2002 WL 32820044 (Cal.Superior) (Trial Motion, Memorandum and Affidavit)
Superior Court of California.
Los Angeles County

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

No. 02-038715.
June 03, 2002.

Class Action

Petitioners'/Plaintiffs' Opposition to State Defendants' Demurrer to Plaintiffs' Verified Complaint

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

Federal

* Copy included in Appendix to Plaintiffs' Opposition to State Defendants' Demurrer to Plaintiffs' Verified Complaint: Additional Non-California Authority.

INTRODUCTION

State defendants demur only to petitioners'/plaintiffs' (plaintiffs) Fifth and Sixth Causes of Action, claims arising under the United States and California Constitutions. They assert that illegal institutionalization does not rise to the level of a constitutional violation, whether state or federal. State Defendants' Memorandum of Points and Authorities in Support of Their Demurrer to Plaintiffs' Verified Complaint (State Defs' Brief) at 1. In fact, illegal institutionalization most definitely infringes on federal and state constitutional liberty interests. Plaintiffs allege that they and the class they represent are institutionalized in violation of their substantive due process liberty interest due to defendants' failure to properly exercise professional judgment, or to provide residential services and supports in accord with professional judgment. These claims are not only valid they are also typical of claims alleging unlawful institutionalization of people with disabilities raised in similar, primarily federal, actions throughout the country. In addition, as has been alleged in other institutional litigation, unlawful and unnecessary segregation and isolation of plaintiffs and class members in institutional settings without any rational basis violates their constitutional rights to equal protection of the laws and infringes on their constitutional rights to freedom of expression and association. The facts alleged in the complaint are more than sufficient to state causes of action under the California and federal Constitutions.

State defendants also argue that the State of California is not a proper party against which relief may be granted. No authority supports the contention that the State may not be sued for injunctive or declaratory relief in the circumstances of this case.

FACTS

State defendants have adequately summarized the pertinent facts as alleged; therefore plaintiffs will not restate them here.

ARGUMENT

I. A DEMURRER MUST BE DENIED IF THE COMPLAINT, ON ITS FACE, STATES A CAUSE OF ACTION.

A demurrer lies only where the ground for objection to a complaint appears on the face of the complaint or from any matter of which the court is required to or may take judicial notice. Code Civ. Proc. § 430.30(a). A general demurrer challenges the complaint or the particular claim or claims to which it is directed to determine the legal sufficiency of the causes of action pleaded. The court must overrule the demurrer if any valid cause of action is pleaded. *E.g., Gruenberg v. Aetna Insurance Co. Inc., 9* Cal.3d 566, 572 (1973). A demurrer is not the proper procedure to challenge the relief sought by an otherwise valid cause of action. *Venice Town Council, Inc. v. City of Los Angeles*, 47 Cal.App.4th 1547, 1561-62 (1996). Moreover, a general demurrer does not lie to only *part* of a cause of action. If there are sufficient allegations to entitle plaintiffs to relief, other allegations cannot be challenged by general demurrer. *Financial Corp. of America v. Wilburn*, 189 Cal.App.3d 764, 778 (1987).

For the purpose of testing the sufficiency of the cause of action, the demurrer admits the truth of all material facts properly pleaded no matter how unlikely. It is not the function of the demurrer to challenge the truthfulness of the complaint. *Serrano v. Priest*, 5 Cal.3d 584, 591 (1971); *Del E. Webb Corp. v. Structural Materials Co.*, 123 Cal.App.3d 593, 604 (1981).

