2002 WL 32820000 (Cal.Super.) (Trial Pleading)
Superior Court of California.

CAPITOL PEOPLE FIRST et al., Petitioners/Plaintiffs,
v.
DEPARTMENT OF DEVELOPMENTAL SERVICES (DDS) et al., Respondents/Defendants.

No. 02-038715.
May 7, 2002.

State Defendants' Memorandum of Points and Authorities in Support of their Demurrer to Plaintiffs' Verified Complaint

Bill Lockyer, Attorney General of the State of California, James M. Humes, Supervising Deputy Attorney General, Susan M. Carson, Deputy Attorney General, State Bar No. 135875, Jocelyn Flaherty, Deputy Attorney General, State Bar No. 164382, 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, Telephone: (415) 703-5603, Fax: (415). 703-1107, Attorneys for State Defendants DDS, Cliff Allenby, CHHS, Grantland Johnson, DHS, Diane Bonta, DOF, B. Timothy Gage

Honorable Ronald M. Sabraw.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

737 F.2d 1239 8
State v. Superior Court (1974)
12 Cal.3d 237 11
Youngberg v. Romeo (1982)
457 U.S. 307 7, 8
Constitutional Provisions
California Constitution, Article 1, § 1 2-5, 12 California Constitution, Article 1, § 7(a) 2, 3, 5, 12 U.S. Constitution, 1 st Amendment 2, 3, 9, 10 U.S. Constitution, 14th Amendment 2, 3, 6, 9-12

INTRODUCTION

Plaintiffs and the class they seek to represent bring this class action against the Departments of Developmental Services, Health Services and Finance and the California Health and Human Services Agency as well as the Secretary or Directors of these agencies (collectively "state defendants") and the 21 regional centers ("regional center defendants"), claiming that they and all similarly situated individuals are illegally institutionalized or at risk of institutionalization because defendants are violating several provisions of the Lanterman Act, section 11135 of the Government Code, the Americans with Disabilities Act ("ADA"), section 504 of the Rehabilitation Act, various provisions of the Medicaid Act, and certain provisions of the state and federal constitutions.

State defendants demur to the fifth and sixth causes of action - state and federal constitutional provisions - on the ground that plaintiffs have failed to allege facts sufficient to state a cause of action under either the California or U.S. Constitution. Plaintiffs' chief complaint - that they are illegally institutionalized - does not rise to the level of a constitutional violation, whether state or federal. Plaintiffs do not have a constitutional right to residential services in the community, state defendants have not violated their rights to free expression and association by providing services to them in the developmental centers as opposed to in small community settings. And, plaintiffs have failed to even identify a similarly situated group let alone show that they are receiving unequal treatment as compared to such a group in violation of equal protection.

Moreover, all of plaintiffs' complaints can be adequately addressed under the other causes of action alleged. The Lanterman Act sets forth California's comprehensive scheme for providing services and supports for individuals with developmental disabilities, and plaintiffs have alleged several violations under the Act that mirror their allegations of constitutional violations. Additionally, they have stated causes of action under the American with Disabilities Act ("ADA") and the Medicaid Act regarding the same allegations they assert under the constitutional provisions. In sum, plaintiffs have not sufficiently alleged facts which establish that state defendants have violated any provision of either the California Constitution or the U.S. Constitution. Accordingly, state defendants' demurrers to the fifth and sixth causes of action must be sustained. Moreover, the State of California is not a proper party against which injunctive relief can be sought, and therefore, the demurrer as to the State as a defendant must be sustained.

STATEMENT OF PERTINENT FACTS

In alleging that all defendants - state defendants and regional center defendants - have violated their rights under Article 1, sections 1 and 7(a) of the California Constitution, plaintiffs state: "Defendants' policies and practices which are challenged in this action have resulted and will result in the indefinite and inappropriate institutionalization of plaintiffs and class members." (Complaint, ¶ 254.) They specifically contend that they have personal liberty interests protected under Article 1, section 1 which include "a fundamental interest in habilitation - that is, the right to achieve one's maximum potential"; that "[t]he State must provide treatment and services in a manner which least drastically curtails the freedom of the individual; that "[inappropriate institutionalization constitutes a form of physical restraint..."; that "[inappropriate confinement in public and private institutions infringes on plaintiffs' and class members' fundamental freedom to associate by preventing them from living in the community."; and that "[t]he unnecessary and inappropriate segregation in public and private institutions of persons with developmental disabilities... whose needs could be met in less restrictive placements in the community" violates the equal protection under section 7(a) of Article 1. (Complaint, ¶ 254(a-e).)

