IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

MIRANDA B., HANNAH C., JAMIE G., JONG K., JOANNE K., JAMES R., GEORGE P., ANTHONY G., LEONARD P., and JUAN S., individually and on behalf of all others similarly situated,

Plaintiffs,

v.

JOHN KITZHABER, Governor of the State of Oregon, in his official capacity, OREGON DEPARTMENT OF HUMAN SERVICES, and BOB MINK, Director of the Oregon Department of Human Services, in his official capacity,

Defendants.

No. CV-00-1753-HU

FINDINGS & RECOMMENDATION

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HUBEL, Magistrate Judge:

Plaintiffs, ten individuals[1] who are institutionalized in state psychiatric hospitals in Oregon, bring this action against John Kitzhaber, Governor of Oregon, in his official capacity, the Oregon Department of Human Services (ODHS), and Bob Mink, Director of the ODHS, in his official capacity. Generally, plaintiffs challenge their unnecessary segregation in the hospitals and defendants' failure to provide them with appropriate services in the community, the most integrated setting appropriate to their needs.

Plaintiffs' claims, for declaratory and injunctive relief only, arise under the Americans with Disabilities Act, the Rehabilitation Act, and the Due Process Clause of the Fourteenth Amendment. Defendants move to dismiss all of plaintiffs' claims under Federal Rules of Civil Procedure 12(b)(1) (lack of subject matter jurisdiction) and 12(b)(6) (failure to state a claim). I recommend that the motion be granted in part and denied in part.

BACKGROUND

The facts are taken from plaintiffs' First Amended Complaint

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[1] Plaintiffs' motion for certification as a class action is pending.

(FAC). Plaintiffs allege that they are qualified individuals with disabilities because they have mental disabilities that substantially limit one or more of their major life activities, including interacting with others, working, and self-care, and are qualified to receive state-funded mental health services. FAC at ¶ 30. Plaintiffs further allege that they want to be discharged from their hospitalization, but they remain unnecessarily institutionalized because defendants have failed to provide sufficient appropriate community-based residential and non-residential programs to serve them. Id. at ¶ 31. They contend that with appropriate supports and services, each of them could live in the community which they contend is the most integrated setting appropriate to their needs. Id.

Plaintiffs contend that defendants provide in-patient intermediate and long-term mental health care in three settings, the first of which is the state's psychiatric institutions - Oregon State Hospital in Salem (OSH) and Portland (POSH), and at the Eastern Oregon Psychiatric Center (EOPC). Id. at ¶ 38. These institutions provide psychiatric care for persons who have been civilly committed under state law. Id. There are 133 adult beds at OSH and POSH and 60 adult beds at EOPC. Id. The hospitals have been operating at full capacity since 1997. Id.

Plaintiffs allege that defendants provide treatment in private hospitals throughout Oregon while patients are awaiting an opening at one of the state hospitals. Id. at ¶ 39. According to plaintiffs, there are twelve private hospitals under contract with the State providing such care. Id. Plaintiffs allege that due to a backlog, psychiatric patients

overflow into medical and surgical units in several of these hospitals. Id. At least twenty people are waiting transfer from a private hospital setting to a state facility. Id. Plaintiffs contend that the cost of treatment in an acute care private hospital is significantly more expensive than treatment in state hospitals and is not eligible for Medicaid reimbursement. Id.

Defendants also provide intermediate and long-term care in community-based facilities including "enhanced care facilities," secure residential treatment facilities (SRTF), and other residential facilities. Id. at ¶ 40. These are known as "step down" facilities and they provide varying levels of patient care at less cost than care in the state hospital. Id. Plaintiffs contend that of the sixty or more class members awaiting community placement, more than half need placement in SRTFs, but there are no beds available. Id. Care in these settings is eligible for Medicaid funding. Id.

Finally, defendants also provide mental health treatment in other community settings, including group homes, adult foster care, supportive living, and other less intensive community-based residential care facilities. Id. at ¶ 41. Care is much less expensive in these settings than in a hospital, and Medicaid funding is available. Id. There are insufficient beds in these facilities to meet the needs of the class, however. Id. Plaintiffs contend that in fiscal 1998 and 1999, there were twenty people living in SRTFs, awaiting transfer to a lower level community-based facility. Id.