II. PLAINTIFFS HAVE SUFFICIENTLY ALLEGED FACTS TO SUPPORT THEIR STATE AND FEDERAL CONSTITUTIONAL CAUSES OF ACTION.

A. Confinement in an Institution Affects Substantive Liberty Interests.

California and federal courts have consistently recognized the impact of involuntary institutionalization of people with disabilities on their fundamental liberty interests. In *In re Hop*, 29 Cal.3d 82, 89 (1982), the California Supreme Court noted: '[PJersonal liberty is a fundamental interest, second only to life itself...' [quoting *People v. Olivas*, 17 Cal.3d 236, 251 (1976)]. *See also, e.g., Conservatorship ofRoulet*, 23 Cal.3d 219, 225 (1979) (Regardless of the purposes for which the incarceration is imposed, the fact remains that it is incarceration (citing *Breed v. Jones*, 421 U.S. 519, 530, n. 12 (1975)); *People v. Burnick*, 14 Cal.3d 306, 323 (1975) (civil commitment entails a 'massive curtailment of liberty' in the constitutional sense (citing *Humphrey* v. *Cady*, 405 U.S. 504, 509 (1972)).

The State Supreme Court has also noted that involuntary confinement is a direct form of physical restraint. And [i]t is beyond dispute that a principal ingredient of personal liberty is 'freedom from bodily restraint' [citation].... *In re Roger S.*, 19 Cal.3d 921, 929 (1977). So substantial is the impact of institutional confinement on the liberty interest, that the Court has held that involuntary confinement in a state psychiatric hospital or state developmental center cannot be effected under the California Constitution without the application of criminal due process standards. *E.g., Conservatorship of Roulet*, 23 Cal.Sd at 224-25; *In re Hop, 29* Cal.Sd at 89.

The rights plaintiffs seek to protect by this action include substantive rights protected against arbitrary deprivation by the Due Process Clause of the Fourteenth Amendment and Article 1, § 1 of the California Constitution. They encompass the right to habilitation, a right which the State Supreme Court has held is entitled to constitutional protection - i.e., the right of every citizen to have the personal liberty to develop, whether by education training, labor, or simply fortuity, to his or her maximum economic, intellectual, and social level.... It lies at the core of the liberty interest protected by the Fourteenth Amendment... and Article 1, section 1 of the California Constitution. *Conservatorship of Valerie N.*, 40 Cal.Sd 143, 162-63 (1985).

B. The Complaint Sufficiently States Causes of Action for Violation of Plaintiffs' Substantive Due Process Rights Under the California and United States Constitutions.

1. The Fourteenth Amendment Protects Against Institutionalization Not Based on the Exercise of Reasonable Professional Judgment.

The mere fact that someone has been institutionalized under proper procedures does not deprive that person of all substantive liberty interests under the Fourteenth Amendment. *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982).[1] Institutionalized persons have a constitutional liberty interest in, and substantive due process right to safety, freedom from harm, freedom from undue restraint, and adequate habilitation. *Id.* at 322. In *Youngberg*, the Court held that, in determining whether these rights have been violated, the Constitution only requires that the courts make certain that professional judgment in fact was exercised and further held that courts must show deference to the judgment exercised by qualified professionals, *Id*, at 321-22. The Court left it to lower courts to decide what constitutes a departure from professional judgment.[2] *Id.* at 319.

Since *Youngberg*, numerous federal appellate and district courts have applied the professional judgment standard and have held that community placement is proper relief for violations of institutional residents' rights under the Due Process Clause to freedom from harm, freedom from undue restraint (which includes inappropriate instirutionalization), and adequate habilitation.[3] *E.g., Thomas S. by Brooks v. Flaherty*, 902 F.2d 250 (4th Cir. 1990), *cert, denied, 498* U.S. 951 (1990); *Clark v. Cohen*, 794 F.2d 79 (3rd Cir. 1986), *cert, denied*, 479 U.S. 962 (1986); *Thomas S. by Brooks v. Morrow*, 781 F.2d 367 (4th Cir. 1986), *cert. denied* by *Kirk v. Thomas S. by Brooks*, 476 U.S. 1124, and *cert, denied* by *Childress v. Thomas S.*, 479 U.S. 869 (1986); *Jackson v. Fort Stanton Hospital and Training School*, 757 F.Supp. 1243 (D.N.M. 1990) *rev 'd in part, appeal dismissed in part*, 964 F.2d 980 (10th Cir. 1992); *Homeward Bound, Inc. v. Hissom Memorial Center*, 1987 Westlaw 27104 (N.D. Okla.1987); *Kirsch v. Thompson, 111* F.Supp. 1077 (E.D. Pa. 1988).