With regard to their claims that defendants have violated their rights to due process and equal protection under the 14th Amendment as well as their right to freedom of expression and association under the 1st Amendment of the U.S. Constitution, plaintiffs allege that they "have a constitutionally protected liberty interest in receiving minimally adequate or reasonable care and services and in being free from undue restraint, including the right to be free of confinement in an institution, when professional judgment recommends that institutionalization is not necessary." (Complaint, ¶ 257.) They specifically claim that defendants deprive them of their fundamental liberty interests in that they "have been denied minimally adequate habilitation and/or been subject to undue restraint by being confined in institutional settings when they could live successfully in small integrated community homes;" that many plaintiffs and class members "remain institutionalized due to the lack of adequate community resources which can meet their individual needs"; that the failure of regional center professionals or Individual Program Plan ("IPP") teams have substantially departed from accepted professional judgment standards where they have failed to recommend plaintiffs or class members be placed in the community; and that defendants have violated the injunction in *Richard Set al. v. DDS* where they have failed to recommend community placement based on family objections. (Complaint, ¶ 258 (a)-(d).)

Plaintiffs have also alleged that defendants have violated their freedoms of expression and association under the 1 st Amendment "by preventing them from living in the community, thereby restricting their ability to participate in community activities and associate with non-disabled members of the community including family and friends." (Complaint, ¶ 259.) And, they allege that defendants have violated the equal protection clause of the 14th Amendment "by establishing, encouraging and otherwise sanctioning programs, policies and practices that.have excluded, separated and segregated people with developmental disabilities from society without any rational basis." (Complaint ¶ 260.)

ARGUMENT

.I.

PLAINTIFFS HAVE FAILED TO SUFFICIENTLY ALLEGE FACTS THAT WOULD ESTABLISH THAT STATE DEFENDANTS HAVE VIOLATED ARTICLE 1, SECTIONS 1 AND 7(A) UNDER THE CALIFORNIA CONSTITUTION.

A. Plaintiffs Have Failed To Sufficiently Allege Facts That Establish State Defendants Have Violated Article 1, Section 1.

Article 1, section 1 provides:
All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness and privacy.

Plaintiffs allege that this provision of the California Constitution guarantees them a

"fundamental interest in habilitation- that is, the right to achieve one's maximum potential." (Complaint, ¶ 254.) However, what plaintiffs truly seek is to impose a mandatory duty on state defendants to provide them with opportunities to achieve their maximum potential. This is evident from the relief requested which includes ordering state defendants to "[d]evelop, expand, and make available with dispatch a sufficient array of integrated, stable quality community living arrangements...." (Complaint, Relief Requested, 13(i).) Plaintiffs would also require state defendants to "[m]ake available a friend-advocate to each plaintiff and member of the plaintiff class to assist each in securing the substantive and procedural protections aforesaid...." (Complaint, Relief Requested, 13 (v).)

However, there is no *affirmative* duty on state defendants to provide for "liberty," "safety," "happiness" or "privacy"; only that they not interfere with a citizen's right to exercise their rights. *(See, e.g., Clausing v. San Francisco Unified School District* (1990) 221 Cal. App. 3d 1224, 1238.).

In *Clausing*, the plaintiff, a developmentally and physically disabled student, brought a class action against teachers, the school district, and the local board of education, alleging that the teacher repeatedly subjected plaintiff and those like him to physical, psychological, verbal abuse, beatings and public humiliation. Plaintiff further alleged that the school district authorized or failed to prevent the abuse by the teacher. Specifically, plaintiffs alleged that Article 1, section 1 of the California Constitution, prohibited defendants from carrying out a "policy" which allegedly authorized teachers in the district to humiliate students by depriving them of their right of privacy. *(Id.)* The Court of Appeals in upholding the trial court's sustaining of the defendants' demurrer stated:

Although citizens have a private cause of action against public entities for violation of the right to privacy, no case has ever held that California Constitution, article 1, section 1, imposes a *mandatory duty* on public entities to protect a citizen's right to privacy. The constitutional mandate is simply that the government *is prohibited from violating the* right....

(Id. (emphasis in original).)

Accordingly, given that California courts have never interpreted Article 1, section 1, to impose a mandatory duty on public entities to protect a citizen's right to privacy, plaintiffs cannot state any facts that would support a violation of Article 1, section 1. Therefore, state defendants' demurrer to plaintiffs' fifth cause of action with regard to the violation of Article 1, section 1 must be sustained without leave to amend.