Plaintiffs allege that because defendants have not provided

enough beds in the community, the system is backing up at every level of the mental health treatment system. Id. at ¶ 42. As a result, assert plaintiffs, defendants are paying premium prices to private hospitals and wasting public resources earmarked for mental health treatment that could be utilized more effectively in other areas of the mental health system if there were a sufficient number of community placements available. Id. Plaintiffs contend that the results of this inefficiency are not merely economic because the system, as currently administered, causes and prolongs human suffering. Id.

Plaintiffs note that in 1997, the state Mental Health Planning and Advisory Council acknowledged a crisis in the mental health care system in Oregon, investigated, and made recommendations as to what systemic changes were needed to alleviate the crisis. Id. at ¶ 43. Plaintiffs allege that in subsequent fiscal years, the crisis escalated. Id. at ¶ 45. Plaintiff cites additional statements by the Oregon Office of Mental Health Services (OMHS) and the Oregon Legislative Fiscal Office regarding the need for additional resources and beds. Id. at ¶¶ 46, 47, 49.

Plaintiffs contend that the damaging effects of long-term hospitalization upon mental health patients is well established. Id. at ¶ 50. A number of class members have engaged in self-harming behaviors that are attributed to the frustration and sense of hopelessness that results from continued hospitalization, despite the determination of their doctors and treating professionals that they are ready for discharge. They

allege that defendants currently have no comprehensive, effectively working plan for placing members of the class in the community. Id. at ¶ 51.

Plaintiffs allege that they have no adequate remedy at law. Id. at ¶ 57. They allege that they will suffer imminent, irreparable injury without an award of injunctive relief. Id. They contend that they require a variety of community-based residential placements for their proper care and treatment. Id. They also allege that without these placements, they will fail to improve in their mental and emotional health, their mental and emotional health will likely deteriorate, and ultimately they will suffer permanent damage to their long-term mental and emotional health. Id.

STANDARDS

I. Rule 12(b)(6)

On a motion to dismiss, the court must review the sufficiency of the complaint. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). The court should construe the complaint most favorably to the pleader:

> In evaluating the sufficiency of the complaint, we follow, of course, the accepted rule that the complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The allegations of material fact must be taken as true. Moyo v. Gomez, 40 F.3d 982, 984 (9th Cir. 1994).

II. Rule 12(b)(1)

A motion to dismiss brought pursuant to Federal Rule of

Civil Procedure 12(b)(1) addresses the court's subject matter jurisdiction. The party asserting jurisdiction bears the burden of proving that the court has subject matter jurisdiction over his claims. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994). Unlike a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), a Rule 12(b)(1) motion can attack the jurisdictional allegations in the plaintiff's complaint regardless of whether the complaint otherwise sufficiently states a claim. See St. Clair v. City of Chico, 880 F.2d 199, 201 (9th Cir. 1989). A challenge to the court's subject matter jurisdiction under Rule 12(b)(1) may rely on affidavits or any other evidence properly before the court. Dreier v. United States, 106 F.3d 844, 847 (9th Cir. 1996).

DISCUSSION

I. Summary of Plaintiffs' Claims

Plaintiffs bring two claims under the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (ADA), one claim under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, and two 42 U.S.C. § 1983 claims alleging violations of the Fourteenth Amendment Due Process Clause.

A. ADA Claims

The first ADA claim challenges defendants' failure to provide plaintiffs services in the most integrated setting under Title II of the ADA. FAC at ¶¶ 58-65. Plaintiff alleges that under 42 U.S.C. § 12134(b), the Attorney General of the United States has promulgated a regulation, 28 C.F.R. § 35.130(d), which requires that all services, programs, and activities of a

public entity be administered in the most integrated setting appropriate to the needs of the qualified individuals with disabilities. Id. at ¶ 61. Plaintiffs contend that they can, with appropriate support and services, live in community-based programs for persons with mental disabilities. Id. at ¶ 62. They allege that they have reached maximum therapeutic benefit from their confinement in state psychiatric hospitals, and the most integrated and appropriate treatment setting is in intermediate or long-term community-based placement. Id. They allege that continued segregation and institutionalization in state hospitals is unjustified, unnecessary, and damaging to their mental health. Id.