Continued institutionalization in the face of professional judgment determining that institutionalization is unnecessary has been held to violate substantive due process rights based on *Youngberg. In Messier v. Southbury Training School*, 916 F.Supp. 133, 140 (D. Conn. 1996), for example, the court, citing *Society for Good Will to Retarded Children v. Cuomo*, 737 F.2d 1239, 1249 (2d Cir. 1984), held that whereas 'there is no constitutional right to community placement,' a decision to keep a resident in an institutional rather than community setting is only constitutional to the extent that it is a 'rational decision based on professional judgment,' The court further held that allegations that defendants failed to consider all residents for possible community placement, as would be required by professional judgment states a claim upon which relief can be granted. *Id.*

Similarly, in *Clark v. Cohen*, the Third Circuit held that institutionalization of an individual with mental retardation in the face of unanimous professional opinion that she should be placed in a far less restrictive environment violated her substantive right to appropriate treatment under *Youngberg.* 794 F.2d at 87. Continued institutionalization in the face of professionals' determination that institutionalization was unwarranted, the court held, violated the resident's substantive due process rights based on *Youngberg.* Citing *Youngberg*, the district court in *Homeward Bound, Inc. v. Hissom Memorial Center* held that freedom from bodily restraint includes the right to be free from confinement in an institution where such confinement is shown on a factual basis to be unnecessary. 1987 WL 27104 at 15; *see also, Jackson v. Fort Stanton Hospital and Training School*, 757 F.Supp. at 1312 (holding that institutional residents' *Youngberg* rights were violated when they remained institutionalized because appropriate community services were not available, despite the professional judgment of their teams that they should be placed in the community).[4]

Substantive due process rights are also violated when evidence demonstrates that professional judgment was not, in fact, exercised or was exercised by unqualified individuals. Decisions must be made by a person competent, whether by education, training or experience, to make the particular decision at issue. *Youngberg*, 457 U.S. at 323 n.30.

Another factor considered on the issue of whether professional judgment has been exercised is adherence to applicable state law or standards. In *Rennie v. Klein*, 720 F.2d 266,269 (3rd Cir. 1983), for example, the court referred to the state standard for denial of the right to refuse antipsychotic drugs - danger to himself or others. Consideration of the validity of professional judgments, the appellate court held, involves application of the applicable state standard. *Id.; see also, Brooks v. Pataki*, 908 F.Supp. 1142,1151-52 (E.D.N.Y. 1995) (procedures for transferring people with developmental and psychiatric disabilities from out-of-state to in-state institutions did not meet professional judgment standard because they were at variance with the state's previously planned process and with procedures specified in state law); *Thomas S.by Brooks v. Flahertyt* 902 F.2d at 252 (finding that professional judgment had not been exercised because the decisions of the treating professionals departed from accepted standards, including the state's written policies).

Professional judgment has also been found to be lacking in instances where decision-making is based on what resources are available rather than on what is appropriate. The district court in *Thomas S.*, for example, found that severe lack of

community resources for persons with plaintiffs' needs resulted in unnecessary confinement of plaintiffs in highly restrictive settings and frustrate[d] the exercise of professional judgment by mental health and mental retardation professionals who became discouraged by the futility, year after year, of recommending services that do not exist. *Thomas S. by Brooks v. Flaherty*, 699 F.Supp. 1178,1195 (W.D.N.C. 1988). Professional judgment probably was not exercised if it was 'modified to conform to available treatment rather than appropriate treatment.' *Id.* at 1200. *See also, Lelsz v. Kavanagh*, 673 F.Supp. 828, 835 (N.D. Tex. 1987) (Deference to professional judgment requires that 'the decision be one based on medical or psychological criteria and not on exigency, administrative convenience, or other non-medical criteria.' (Citing *Clark v. Cohen*, 613 F.Supp. 684, 704 and n.13)).