B. Plaintiffs Have Failed To Sufficiently Allege Facts That Establish That State Defendants Have Violated The Due Process Clause Under Article I, Section 7(a).

Plaintiffs further allege in the fifth cause of action that defendants have violated their rights pursuant to Article 1, section 7(a) of the California Constitution. Specifically, plaintiffs allege that "inappropriate institutionalization constitutes a form of physical restraint and violates the guarantees of Article 1, section 1 and section 7(a) which establish substantive and procedural protections against unreasonable bodily restraint." (Complaint, ¶ 254.) Plaintiffs also allege that "[t]he unnecessary and inappropriate segregation in public and private institutions of persons with developmental disabilities, including plaintiffs and class members, whose needs could be met in less restrictive placements in the community, denies these individuals equal protection under the laws in violation of Art.l §7(a)." *(Id.)* Article 1, section 7(a) of the California Constitution provides in pertinent part:

A person may not be deprived of life, liberty, or property without the due process of law or denied equal protection of the laws;....

In order to determine whether a person's due process right has been violated, the California Supreme Court has held that four factors must be considered. The factors are: (1) the private interest that will be affected by the official action, (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probative value, if any, of additional or substitute procedural safeguards, (3) the dignitary interest in informing individuals of the nature, grounds and consequences of the action and enabling them to present their side of the story before a responsible governmental official, and (4) the governmental interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *(People v. Ramirez* (1979) 25 Cal.3d 260, 269; see also *Rains v. Belshe* (1995) 32 Cal.App.4th 157, 178; *Cramer v. Gillermina R.* (1981) 125 Cal.App.3d 380, 388.)

Here, plaintiffs have alleged merely that [i]nappropriate institutionalization constitutes a form of physical restraint...." However, plaintiffs fail to allege any facts with regard to the other three *Ramirez* factors to show how the State's procedures are insufficient to protect their due process rights. Accordingly, as plaintiffs have failed to properly plead a violation of due process based on their placement in developmental centers or large community-based facilities, or with respect to undue restraint, state defendants' demurrer to the fifth cause of action with regard to due process violation must be sustained without leave to amend,

C. Plaintiffs Have Not Allege Sufficient Facts To Establish That State Defendants Have Violated The Equal Protection

Clause.

"The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification affecting two or more similarly situated groups in an unequal manner." *(Cramer*, 125 Cal, App. 3d at 387, citing *In re Eric J.* (1979) 25 Cal.3d 522, 530.) "A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *(Cramer*, 125 Cal.App, 3d at 387, citing *Reed v. Reed* (1971) 404 U.S. 71,76.) Here, plaintiffs have failed to allege that the state has adopted a classification affecting two or more similarly situated groups in an unequal manner.

Therefore, as plaintiffs fail to properly allege the basic elements required to prove a violation of equal protection under the California Constitution, state defendants demurrer to the equal protection portion of the fifth cause of action must be sustained without leave to amend.

II.

PLAINTIFFS HAVE FAILED TO SUFFICIENTLY ALLEGE FACTS THAT WOULD ESTABLISH THAT STATE DEFENDANTS HAVE VIOLATED PLAINTIFFS' RIGHTS UNDER THE 1ST AND 14THY AMENDMENTS OF THE U.S. CONSTITUTION.

A. Plaintiffs Have Failed To Allege Sufficient Facts To Show That State Defendants Have Violated The Due Process Clause Of The 14th Amendment.

"The Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them,"' *Foucha v. Louisiana* (1992) 504 U.S. 71, 80. "The touchstone of due process is protection of the individual against arbitrary action of government." *(County of Sacramento v. Lewis* (1998) 523 U.S. 833, 845.) Where the plaintiff challenges the actions of a government executive, "only the most egregious official conduct can be said to be 'arbitrary' in the constitutional sense." *(Id.* at 846.) Mere negligence is never sufficient for substantive due process liability. (See *Daniels v. Williams* (1986) 474 U.S. 327.) Under *Lewis*, substantive due process liability attaches only to executive action that is "so ill-conceived or malicious that it 'shocks the conscience."' (*Miller* v. *City of Philadelphia* (3d Cir. 1999) 174 F.3d 368,375, quoting *Lewis*, 523 U.S. at 846.) "The exact degree of wrongfulness necessary to reach the 'conscience-shocking' level depends upon the circumstances of a particular case." *(Miller*, 174 F.3d at 375.)

