United States District Court, N.D. Georgia.
L.C., by Jonathan ZIMRING as guardian ad litem and next friend, Plaintiff,
E.W., by Jonathan Zimring as guardian ad litem and next friend, Plaintiff-Intervenor,
v.
Tommy OLMSTEAD, Director of the Department of Human Resources, et al., Defendants.

Civil Action No. 1:95-cv-1210-MHS.
March 26, 1997.

ORDER

SHOOB, Senior District Judge.

***1** This is an action for declaratory and injunctive relief brought on behalf of two mentally retarded persons, L.C. and E.W., who have been institutionalized in a state mental hospital. They allege that under rights granted them by the Americans with Disabilities Act and the Fourteenth Amendment to the United States Constitution, they are entitled to an order requiring the state to provide them care in the "most integrated setting appropriate," which they contend is a community-based treatment program rather than a state mental hospital. Before the Court are plaintiffs' and defendants' cross-motions for summary judgment as well as plaintiff E.W.'s motion for a preliminary injunction. The Court's rulings are summarized below.

Background

On May 11, 1995, plaintiff L.C., a 27-year-old mentally retarded woman who has also been diagnosed as schizophrenic, filed this action challenging her continued confinement at Georgia Regional Hospital at Atlanta ("GRH-A"), a state mental institution. L.C. named as defendants the Commissioner of the Georgia Department of Human Resources, the Superintendent of GRH-A, and the Executive Director of the Fulton County Regional Board, which is responsible for the provision of mental health and mental retardation services to residents of Fulton County.

In her complaint, L.C. alleged that, despite the professional judgment of her psychiatric treatment team that she no longer required in-patient psychiatric treatment but instead needed community residential and habilitation services, defendants had continued to confine her at GRH-A. L.C. alleged that her continued unnecessary confinement violated her rights to freedom from undue restraint, minimally adequate treatment, freedom from illegal discrimination, and placement in the most integrated setting appropriate to her needs, which were guaranteed by the Fourteenth Amendment to the United States Constitution and under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12131 *et seq.* She sought declaratory and injunctive relief requiring, inter alia, that she be released from GRH-A into a community care residential program and provided with appropriate treatment by qualified professionals.

On or about July 27, 1995, pursuant to a consent order entered in this action, defendants discharged L.C. from GRH-A to Brook Run, a state institution for treatment of the mentally retarded. On February 12, 1996, L.C. was released from Brook Run to a community support program known as "Nyasha Hands." However, L.C. contends that she is not receiving appropriate services to support her in the community and is at high risk of having problems that will cause her to be returned to GRH-A.

Meanwhile, on January 29, 1996, the Court granted the motion to intervene as plaintiff filed by E.W., a 43-year-old mentally retarded woman who has also been diagnosed with a variety of mental disorders. Like L.C., E.W. alleged that she was confined unnecessarily and inappropriately at GRH-A and sought release into a community-based residential program.

***2** On July 12, 1996, plaintiff E.W. moved for a preliminary injunction directing defendants to release her from GRH-A to an appropriate, integrated community setting. On August 20, 1996, plaintiffs also filed a motion for summary judgment. On August 22, 1996, defendants filed a cross-motion for summary judgment. The Court has deferred a hearing on E.W.'s motion for a preliminary injunction pending a ruling on the parties' cross-motions for summary judgment.

Summary Judgment Standard

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate when "there is no genuine issue as to any material fact ... and the moving party is entitled to judgment as a matter of law." In *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), the Supreme Court held that this burden could be met if the moving party demonstrates that there is "an absence of evidence to support the non-moving party's case." *Id.* at 325. At that point, the burden shifts to the non-moving party to go beyond the pleadings and present specific evidence giving rise to a triable issue. *Id.*, at 324.

In reviewing a motion for summary judgment, the Court must construe the evidence and all inferences drawn from the evidence in the light most favorable to the non-moving party. *WSB-TV v. Lee,* 842 F.2d 1266, 1270 (11th Cir.1988). Nevertheless, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

The Parties' Contentions

Plaintiffs contend that defendants have unnecessarily institutionalized and segregated them in a mental hospital rather than placing them in an appropriate, integrated community setting, and that this constitutes unlawful discrimination on the basis of their disability in violation of the ADA. Plaintiffs also allege that defendants have failed to provide them minimally adequate treatment and habilitation and freedom from undue restraint in violation of their rights under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

Defendants contend that L.C.'s claims are moot because she is already being treated in an adequate community placement. Defendants further argue that they have not violated E.W.'s rights under the ADA because she has been denied community placement due to inadequate funding and not due to any discrimination based on her disability. Finally, defendants contend that they have not violated E.W.'s rights under the Due Process Clause because the decision to treat her at GRH-A rather than in the community was based on the exercise of professional judgment.