Community placement has also been ordered upon findings of violations of other *Youngberg* rights - for example, undue restraint, and/or inadequate habilitation. The Second Circuit has interpreted *Youngberg* to encompass a right to training sufficient to prevent basic self-care skills from deteriorating. *Society for Good Will to Retarded Children*, 737 F.2d at 1250. In *Thomas S.*, the district court found that the institutions where plaintiffs resided provided very abnormal living environments, where class members tended to copy inappropriate behavior and had little hope of maintaining or improving their self-care skills. They learn to live in an institution, and their ability to be integrated into the community and adapt to community life deteriorates. 699 F.Supp. 1193-94. In *Homeward Bound, Inc. v. The Hissom Memorial Center*, among the harm that the court found endemic in the institutional environment were regression and other harm arising from segregation and confinement; lack of privacy, including having to spend days together in day rooms and eating in large groups; and loss or reduction in skills. 1987 WL 27104 at 20.

2. Plaintiffs Seek Appropriate Relief on Behalf of Class Members.

State defendants cite *Lelsz v. Kavanagh*, 807 F.2d at 1241, and other cases for the unexceptional conclusion that there is no constitutional right to treatment in the least restrictive environment. State Defs' Brief at 8. The court's decision in *Lelsz*, however, provides no authority for a court to deny relief when it finds that institutional residents are not provided the constitutional minimum standard of habilitation at the institution and that the defendants' own professional judgment is that they should receive services in another setting. State defendants also cite the appellate decision in *Society for Good Will to the Retarded Children v. Cuomo* which similarly held that, under the *Youngberg* standards, no right exists to training in the least restrictive environment. On the other hand, the court held, [w]e may rule only on whether a decision to keep residents at SDC is a rational decision based on professional judgment. 737 F.2d at 1249.

The relief plaintiffs seek in this case is unquestionably within the traditional equitable powers of the court. As discussed in the previous section, community placement frequently has been held to be appropriate relief for violations of substantive due process rights resulting from inappropriate institutionalization. A decision concerning the appropriate relief can be rendered only after a determination on the merits.[5]

(3.) State Defendants Owe a Duty to Institutionalized Persons Even if Their Placements Are Deemed Voluntary.

Defendants also argue that they owe no duty to plaintiffs or class members who have been institutionalized voluntarily.[6] State Defs' Brief at 8 and n. 1. As authority, they cite *DeShaney v, Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989); *Fialkowski v. Greenwich Home for Children, Inc.*, 921 F.2d 459 (3rd Cir. 1990); and *Philadelphia Police and Fire Ass'n*, 874 F.2d 156 (3rd Cir. 1989). Regardless of the form of plaintiffs' and class members' admissions, the cases cited are inapposite.

The cases State defendants cite dealt with persons who are not in *any* form of custody, voluntary or not, of the defendants who were alleged to have harmed them. And even if this court were to find that some class members are not in custody of the defendants, the plaintiffs still would be entitled to relief because the injuries they have experienced are harms caused directly by persons acting under color of state law, rather than by private parties as in *DeShaney.*

In *Philadelphia Police and Fire Ass 'n*, the state did not participate in the harm experienced by the plaintiffs, either as custodian, supervisor or direct actor. The court held that the state had no// affirmative constitutional duty to continue services

to clients of the county mental retardation program who lived at home with their families. 874 F.2d at 168. None of the plaintiffs lived in a residential facility operated by the state or its contractors.