In *Youngbergv. Romeo* (1982) 457 U.S. 307, 315-22, the Supreme Court concluded that substantive due process under the Fourteenth Amendment imposes duties on states concerning the care and training they are obligated to provide institutionalized individuals under their care. The states are obligated under the Due Process Clause to provide safe living conditions, freedom from bodily restraint, and minimally adequate training. *(Id.* at 319-320.) The duty to train is limited to such training as "an appropriate professional would consider reasonable to ensure [an individual's] safety and to facilitate his ability to function free from bodily restraints." *(Id.* at 324.) Finally, the Supreme Court established in *Youngberg* that the states are required to make certain that professional judgment is being exercised in making those decisions concerning the care and training of institutionalized individuals. *(Id. at 321.)*

The plaintiff in *Youngberg* was a profoundly retarded man with an IQ of between eight and ten who had been committed to a state hospital after his mother could no longer care for him. *(Id* at 309.) While in the state hospital, Romeo suffered numerous injuries, some self-inflicted and some inflicted by other residents. *(Id.* at 310). Romeo's mother brought a section 1983 action on his behalf, alleging that hospital officials knew that Romeo was being injured but failed to institute appropriate preventative measures, that the defendants improperly restrained Romeo for prolonged periods, and that the defendants were not providing Romeo with appropriate treatment or training for his mental retardation. *(Id.* at 311.)

The Third Circuit ruled that the jury instructions failed to properly define the scope of Romeo's constitutional rights and held that the standards were couched in terms of "compelling necessity," "substantial necessity," and "least intrusive alternative."

The Supreme Court found that the standards articulated by the Third Circuit majority imposed too great a burden on the state. *(Id.* at 321-22.) The Court concluded that "the Constitution only requires that the courts make certain that professional judgment in fact was exercised. It is not appropriate for the courts to specify which of several professionally acceptable choices should have been made." *(Id.)* The Court emphasized that a decision, "if made by a professional, is presumptively valid; liability may be imposed only when the decision by the 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.)[1]

In this action, plaintiffs allege that defendants have violated their right to substantive due process by denying them "minimally adequate habilitation" or subjecting them to "undue restraint" because defendants have confined them to institutional settings "when they could live successfully in small integrated community homes." (Complaint, ¶ 258(a).) Alleging that "community services provide a better quality of life," plaintiffs' complaint alleges that the federal constitution incorporates a "fundamental liberty interest in being able to move into the community" and guarantees the plaintiffs a right to "seek their release from institutions without arbitrary procedures." (Complaint ¶¶ 154-163,257.) However, plaintiffs do not have a constitutional right to have the state provide services to them in the community. At most, they have a substantive right to safety and minimal training to ensure undue *bodily* restraint in the institution. Plaintiffs have not alleged sufficient facts to support a cause of action for violation of substantive due process under the 14th Amendment.

B. Plaintiffs Have Failed To Allege Sufficient Facts That State Defendants Have Violated Their 1st Amendment Rights To Freedom Of Expression And Association.

There are two forms of constitutionally protected "freedom of association." Under one, the Court has recognized "choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." *(Roberts v. United States Jaycees* (1984) 468 U.S. 609, 617-618.) Under the other, "the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment - speech, assembly, petition for the redress of grievances, and the exercise of religion. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties." (*Id.* at 618.)

"The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State." *(Id*, at 618 (citations omitted).) Only close personal relationships such as with family are protected. *(Id.* at 619-20; see also *Freeman v. City of Santa Ana* (9th Cir. 1995) 68 F.3d 1180, 1887 (customers of a bar not close personal relationship).)

In this action, plaintiffs have alleged that "[d]efendants have violated the rights of plaintiffs and class members to the freedoms of expression and association by the First Amendment by preventing them from living in the community, thereby restricting their ability to participate in community activities and associate with non-disabled members of the community including family and friends." (Complaint ¶ 259.) First, they have no 1st Amendment right of association with members of the general public. Second, they have failed to allege any facts that show that state defendants are precluding them from maintaining close relationships with family and friends. Simply alleging that it would be easier to maintain those relationships if they lived in a small community-based setting is not enough. Plaintiffs have not alleged sufficient facts to maintain a cause of action for violation of the 1st Amendment right of association.