Plaintiffs further allege that providing services to them in the most integrated setting appropriate to their needs, rather than in a segregated institution, would not result in a fundamental alteration of the ODHS's programs, nor will it impose an undue burden. Id. at ¶ 64. Plaintiffs contend that defendants have no plan currently in place to assure that they are provided with services in the most integrated setting appropriate to their needs. Id. at ¶ 65.

The second ADA claim challenges defendants' "[u]se of [u]nlawful [m]ethods of [a]dministration." Id. at ¶¶ 66 - 70. Plaintiffs cite a rule providing that "[a] public entity may not . . . utilize . . . methods of administration . . . [t]hat have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability[.]" 28 C.F.R. § 35.130(b)(3)(i). FAC at ¶ 67. Plaintiffs allege that defendants violate this rule by failing to use funding, which

currently supports institutional services, to support community-based programs and thus, allowing plaintiffs to be promptly discharged. Id. at ¶ 68. Plaintiffs assert, therefore, that defendants use methods of administration that have the effect of subjecting plaintiffs to continued unnecessary segregation in state psychiatric facilities and therefore, discriminate against them. Id.

Plaintiffs also allege that defendants have failed to assess the needs of all residents, such as plaintiffs, who are confined at state psychiatric facilities, and to develop services that meet their individual needs. Id. at ¶ 70. Plaintiffs contend that defendants have failed to develop an array of community-based services that can meet the special treatment needs of hospital residents such as plaintiffs. Id. Plaintiffs further contend that instead, defendants have a limited menu of community-based services into which residents of psychiatric facilities, such as plaintiffs and the putative plaintiff class, must fit if they are to be discharged. Id. Plaintiffs allege that this has resulted in plaintiffs' continued, unnecessary institutionalization. Id.

B. Rehabilitation Act Claim

Plaintiffs' Rehabilitation Act claim also challenges defendants' failure to provide required services in the most integrated setting. Id. at ¶¶ 71-79. Plaintiffs allege that defendant ODHS receives federal financial assistance through, inter alia, Title XIX (Medicaid), the Community Mental Health Services grant, and the Developmentally Disabled Services Act grant and that therefore, ODHS is subject to Section 504 of the

Rehabilitation Act. Id. at ¶ 73. Federal regulations implemented pursuant to Section 504 prohibit discrimination against handicapped persons and require that disability programs receiving federal assistance provide services in the most integrated setting appropriate to the person's needs. Id. at ¶ 74 (citing 45 C.F.R. §§ 84.4(a), (b)(2)). Plaintiffs also make similar allegations to their ADA "most integrated setting claim." Id. at ¶¶ 75-78.

C. Section 1983 Claims

Plaintiffs allege that by being confined in state psychiatric hospitals against their will, they are being denied the less restrictive community-based residential placements that are appropriate for their proper care or treatment. Id. at ¶ 82. They allege that they are thus denied a liberty interest to which they are entitled under the Due Process Clause of the Fourteenth Amendment. Id. Further, they allege that by continuing to segregate them in state hospitals, defendants subject plaintiffs to conditions that damage plaintiffs' mental health. Id.

In their fifth claim, plaintiffs allege that defendants have failed and are failing to provide plaintiffs with minimal treatment that is minimally adequate, in violation of their rights under the Fourteenth Amendment Due Process Clause, and as a result, plaintiffs are suffering and will continue to suffer, harm. Id. at ¶ 85.

II. ADA and Rehabilitation Act Claims

Defendants make three arguments against the ADA and Rehabilitation Act claims: (1) the ADA and the Rehabilitation

Act do not validly abrogate Oregon's Eleventh Amendment immunity from private suit in federal court; (2) the individual state defendants are not subject to suit under Title II of the ADA or Section 504 of the Rehabilitation Act; and (3) the ADA and Rehabilitation Act claims are not ripe for judicial review.