The Third Circuit's opinion in *Fialkowski* likewise has no applicability here because it dealt with the liability of a defendant who provided no residential service to the plaintiff. Moreover, *Fialkowski* was decided on summary judgment, not on a motion to dismiss. The decision turned on an analysis of the factual relationship between the state and the service provider. The court noted that the state might have been liable for constitutional violations had the facts established that it was acting pursuant to a policy - i.e., a 'deliberate' or 'conscious' choice not to provide training regarding certain potential constitutional violations as opposed to showing only that "an otherwise sound program had occasionally been negligently administered'.... 921 F.2d at 467.

More to the point, other courts addressing the issue on facts similar to those here have held that the voluntary nature of admissions to institutions has no bearing on application of the *Youngberg* standards. *E.g., Thomas S.*, 699 F.Supp. at 1185; *Society for Good Will to Retarded Children v. Cuomo*, 737 F.2d at 1245-46 and n. 4; *United States v. State of Tennessee*, 798 F.Supp. 483,487 (W.D. Term. 1992). The California Supreme Court has noted, moreover, that the notion of voluntariness with respect to institutional admissions of people with cognitive impairments is often a fiction. *In re Hop, 29* Cal.3d at 90-91. Even if relevant, the voluntary versus involuntary nature of plaintiffs' and class members' institutional placements is, in any event, a factual matter which cannot be decided on demurrer.

4. The Complaint Alleges Sufficient Facts to State a Claim for Violation of Plaintiffs' Substantive Due Process Rights Under the State and Federal Constitutions.

The complaint alleges facts that sufficiently state a cause of action for violation of plaintiffs' substantive due process rights under the *Youngberg* standard as it has been applied in numerous *post-Youngberg* cases, including those discussed above. Plaintiffs have alleged that defendants fail to exercise professional judgment in making placement recommendations and otherwise exercise professional judgment in a manner that subjects plaintiffs to harm in the form of unnecessary institutionalization (undue restraint) and inadequate habilitation. Assuming the truth of those facts for purposes of a demurrer, plaintiffs state a cause of action under the Due Process Clause of the Fourteenth Amendment.[7]

Specifically, the complaint alleges that defendants fail to exercise or act in accord with professional judgment by continuing to institutionalize people who are recommended by their planning teams for movement to community homes; and that defendants make recommendations, not based on individual needs and choices, but based on the lack of a mandate from the Department of Developmental Services, inadequate individual program planning by regional center and institutional staff, and/or a lack of sufficient fiscal resources for the development of quality community living arrangements and ancillary supports. *E.g.*, Complaint, fflf 111,113f, 164-171, 258b, 258c. The complaint further alleges that defendants fail to conduct adequate assessments and fail to do individualized program planning in accord with standards established in State law - i.e., the Lanterman Act - which, as discussed, courts have found to be a basis for findings that professional judgment has not been exercised. *E.g.*, Complaint, ¶¶ 111,113d, 172-175. Plaintiffs further allege that defendants' policies, procedures, and funding practices fail to make available a sufficient array of quality community living arrangements responsive to the individual needs and choices of plaintiffs and class members, circumstances that cases have held frustrate and prevent decision-making based on professional judgment. *E.g.*, Complaint, ¶¶ 113e, 176-180. The complaint also alleges facts supporting the contention that defendants fail to exercise professional judgment with respect to developmental center residents insofar as the persons most knowledgeable of community services frequently fail to attend individual program planning meetings. *E.g.*, Complaint, ¶¶ 17, 173c, 173d, 258c. In addition, the complaint alleges that decisions are not made in accord with professional judgment insofar as recommendations against movement from developmental centers to the community are frequently based solely on the objections of family members or conservators (in violation of the federal court injunction in *Richard S. et al, v. Bell et* al.). Complaint, ¶258d.

Plaintiffs also allege, in accord with *Youngberg*, that defendants' policies, practices, acts and omissions deprive plaintiffs of their fundamental liberty interests in violation of their substantive due process rights by exercising professional judgment in a manner that denies them minimally adequate habilitation and subjects them to undue restraint through unnecessary institutionalization. *E.g.*, Complaint ¶¶ 5, 111, 258a

For the foregoing reasons, the complaint alleges, the named plaintiffs and an untold number of class members remain needlessly institutionalized and, thus, unduly restrained, in violation of their liberty interests protected by the Due Process Clause of the Fourteenth Amendment. *E.g.*, Complaint ¶¶13, 17, 23, 27, 31, 35, 41, 47, 51-52, 58, 62, 68-69.