Discussion

1. *Mootness*

[1] After this lawsuit was filed, defendants placed L.C. in a community-based support program. However, due to a funding problem, L.C. did not receive the services intended to be provided through this program for at least several months. While it appears that the funding problem has been resolved for now, given plaintiff's history of at least eighteen prior hospitalizations at GRH-A and the questionable stability of her current placement, the Court finds that there is a significant threat of L.C.'s being returned to GRH-A. The Court concludes that plaintiff's claims are not moot because they are "capable of repetition, yet evading review." *Sultenfuss v. Snow,* 35 F.3d 1494, 1498 n. 5 (11th Cir.1994); *see also Vitek v. Jones,* 445 U.S. 480, 487, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980); *Lynch v. Baxley,* 744 F.2d 1452, 1457 (11th Cir.1984).

2. *ADA*

***3** Title II of the ADA provides that "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. To prove a violation of Title II, plaintiffs must show: (1) that they are "qualified individual[s] with a disability"; (2) that they were excluded from participation in or denied the benefits of some public entity's services, programs, or activities, or were otherwise discriminated against; and (3) that such discrimination was "by reason of" their disability. *See Concerned Parents to Save Dreher Park Center v. City of West Palm Beach,* 846 F.Supp. 986, 990 (S.D.Fla.1994).

In this case, there is no dispute that plaintiffs are qualified individuals with a disability. There is also no dispute that plaintiffs can be placed in the community. As noted above, defendants have already placed L.C. in a community-based program. As for E.W., although defendants dispute whether she *should* be placed in the community, the record demonstrates that the qualified experts are unanimous in their opinion that E.W. *can* be placed in the community, and defendants concede that E.W. qualifies for community-based services.[FN1]

> FN1. In a supplemental brief, defendants take the position that a recent medical problem experienced by E.W. precludes a community placement for her at this time. However, the evidence submitted by defendants does not support this conclusion. The record establishes that E.W.'s medical problem has been resolved by surgery and does not prevent her being placed in the community.

[2] Defendants argue, however, that plaintiffs have failed to prove the third element of their ADA claim, i.e., that they have been discriminated against "by reason of" their disability. Defendants contend that plaintiffs have been denied community-based placements due to inadequate funding, not because of any discrimination based on their disability. The Court concludes, however, that under the ADA, unnecessary institutional segregation of the disabled constitutes discrimination *per se,* which cannot be justified by a lack of funding.

First, it is clear from the statute itself that "segregation" of individuals with disabilities is a "form[ ] of discrimination" that Congress intended to eliminate. 42 U.S.C. § 12101(a)(2), (3), (5). Indeed, the legislative history is replete with statements reflecting Congress's intent to prohibit unnecessary segregation of the disabled.[FN2]

> FN2. For example, Senator Harkin, floor manager of the ADA in the Senate, stated that the Act "guarantees individuals with disabilities the right to be integrated into the economic and social mainstream of society; segregation and isolation by others will no longer be tolerated." 135 Cong. Rec. 19803 (1989). Plaintiffs cite numerous additional examples in their briefs.

Second, the regulations promulgated by the Attorney General to implement Title II plainly prohibit unnecessary institutionalization: "A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." [FN3] 28 C.F.R. § 35.130(d). The regulations also require public entities to make reasonable modifications in existing programs in order to avoid discrimination: "A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7).

> FN3. The "most integrated setting appropriate" is "a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible ..." 28 C.F.R. Pt. 35, App. A.

***4** Finally, in a similar case, the Third Circuit rejected an argument that continued institutionalization in a nursing home was justified by a lack of funding for an attendant care program that would permit the plaintiff to live at home. *Helen L. v. DiDario,* 46 F.3d 325 (3rd Cir.), *cert. denied,* 516 U.S. 813, 116 S.Ct. 64, 133 L.Ed.2d 26 (1995).