C. Plaintiffs Have Failed To Allege Sufficient Facts To Establish That State Defendants Have Violated Their Rights Under The Equal Protection Clause Of The 14th Amendment.

"The equal protection clause of the 14th Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *(City of Cleburne v. Cleburne Living Center* (1985) 473 U.S. 432, 439, citing *Plyler v. Doe* (1982) 457 U.S. 202, 216. "The

first step in equal protection analysis is to identify the [defendants'] classification of groups."' *(Freeman* at 1187 (citation omitted).) "To accomplish this, a plaintiff can show that the law is applied in a discriminatory manner or imposes different burdens on different classes of people." *(Id.* (citation omitted).) "Once the plaintiff establishes governmental classification, it is necessary to identify a 'similarly situated' class against which the plaintiff's class can be compared." *(Id., citing Attorney General v. Irish People, Inc.* (D.C. Cir. 1982) 684 F.2d 928, 946 ("Discrimination cannot exist in a vacuum; it can be found only in the unequal treatment of people in similar circumstances").)

Here, plaintiffs have not alleged a class of persons to which they are similarly situated. In fact, they merely allege that "[djefendants have violated the rights of plaintiffs and class members secured by the Equal Protection Clause... by establishing, encouraging and otherwise sanctioning programs, policies and practices that have excluded, separated and segregated people with developmental disabilities from society without any rational basis." (Complaint § 260.) In other words, they allege discrimination in a vacuum; they have not even identified a similarly situated group. Thus, plaintiffs have not alleged sufficient facts to establish that state defendants have violated their right to equal protection under the 14th Amendment.

III.

THE STATE OF CALIFORNIA IS NOT A PROPER PARTY AGAINST WHICH RELIEF MAY BE GRANTED.

Plaintiffs sue "the State of California" as a defendant in the first, second, fourth, fifth, sixth, seventh and ninth causes of action in plaintiffs' complaint. In cases for declaratory and injunctive relief the "State" as opposed to an agency or officer is not a proper party against which relief may be granted. *State v. Superior Court* (1974) 12 Cal.Sd 237, 255. In *State*, plaintiffs applied for a permit from the California Coastal Zone Conservation Commission ("Commission") to develop land within the coastal zone. The Commission denied their permit and plaintiffs filed a petition in the superior court for a writ of mandamus and other relief against the State of California, the Commission, its members and two Commission employees. The Commission demurred to the petition on a variety of grounds including that the State of California was mis-joined as a defendant and that the petition failed to state a cause of action as to the State with respect to some of the causes of action. The California Supreme Court sustained defendant's demurrers challenging the State of California as a defendant. The Court held that only the Commission could grant the relief requested, which was to set aside its decision, and therefore the State was not a proper defendant. *(Id.)* The Court next sustained demurrers to the fourth and fifth causes of action because they did not contain allegations that established any right to declaratory relief against the State, finding that the only declaratory relief available was against the Commission acting as the agent of the State. *(Id.)* In the instant case, the plaintiffs seek declaratory relief against the State of California, which may only be granted by an agent of the State and not by the State itself. Accordingly, state defendants respectfully request that this Court sustain a demurrer to the State of California as a defendant in the first, second, fourth, fifth, sixth, seventh and ninth causes of action as it is not a proper party in this matter.

CONCLUSION

For all the foregoing reasons, plaintiffs have failed to allege facts sufficient to establish violations under Article 1, sections 1 and 7(a) under the California Constitution or under the 1st and 14th Amendments to the U.S. Constitution. Therefore, state defendants' demurrers to the fifth and sixth causes of action must be sustained without leave to amend. Additionally, as the State of California is not a proper party against which relief may be granted, the demurrer to the State of California as a defendant in the first, second, fourth, fifth, sixth, seventh, and ninth causes of action must also be sustained without leave to amend.

Footnotes

[1] . Since its decision in *Youngberg*, the Court held that a state has a constitutional duty to provide safe conditions only when it, by an affirmative exercise of its power, limits a person's freedom to act on his own behalf. (*DeShaney v. Winnebago County Dep't of Soc. Servs.*, (1989) 489 U.S. 189, 195.) As a result, defendants do not owe a duty to any of the plaintiffs who are voluntarily

committed to developmental centers for their care. *(Fialkowski v. Greenwich Home for Children, Inc.* (3d Cir. 1990) 921 F.2d 459; *Philadelphia Police and Fire Ass'n.* v. *Philadelphia* (3d Cir. 1989) 874 F.2d 156.)

End of Document