Complaint at ¶65-66.

in the community with the right supports,[7] these opinions are not resulting in any action because Plaintiffs' guardians have indicated that Plaintiffs do not wish to move to the community. Consequently, Plaintiffs are not being considered for community placement at this time. See Certification of Eloise Hawkins at ¶4-10, Exhibit C, Individual Habilitation Plan of T.C. at p.8-9; Exhibit D, Individual Habilitation Plan of K.C. at p.9-10; Exhibit E, Individual Habilitation Plan of C.D. at p.7-8; Exhibit F, Individual Habilitation Plan of L.G. at p.9; Exhibit G, Individual Habilitation Plan of D.H. at p.7; Exhibit H, Individual Habilitation Plan of P.I. at p.9; Exhibit I, Individual Habilitation Plan of B.S. at p.8-9. No reason exists for this court to adjudicate whether Plaintiffs are capable of living in the community with the right supports, as the majority of their treatment professionals opine, when there are no plans to transfer Plaintiffs to the community. Second, assuming *argunedo* that Defendants had a policy expressing that every individual could be served in the community with the right supports, this opinion would not violate the ADA or Rehabilitation Act because providing services in a more integrated setting is not discriminatory, and explained above.

[7] Notably, the treatment team for one Plaintiff has opined that this individual is not capable of living in the community at this time. See Certification of Elosie Hawkins at ¶9, Exhibit H.

For these reasons, Plaintiffs have not stated a valid cause of action under ADA and Rehabilitation Act and their amended complaint should be dismissed.

POINT III

PLAINTIFFS' MEDICAID ACT CLAIMS SHOULD BE DISMISSED BECAUSE THE ACT DOES NOT REQUIRE DEFENDANTS TO SERVE PLAINTIFFS IN A PARTICULAR INSTITUTION.

Plaintiffs' allegation that the Medicaid Act entitles them to receive services at Vineland Developmental Center is without merit. The Medicaid Act requires a participating state to provide an institutional level of services; it does not require a state to offer care in a particular institution. Therefore, Plaintiffs' complaint, in which they attempt to use the Medicaid Act prevent the potential closure of Vineland, should be dismissed.

Pursuant to N.J.S.A. 30:4D-1 et seq., New Jersey participates in the Medicaid Program established by Title XIX of the Social Security Act (the "Act"), 42 U.S.C.A. 1396 et seq. The Medicaid program is a joint federal-state program designed to provide medical assistance to qualified individuals "whose income and resources are insufficient to meet the cost of necessary medical services." 42 U.S.C.A. 1396. In short, "Medicaid was created to provide medical assistance to the poor at the expense of the public." Mistrick v. Division of Medical Assistance and Health Services, 154 N.J. 158, 165 (1998); Estate of DeMartino v. Division of Medical Assistance and Health Services, 373 N.J. Super.

210, 217 (App. Div. 2004), certif. denied, 182 N.J. 425 (2005). The Federal Government shares the cost of medical assistance with states that elect to participate in the Medicaid program. Mistrick, 154 N.J. at 165-66; DeMartino, 373 N.J. Super. at 217. Participating states must adopt medical assistance plans that meet the requirements of the federal Medicaid law. DeMartino, 373 N.J. Super. at 217.

New Jersey participates in the Medicaid program pursuant to the New Jersey Medical Assistance and Health Services Act (the Act), N.J.S.A. 30:4D-1 et seq. The Division of Medical Assistance and Health Services within DHS is the State agency designated pursuant to 42 U.S.C.A. 1396a(a)(5), to administer the Medicaid program in New Jersey. N.J.S.A. 30:4D-5; N.J.S.A. 30:4D-7.

The expressed intent of the Legislature is that the State be enabled, within the limits of funds available for any fiscal year, to obtain all benefits provided by the Federal Social Security Act, 42 U.S.C.A. 301 et seq., N.J.S.A. 30:4D-2. Thus, N.J.S.A. 30:4D-1 et seq. requires that the Department take all necessary steps, consistent with fiscal responsibility, for the proper administration of the New Jersey Medicaid Program.

Plaintiffs rely on several provisions of the Medicaid Act, as well as its implementing regulations, in support of their contention that the Act requires Defendants to serve Plaintiffs at Vineland Developmental Center. See Amended Complaint at ¶105-113.

None of these provisions entitles Plaintiffs to receive care in their preferred institution.

42 U.S.C. 1396d(a)(15) requires medical assistance under the State's Medicaid plan to include "services in an intermediate care facility for the mentally retarded [ICF/MR]." The State developmental centers provide an ICF/MR level of care. See Complaint at ¶35. Likewise, 42 U.S.C. 1396n(c)(2)(C) provides that a waiver shall not be granted unless the State assures that individuals who are eligible to participate in a State's waiver program are "informed of the feasible alternatives, if available under the waiver, at the choice of such individuals, to the provision of inpatient hospital services, nursing facility services, or [ICF/MR] services."