Holding that "the ADA and its attendant regulations clearly define unnecessary segregation as a form of illegal discrimination against the disabled," *id.* at 333 (footnote omitted), the court concluded that "since the Commonwealth has chosen to provide services to Idell S. under the ADA, it must do so in a manner which comports with the requirements of that statute." *Id.* at 339.

[3] In this case, defendants contend that all available funds are being used to provide services to other disabled persons. However, there is no dispute that defendants already have existing programs providing community services to persons such as plaintiffs. It is also undisputed that defendants can provide services to plaintiffs in the community at considerably *less* cost than is required to maintain them in an institution.[FN4] Thus, defendants cannot demonstrate that any fundamental alteration of their program is required in order to serve plaintiffs appropriately in the community. The fact that it may be more convenient, either administratively or fiscally, to provide services in a segregated manner does not justify defendants' failure to comply with the ADA.

> FN4. The record establishes that, on an annual basis, institutional care for the mentally retarded costs more than twice as much as community care, and that the same is true for the mentally ill.

For the foregoing reasons, the Court denies defendants' motion for summary judgment and grants plaintiffs' motion for summary judgment on plaintiffs' ADA claim; declares that defendants' failure to place plaintiffs in an appropriate community-based treatment program violates the ADA; permanently enjoins defendants from further violating plaintiffs' rights under the ADA; and orders defendants to comply with the ADA by releasing E.W. to an appropriate, community-based treatment program and by providing L.C. with all appropriate services necessary to maintain her current placement in such a program. In light of this ruling, the Court denies as moot plaintiff-intervenor E.W.'s motion for a preliminary injunction.

3. *Due Process*

[4] Plaintiffs also contend that their unnecessary institutionalization by defendants and defendants' failure to place them in an appropriate community-based treatment program violates the Due Process Clause of the Fourteenth Amendment, which guarantees them the right to minimally adequate treatment and freedom from undue restraint. *See Youngberg v. Romeo,* 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982); *Wyatt v. Stickney,* 334 F.Supp. 1341 (M.D.Ala.1971). It appears, however, that this claim is rendered moot by the Court's grant of summary judgment to plaintiffs on their ADA claim.

First, having already determined that plaintiffs' continued institutionalization is unlawfully discriminatory under the ADA, it is unnecessary for the Court also to decide whether plaintiffs' institutional care is minimally adequate or unduly restrains their freedom in violation of the Fourteenth Amendment. Second, insofar as plaintiffs seek as a remedy for defendants' alleged Fourteenth Amendment violation a discharge to an appropriate community-based treatment program, the Court has already granted such relief in connection with the grant of summary judgment on their ADA claim. Finally, insofar as plaintiffs seek an order requiring defendants to provide them with appropriate habilitation and treatment by qualified professionals to prevent deterioration of their pre-existing skills and with the ultimate goal of integrating them into the mainstream of society, the Court has already granted such relief by ordering defendants to comply with the ADA by placing E.W. in an appropriate community-based treatment program and by providing L.C. all appropriate services necessary to maintain her current placement in such a program.

***5** Accordingly, the Court denies as moot both plaintiffs' and defendants' motions for summary judgment on plaintiffs' claims under the Fourteenth Amendment.

Summary

The Court GRANTS defendants' motion to extend time for filing defendants' motion for summary judgment [#

58-1]; DENIES IN PART and DENIES AS MOOT IN PART defendants' motion for summary judgment [# 61-1]; GRANTS IN PART and DENIES AS MOOT IN PART plaintiffs' motion for summary judgment [# 59-1]; and DENIES AS MOOT plaintiff-intervenor E.W.'s motion for a preliminary injunction [# 50-1].

The Court DECLARES that defendants' failure to place plaintiffs in an appropriate community-based treatment program violates Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12131 *et seq.;* PERMANENTLY ENJOINS defendants from further violating plaintiffs' rights under the ADA; and ORDERS defendants to comply with the ADA by releasing plaintiff-intervenor E.W. to an appropriate, community-based treatment program and by providing plaintiff L.C. with all appropriate services necessary to maintain her current placement in such a program.

Pursuant to Federal Rule of Civil Procedure 58(2), the Court DIRECTS the clerk to enter a final judgment in this action in the form of the preceding paragraph.

IT IS SO ORDERED.

N.D.Ga.,1997.
L.C., by Zimring v. Olmstead
Not Reported in F.Supp., 1997 WL 148674 (N.D.Ga.), 9 NDLR P 276

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