C. The Complaint Sufficiently States Causes of Action for Violation of Plaintiffs' Equal Protection Rights Under the California and United States Constitutions.

Since the day the United States Supreme Court struck down the separate-but-equal doctrine of an earlier era, it has been well-settled that segregation is a component of the discrimination prohibited by the Equal Protection Clause of the Fourteenth Amendment. *Brown* v. *Board of Education*, 347 U.S. 483 (1954), *overruling Plessy v. Ferguson*, 163 U.S. 537 (1896). In *City of Clebume v. Cleburne Living Center*, 473 U.S. 432 (1985), the Supreme court applied the principle to people with developmental disabilities by ruling that a city could not exclude such persons from a community, barring them from establishing a home there, in the absence of a legitimate state interest or rational explanation. *Id.*[8] at 450.

Under *Cleburne*, the very question posed in a case such as this, where segregation of persons with developmental disabilities is in issue, is whether there are indeed legitimate justifications for that segregation such that the state can show that the segregation really does benefit those who are segregated. Citing *Brown* and *Cleburne*, the district court in *Homeward Bound, Inc.* v. *Hissom Memorial Center* held that a state practice which segregates people with developmental disabilities from the community runs afoul of the Equal Protection Clause if the segregation is not rationally related to a legitimate state interest. 1987 WL 27104 at 19.

Plaintiffs' federal and state equal protection causes of action are based on the contention that isolating people with developmental disabilities in large institutions when their needs could be met in small-scale community living arrangements, cannot legitimately be justified as furthering the goal of providing care and habilitation. Plaintiffs have alleged that defendants have violated their equal protection rights by unnecessarily and inappropriately segregating plaintiffs and class members in public and private institutions, and 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, ¶¶ 254e, 260. State defendants will have an opportunity to establish that there are legitimate justifications for that segregation. Proof of these allegations, however, entails factual determinations which cannot be decided by demurrer.

D. The Complaint Sufficiently States Causes of Action for Violation of Plaintiffs' Rights to Freedom of Expression and Association.

State defendants challenge plaintiffs' claims to freedom of expression and association under the First Amendment. In fact, courts have found that institutionalization is associated with restrictions on institutionalized persons' right to associate and interact with members of the community. For example, the district court in *Thomas S.* found that:
Members of the plaintiff class have been unnecessarily congregated and segregated together in large institutions. Consequently, they are foreclosed from choosing their associates and from socializing with non-handicapped or non-institutionalized individuals. They are forced to associate almost exclusively with institutionalized, mentally disabled people and institutional staff.

Because of the lack of services in the community, plaintiffs are essentially compelled to choose between the exercise of their First Amendment right to freedom of association and participation in a state program of care and habilitation. This pattern of segregation and congregation prohibits free association and leads to further denial of free association because it is self-perpetuating.

The plaintiffs' right to freedom of association has been violated, as has their right to habilitation necessary to ensure that right.

699 F.Supp. at 1204; *cf, Otmstead, 527* U.S. at 601 (holding that, under the ADA, unnecessary institutionalization is a form of discrimination on the basis of disability and noting Congress' judgment that confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.).

Plaintiffs have alleged that the unnecessary segregation of plaintiffs and class members prevents them from living in the community, and thereby unjustifiably restricts their ability to participate in community activities and associate with non-disabled members of the community, including family and friends. By their Fifth and Sixth Causes of Action they have sufficiently alleged that such restrictions violate their constitutional rights to freedom of association and expression under the California and federal Constitutions. *E.g.*, Complaint, ¶¶ 254d, 259.

