IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

WILLIAM LONG, et al.,

Plaintiffs,

v. CASE NO. 4:08cv26-RH/WCS

HOLLY BENSON, et al.,

Defendants.

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ORDER DENYING MOTION TO DISMISS AND DEFERRING RULING ON CLASS CERTIFICATION

The plaintiffs in this action are Medicaid-supported residents of nursing facilities who allege that they could reside and receive appropriate care in the community. They further assert that defendant state officials have subjected them to unjustified discrimination on the basis of disability by failing to assess properly the services that would enable them to live in the community, by not informing them about these services, and by not supporting these services generally. This conduct, allege plaintiffs, violates the anti-discrimination provision contained in the public services portion (Title II) of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12132, and regulations that require that "a public entity shall

administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities," 28 C.F.R. § 35.130(d). The defendants have moved to dismiss, and the plaintiffs have moved to certify class of similarly situated individuals in Florida. Oral argument was held on these pending motions and a ruling announced that is confirmed by this written order.

The Supreme Court recently set forth the standard governing motions to dismiss:

> Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Specific facts are not necessary; the statement need only "'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atlantic Corp. v. Twombly*, 550 U.S. __, 127 S. Ct. 1955, 167 L. Ed. 2d. 929 (2007) (slip op., at 7-8) (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)). In addition, when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint. *Bell Atlantic Corp.*, *supra*, at __, 127 S. Ct. 1965 (slip op., at 8-9) (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508, n.1, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002); *Neitzke v. Williams*, 490 U.S. 319, 327, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989); *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974)).

Erickson v. Pardus, 127 S. Ct. 2197, 2200, 167 L. Ed. 2d 929 (2007). The requirement that in ruling on a motion to dismiss the complaint's allegations be accepted as true applies "even if [the allegations are] doubtful in fact." *Bell Atlantic*, 127 S. Ct. at 1965.

The dispositive case here is *Olmstead v. L.C. ex rel. Zimring* 527 U.S. 581, 119 S. Ct. 2176, 144 L. Ed. 2d 540 (1999). There the Supreme Court held that "under Title II of the ADA, States are required to provide community-based treatment for persons with mental disabilities when the State's treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities." 527 U.S. at 607.

The defendants argue that *Olmstead* does not control the case at bar because the plaintiffs have not alleged that state treatment professionals have determined that community placement is appropriate. Part of the plaintiffs' allegation, however, is that defendants have failed to assess properly, and that community placements would be determined appropriate as required by *Olmstead* if proper assessments were performed. The defendants read the complaint's allegation that the defendants "fail[ed] to assess properly" to mean that they assessed, but did so improperly, thus framing the question as a challenge to the state's medical decisions. Leaving aside the question of what substantive result would follow if this is what is ultimately proven, it is clear that the allegation itself could more plainly be read to include an assertion that the defendants failed to assess at all.

The plaintiffs further rely on regulations requiring that a "recipient [of

federal financial assistance] may not, directly or through contractual or other arrangements, utilize criteria or methods of administration . . . that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap." 45 C.F.R. § 84.4(b)(4); 28 C.F.R. § 41.51(b)(3). State officials cannot avoid the obligations of the ADA as interpreted by *Olmstead* by denying the provision of proper assessments. Thus the complaint states a claim upon which relief can be granted.

This is so notwithstanding the defendants' related arguments that regulations cited by the plaintiffs are beyond the scope of congressionally delegated authority, such that Title II itself does not require placement of the plaintiffs in the "most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d).[1] That argument is contrary to the ultimate holding of *Olmstead*.[2]

The defendants made an *ore tenus* motion for interlocutory appeal following

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[1] Following notification to the United States Attorney General of the a challenge to a federal regulation pursuant to 28 U.S.C. § 2403(a), the government filed a statement of interest and appeared as an amicus at oral argument to attend to its interests in this matter pursuant to 28 U.S.C. § 517.

[2] To be sure, *Olmstead* did not explicitly address the validity of the regulations. In the words of the Court, "We recite these regulations with the caveat that we do not here determine their validity. While the parties differ on the proper construction and enforcement of the regulations, we do not understand petitioners to challenge the regulatory formulations themselves as outside the congressional authorization." 527 U.S. at 592.

the court's indication at oral argument that the motion would be denied. As a matter of discretion, I decline to certify the issue for immediate appeal.

The defendants have requested further discovery on the issue of class certification, raising significant questions as to whether the plaintiffs themselves could meet any proposed definition of the class. A ruling on the motion for class certification will be deferred pending further discovery, but general discovery should proceed.

For these reasons and others set forth on the record of the hearing of May 29, 2008,

IT IS ORDERED:

1. The defendants' motion to dismiss (document 26) is DENIED.

2. The defendants' ore tenus motion for certification under 28 U.S.C. § 1292(b) is DENIED.

3. A ruling on the plaintiffs' motion to certify class is deferred pending further discovery. The defendants may file a supplemental response to the plaintiffs' motion to certify class by July 29, 2008. As of that date, the court will

take the matter under advisement and may set a hearing or enter a ruling without a hearing.

SO ORDERED this 7th day of June, 2008.

s/Robert L. Hinkle
Chief United States District Judge