The regulations implementing the Medicaid Act also require a State to provide ICF/MR level of services. 42 C.F.R. 441.302(d) requires, as a precursor to a grant of a waiver, that a State give beneficiaries "the choice of either institutional or home and community based services."

Thus, the Medicaid Act does not require Defendants to serve individuals in a particular institution, like Vineland Developmental Center, but to offer the choice of ICF/MR level of services. Indeed, if individuals had a right to receive services at any chosen facility, states would be hamstrung from allocating resources in a fiscally responsible manner. Plaintiffs' attempt to

use the Medicaid Act to prevent the closure of Vineland finds no support in the law, and their amended complaint should be dismissed.

Lastly, Plaintiff's reliance on 42 C.F.R. 483.440 is also mistaken. While that regulation requires ICF/MRs to provide beneficiaries "a continuous active treatment program," it does not prohibit states from transferring individuals to different facilities. Indeed, the regulation includes provisions applicable when an individual "is to be either transferred or discharged." See 42 C.F.R. 483.440(b)(4). Thus, rather than forbidding a transfer, the regulation contemplates such action.

POINT IV

THE COURT SHOULD ABSTAIN FROM HEARING PLAINTIFFS' DUE PROCESS CLAIMS BECAUSE THE STATE HAS AN ADMINISTRATIVE AND JUDICIAL APPEAL PROCESS TO ADJUDICATE THE APPROPRIATENESS OF DEFENDANTS' OFFERS OF RESIDENTIAL PLACEMENT.

Plaintiffs allege that Defendants' offers of alternate residential placements, if these offers are ever made, will be so deficient that they will violate Plaintiffs' due process rights. Even if the court finds that Plaintiffs' due process claims are ripe, it should abstain from adjudicating these claims because Plaintiffs may avail themselves to an administrative and judicial appeal process if they are displeased with any offers of residential placement they may receive. The State standard by which such offers of placement are judged in this appeal process

far exceeds the federal due process standard. The court should defer to this process under the Burford abstention doctrine, rather than attempting to hear appeals regarding the appropriateness of each offer of placements to particular individuals in a class action, as Plaintiffs propose.[8]

While federal courts generally exercise the jurisdiction conferred upon them by Congress, a District Court should decline to exercise jurisdiction when doing so would "clearly serve a countervailing interest." Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 716 (1996). The concept of abstention has been refined over the years and has been applied in a variety of contexts. Ibid. The unifying principle behind various abstention doctrines is "deference to the paramount interests of another sovereign, and the concern is with principles of comity and federalism." Id. at 723.

In Burford v. Sun Oil Co., 319 U.S. 315 (1943), the plaintiff brought a Fourteenth Amendment challenge to the reasonableness of the Texas Railroad Commission's grant of an oil

[8] Although they include "class action allegations" in their complaint, Plaintiffs have not yet moved to certify a class under Fed. R. Civ. P. 23. See E. Texas Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 404-05 (1977)(A plaintiff's failure to move for class certification prior to trial may be reason to deny certification). As will be more fully argued in opposition to any motion for class certification, Plaintiffs' claims regarding the appropriateness of residential services are highly individualistic, and cannot possibly be litigated in a class action. Moreover, Plaintiffs seek to represent all residents of Vineland Developmental Center, some of whom desire community placement.

drilling permit. The constitutional challenge involved the question of whether the commission had properly applied the state's complex oil and gas conservation regulations. New Orleans Public Service, Inc. v. Council of the City of New Orleans, 491 U.S. 350, 360 (1989)(citing Burford, supra, 319 U.S. at 331). Texas had created "a centralized system of judicial review of commission orders, which 'permitted the state courts, like the Railroad Commission itself, to acquire a specialized knowledge' of the regulations and industry." Ibid. (quoting Burford, supra, 319 U.S. at 327). The Supreme Court concluded that, because the exercise of equitable jurisdiction by Federal District Courts alongside state court review had repeatedly led to "delay, misunderstanding of local law, and needless federal conflict with the state policy,... a sound respect for the independence of state action required the federal equity court to stay its hand." Ibid. (quoting Burford, supra, 319 U.S. at 327, 334).

From Burford and its progeny, the Supreme Court developed the abstention principle now commonly referred to as the "Burford doctrine." New Orleans Public Service, supra 491 U.S. at 361. The parameters of this doctrine are as follows:

> [w]here timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are difficult questions of state law bearing on policy problems of public import whose importance transcends the result in the case then at bar;

> or (2) where the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.
>
> Ibid.; see also Chiropractic America v. LaVecchia, 180 F.3d 99, 104 (3d Cir. 1999).