III. THE STATE OF CALIFORNIA IS A PROPER PARTY TO THIS ACTION.

State defendants do not cite, and plaintiffs have not found, any authority immunizing the State of California from being named as a defendant in an action for declaratory and/or injunctive relief. Article 3, section 5 of the California Constitution provides that suit may be brought against the State of California. Neither that provision nor any other authority of which plaintiffs are aware provides any limitation on the ability of a plaintiff to sue the State of California for injunctive or declaratory relief.

Indeed, in *Butt v. State of California*, 4 Cal.4th 668 (1992), the California Supreme Court affirmed a trial court's decision to issue a preliminary injunction against the State of California in a case involving the inability of a school district to complete the final weeks of a school term due to inadequate financial resources. The Supreme Court held that the trial court properly ordered the State and its officials to protect the students' rights because the State of California itself has a duty to provide education. *Id.* at 704.

Here, too, it is the State of California itself that has assumed the responsibility to protect the rights of all alifomians with developmental disabilities. The Lanterman Developmental Disabilities Services Act provides: ' *The State of California*2006455924;0142;1993017236;RT;;; accepts a responsibility for persons with developmental disabilities and an obligation which it must discharge. Welf. & Inst. Code § 4501 (emphasis added); *see also, Williams v. Macomber*, 226 Cal.App.3d 225, 232 (1990)2006455924;0103;1990179847;RP;;226;232; *Ass 'nfor Retarded Citizens-California v. Dept. of Developmental Services*, 38 Cal.3d 384, 392 (1985)2006455924;0104;1985114764;RP;;233;392 ([T]he [Lanterman] Act defines a basic right and a corresponding basic obligation: the right which it grants to the developmentally disabled person is to be provided with services that enable him to live a more independent and productive life in the community; the obligation which it imposes on the *state* is to provide such services. (emphasis added)). As in *Butt*,2006455924;0143;1993017236;RT;;; it is proper to enjoin both the State of California and its agents in this case to ensure that the rights of Califomians with developmental disabilities are upheld.

Butt also puts the State defendants' sole authority - *State v. Superior Court*, 12 Cal.3rd 237 (1974) - into context because the injunction in *Butt* would have been reversed if there were a rule barring claims of injunctive and/or declaratory relief against the State of California. *State* holds only that a demurrer was proper on the facts of that case. The plaintiffs in *State* sought review of a decision by the Coastal Commission to reject an application for a building permit, hi a paragraph, the Court held that the demurrer as to the State of California should have been sustained because (1) only the Coastal Commission and its members can set aside the Commission's prior decision and (2) the complaint contained no allegations establishing any right to declaratory relief against the State of California. *Id.* at 255. Neither rationale has any application here. Plaintiffs do not challenge a single decision of any state agency or commission. Rather, plaintiffs seek relief for the systemic violations of law perpetrated by the State of California and certain of its agents against individuals with developmental disabilities. Moreover, unlike in *State*, plaintiffs have alleged (in detail) the basis for their claims against the State of California and the other defendants.

Finally, it is common practice for injunctive relief to run against the enjoined person and all persons or entities through whom the enjoined person may act, such as its agents. Thus, plaintiffs name the State of California so that any relief they obtain will bind the State of California and each of its agents. For example, it would ensure that plaintiffs are protected if they obtain a

judgment that the state agency defendants claim insufficient resources or authority to satisfy. Thus, should the Court sustain the demurrer on this point, plaintiffs may be forced to amend their complaint to name the Governor and other state officials to ensure that plaintiffs obtain full and complete relief.

CONCLUSION

A demurrer must be denied if a complaint or cause of action pleads *any* valid claim for relief. The facts alleged in the complaint here are sufficient to state claims under the Due Process Clauses of the California and federal Constitutions many times over. The complaint states more than sufficient facts concerning defendants' failure to exercise professional judgment to establish violations of plaintiffs' and class members' substantive due process rights. State defendants have cited no case upholding a motion to dismiss or demurrer with respect to such claims. To the contrary, myriad cases have recognized valid due process claims based on similar factual allegations. Similarly, plaintiffs state sufficient facts to establish claims for violations of their constitutional rights to equal protection, freedom of association and expression. Finally, State defendants cite no applicable authority supporting their contention that the State is an improper party to these proceedings.