A. Eleventh Amendment Immunity

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. Although not expressed in the text, the Supreme Court has held that the Eleventh Amendment grants a state immunity from suits brought in federal court by its own citizens as well as citizens of another state. See Kimel v. Florida Bd. of Regents, 528 U.S. 62, 72-73 (2000); Edelman v. Jordan, 415 U.S. 651, 662-63 (1974). As recently stated by the Supreme Court: "The ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not be sued by private individuals in federal court." Board of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356, _____, 121 S. Ct. 955, 962 (2001).

Nonetheless, private citizens may sue states in federal court if the state has waived its Eleventh Amendment immunity or if Congress has abrogated the immunity. In re Jackson, 184 F.3d 1046, 1048 (9th Cir. 1999). Defendants assert that it is undisputed that Oregon has not consented to this suit and thus, the only question is whether Congress has validly abrogated the state's immunity.

To determine whether Congress has validly abrogated the states' Eleventh Amendment immunity, the court engages in a two-prong analysis. See Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 55 (1996). First, the court determines whether Congress has unequivocally expressed its intent to abrogate the immunity. Id. Here, the answer to that question is clear: the ADA expressly provides that "[a] State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter." 42 U.S.C. § 12202. The Rehabilitation Act contains similar language: "A State shall not be immune under the Eleventh Amendment . . . from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 . . . or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance." 42 U.S.C. § 2000d-7.

Second, the court must determine whether Congress has acted pursuant to a valid exercise of power. Seminole Tribe, 517 U.S. at 55; see also Garrett, 121 S. Ct. at 962 ("Congress may abrogate the States' Eleventh Amendment immunity when it both unequivocally intends to do so and acts pursuant to a valid grant of constitutional authority.") (internal quotation omitted). Defendants argue that both the Rehabilitation Act and Title II ADA claims fail because Congress has not acted pursuant to a valid grant of power.

Defendants filed the motion to dismiss before the Garrett opinion came out on February 21, 2001. Thus, initially, defendants relied on other recent Supreme Court cases

interpreting the Eleventh Amendment, but not in the context of the ADA or the Rehabilitation Act. See Kimel, 528 U.S. 62; Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999); City of Boerne v. Flores, 521 U.S. 507 (1997). Defendants also acknowledge that, before Garrett, circuit courts were split on the issue of whether Title II of the ADA constituted a proper exercise of Congress's power under section 5 of the Fourteenth Amendment. Compare Popovich v. Cayahoga County Court of Common Pleas, 227 F.3d 627, 638 (6th Cir. 2000) (Congress exceeded its authority under enforcement clause of Fourteenth Amendment when it attempted to abrogate Eleventh Amendment immunity by applying ADA's disability discrimination provision to the States); Brown v. North Carolina Div. of Motor Vehicles, 166 F.3d 698, 705-07 (4th Cir. 1999) (regulation promulgated under Title II of ADA (28 C.F.R. § 35.130(f)), exceeded Congress's powers under section 5 of Fourteenth Amendment), cert. denied, 121 S. Ct. 1186 (2001); Alsbrook v. City of Maumell, 184 F.3d 999, 1007 (8th Cir. 1999) (Title II of ADA exceeded Congress's powers under section 5), cert. granted in part, 120 S. Ct. 1003, cert. dismissed, 120 S. Ct. 1265 (2000); with Coolbaugh v. Louisiana, 136 F.3d 430, 433-38 (5th Cir. 1998) (application of Title II of ADA to States is constitutional exercise of Congress's power under section 5 of Fourteenth Amendment).

Defendants acknowledge that the Ninth Circuit has ruled contrary to their position in concluding that Title II of the ADA is a valid exercise of Congress's section 5 power. In Clark v. California, 123 F.3d 1267, 1269-71 (9th Cir. 1997), the Ninth

Circuit performed the two-step analysis noted above and concluded that Congress acted under a valid exercise of power pursuant to the Equal Protection Clause when it abrogated states' Eleventh Amendment immunity in disability discrimination suits under both Title II of the ADA and the Rehabilitation Act.

The court then followed that holding in Dare v. California, 191 F.3d 1167, 1174-75 (9th Cir. 1999), cert. denied, 121 S. Ct. 1187 (2001). In Dare, the court noted College Savings Bank, which came after Clark, and the circuit split, but adhered to its holding in Clark. Id. at 1173-74. The court also noted that the majority of the circuits addressing the issue, at that time, had followed the Ninth Circuit's approach in Clark. Id. at 1173.