The Burford doctrine requires abstention in this case because Plaintiffs may appeal any offers of residential placement through an administrative and judicial appeal process. The standard by which offers of placement are judged in this State appeal process far exceeds any due process standard. Further, federal review in this case would disrupt the State's efforts to maintain coherent policy regarding offers of residential placement to some of its most vulnerable citizens.

First, timely and adequate State proceedings exist through which Plaintiff may obtain the relief they seek. State law requires services offered by any facility to persons with developmental disabilities to "be designed to maximize the developmental potential of [individuals receiving services] and [to] be provided in humane manner in accordance with generally accepted standards ... and with full recognition and respect for the dignity, individuality and constitutional, civil and legal rights of [such individuals], and in a setting and manner which is least restrictive of each person's personal liberty." N.J.S.A. 30:6D-9; see also J.E. v. Division of Developmental Disabilities, 131 N.J. 552, 565 (1993)(holding that DDD's clients have a "right,

based on statutory and regulatory entitlements, to the most appropriate placement available that best can enhance their developmental potential in the least-restrictive setting.").

In contrast, the due process clause affords the right to only "minimally adequate training."[9] Youngberg v. Romeo, 457 U.S. 307, 322 (1982). Decisions by treating professionals are presumed valid, and "liability may be imposed only when the decision by a professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." Id. at 323.

Thus, the standard by which DDD's offers of placement are judged in the State appeal process far exceeds the due process standard by which this court may judge these same offers of placement. In fact, the Supreme Court in Youngberg recognized that "[b]y so limiting judicial review of challenges to conditions in state institutions, interference by the federal judiciary with the internal operations of these institutions should be minimized." Id. at 322.

Plaintiffs may appeal the appropriateness of any offers of residential placement through an administrative and judicial

[9] Notably, Youngberg involved individuals who were involuntarily committed to state institutions. Id. at 309. In the case at bar, Plaintiffs voluntarily receive services and are not involuntarily committed.

appeal process. See N.J.A.C. 10:46B-5.1; see also J.E., supra, 131 N.J. at 568-69 (holding that placement appeals warrant trial-type hearings in OAL hearing with the burden of proof on DDD). DDD will transmit appeals regarding offers of placement to the OAL for an evidentiary hearing. See N.J.A.C. 10:46B-5.1; N.J.A.C. 10:48-2.1. After a hearing, the Administrative Law Judge will issue a decision, which shall be adopted, rejected, or modified by the Assistant Commissioner for DDD. See N.J.A.C. 10:48-7.1(d). Plaintiffs may then appeal the Assistant Commissioner's decision to the Superior Court of New Jersey, Appellate Division. See N.J.A.C. 10:48-7.1(d); N.J. Ct. R. 2:2-3(a)(2). Thus, as required by the Burford doctrine, timely and adequate state-court review is available to Plaintiffs should Defendants offer them residential placements they find inappropriate. See New Orleans Public Service, supra 491 U.S. at 361.

Second, federal review would frustrate the State's ability to maintain a consistent policy with respect to the provision of services to individuals with developmental disabilities, some of the State's most vulnerable citizens. See Chiropractic, supra, 180 F.3d at 104. Caring for these individuals is a matter of substantial public concern. Accordingly, the State's Developmentally Disabled Rights Act denotes rights and establishes standards for services. N.J.S.A. 30:6D-2. As the agency charged with the provision and oversight of these services,

N.J.S.A. 30:6D-26, DDD possesses a specialized expertise in assessing the appropriateness of services it provides to particular individuals. See Newark v. Natural Resource Council, Dep't of Envt'l Protection, 82 N.J. 530, 539, cert. denied, 449 U.S. 983 (1980)("The presumption of reasonableness of agency decisions is even stronger [when] the agency has been delegated discretion to determine the specialized and technical procedures for its tasks"). DDD's assessments are further buttressed by trial-type hearings in the OAL regarding offers of placement, as well as judicial review of final agency decisions.

Federal review of DDD's offers of placement would upset the agency's employment of its specialized expertise in disputes regarding offers of residential placement. The court's exercise of jurisdiction in this case would prevent DDD, as well as a reviewing State court, from judging the appropriateness of specific offers of placements to particular individuals under the coherent State standard set forth in the agency's statutes and regulations. Instead, the court would collectively review offers of placement to Plaintiffs, as well as the entire population of Vineland Developmental Center if Plaintiffs' proposed class is certified, under the minimal due process standard. Such review would thwart the State's ability to maintain a coherent policy with respect to the provision of services to individuals with developmental disabilities, undoubtedly a matter of substantial public concern.

Therefore, the court should abstain from hearing Plaintiffs' claims under the Burford abstention doctrine.

CONCLUSION

For all the foregoing reasons, Plaintiff's complaint should be dismissed.

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