Plaintiffs respectfully request that State defendants' demurrer be denied.

Footnotes

[1] Plaintiffs herein allege violations of plaintiffs' substantive, not procedural, due process rights. Therefore, the cases State defendants cite specifying factors for identifying whether procedural due process rights have been violated are inapposite. State Defs' Brief at 5-6. The relevant standard here is the one delineated by the United States Supreme Court in *Youngberg.*

[2] m subsequent opinions, the Supreme Court has further qualified that a professional's judgment must be reasonable. *E.g., School Board of Nassau County v. Arline*, 480 U.S. 273, 288 (1987); *see also, Olmstead v. L. C.*, 527 U.S. 581, 602 (1999).

[3] *Clausingv. San Francisco Unified School Dist.*, 221 Cal.App.3d 1224,1238 (1990), cited by State defendants, wherein the court held there was no affirmative duty to protect a citizen's right to privacy, does not preclude the relief plaintiffs seek. State Defs' Brief at 4. Any effective relief prohibiting or enjoining defendants from violating plaintiffs' liberty interests through inappropriate institutionalization must, by necessity, include moving such individuals out of the institution.

[4] As the foregoing cases make clear, the protection from undue restraint referred to in *Youngberg* includes inappropriate institutionalization itself, not merely bodily restraint in the institution as State defendants contend. State Defs' Brief at 9. *See also, In re Roger S.*, 19 Cal.3d at 929 (holding that involuntary confinement is a direct form of physical restraint and that freedom from bodily restraint is a principal ingredient of personal liberty).

[5] Although they purport to attack plaintiffs' due process claim for failure to state a cause of action, in fact, State defendants really attack plaintiffs' *remedy* and not their well-pleaded *claims* which, in this instance, arise under the State and federal Constitutions. *E.g.*, State Defs' Brief at 3-4. The relief that State defendants refer to, however, is based not only on plaintiffs' constitutional claims, but also on claims arising under, *inter alia*, the Lanterman Act, which does in fact impose a mandatory duty to provide residential services and supports in the least restrictive setting. If, after trial or on summary judgment, the Court finds that defendants have violated plaintiffs' constitutional rights as pleaded in the complaint, the Court will then have the duty to formulate a remedy to correct the violations. Thus, defendants' motion falls outside the confines of a demurrer, which is limited to claims, not relief. *See, e.g., Venice Town Council v. City of Los Angeles*, 47 Cal.App.4th at 1561-62.

[6] This, of course, begs the factual question, particularly with respect to developmental center residents, as to whether any residents are admitted voluntarily. Strict due process requirements mandate judicial commitment orders for virtually all persons placed in a developmental center. *See, e.g., In re Hop.* Moreover, with respect to any institutional setting, the voluntariness of any choice is illusory when, as alleged by this action, appropriate alternatives are not offered or available.

[7] Because the California Constitution must meet minimal federal due process standards, plaintiffs also state a viable substantive due process claim based on infringement of the fundamental liberty interest protected by the California Constitution, Article 1, §§ 1 and 7. *See, e.g., Addington v. Texas*, 441 U.S. 418,430-31 (1979) (states may adopt different due process standards and procedures, so long as they meet the constitutional minimum), In fact, the due process liberty interest under the California Constitution has been construed to be broader than under the federal Constitution. *See, e.g., People v. Ramirez, 25* Cal.3d 260, 265-68 (1979).

[8] While refusing to decide whether they fall into a suspect or quasi-suspect class, the Supreme Court nonetheless recognized that policies that exclude persons with mental retardation may be impermissibly based on prejudice and fear. 473 U.S. at 438, 443-46.

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