Nonetheless, defendants argue, Garrett completely undermines the Ninth Circuit's previous holdings in the Clark and Dare cases.

Garrett held that individuals may not bring a claim, in federal court, under Title I of the ADA against a state for money damages. In reaching this decision, the Court noted that it is the responsibility of the Court, not Congress, to define the substance of the constitutional guarantees. 121 S. Ct. at 963. "Accordingly, § 5 [of the Fourteenth Amendment] legislation reaching beyond the scope of § 1's actual guarantees must exhibit congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." Id.

The Court noted that the first step in the abrogation analysis is "to identify with some precision the scope of the

constitutional right at issue." Id. In Garrett, the Court then went to the "limitations § 1 of the Fourteenth Amendment places upon States' treatment of the disabled." Id. The court looked to its prior decisions under the Equal Protection Clause dealing with the issue. Id.

The Court noted that it had previously held that classifications based on disability are subject only to rational basis review. Id. at 963-64 (citing City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985)). Under Cleburne, it noted, states are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions towards such individuals are rational. Id. at 964.

Once the Court determined the contours of the constitutional right at issue, it examined whether Congress identified a history and pattern of unconstitutional employment discrimination, the type of discrimination addressed by Title I, by the states against the disabled. Id. The Court concluded that Congress had failed in that effort. Id. at 964-66.

Alternatively, the Court held that even if there were sufficient evidence of a pattern of employment discrimination by the states, the rights and remedies created by the ADA against the states raised "congruence and proportionality" concerns. Id. at 966. That is, in many cases, the accommodation duty far exceeded what is constitutionally required. Id. at 967. Thus, Congress did not act pursuant to a valid grant of power in enacting Title I of the ADA. As a result, individuals may no longer pursue Title I suits against a state in federal court.

Relying on Garrett, defendants argue that Title II suffers the same fate as Title I and that the Ninth Circuit cases to the contrary are invalid after Garrett. Additionally, defendants argue that even though Garrett was an ADA case, its reasoning is directly applicable to the Rehabilitation Act as well.

1. Rehabilitation Act

As to the Rehabilitation Act, the Ninth Circuit has held not only that Congress has validly abrogated the states' Eleventh Amendment immunity in the Rehabilitation Act, the holding defendants argue is undermined by Garrett, but has alternatively held that a state waives its Eleventh Amendment immunity against Rehabilitation Act claims by accepting federal funds.

In Clark, the Ninth Circuit explained:

> We note also that the Rehabilitation Act includes an express waiver of Eleventh Amendment immunity which California accepted when it accepted Rehabilitation Act funds. Even if Congress has not abrogated a state's immunity under the Eleventh Amendment, a state may waive it. See Seminole Tribe, 517 U.S. at ----, 116 S. Ct. at 1128. One way for a state to waive its immunity is to accept federal funds where the funding statute "manifest[s] a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity." Atascadero [State Hosp. v. Scanlon], 473 U.S. [234] at 247, 105 S. Ct. [3142] at 3149-50 [1985].
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> In this case, the Rehabilitation Act manifests a clear intent to condition a state's participation on its consent to waive its Eleventh Amendment immunity. The amended Rehabilitation Act provides:
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> > (1) A State shall not be immune under the Eleventh Amendment ... from any suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 ... of [sic] the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.
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> 42 U.S.C. § 2000d-7. The Supreme Court has characterized this section as "an unambiguous waiver

> of the States' Eleventh Amendment immunity." Lane v. Pena, 518 U.S. 187, ----, 116 S. Ct. 2092, 2100, 135 L. Ed. 2d 486 (1996). Because California accepts federal funds under the Rehabilitation Act, California has waived any immunity under the Eleventh Amendment.

Clark, 123 F.3d at 1271; see also Jim C. v. United States, 235 F.3d 1079, 1082 (8th Cir. 2000) (en banc) (Congress may require waiver of state sovereign immunity as condition for receiving federal funds, even though Congress could not order waiver directly, so long as financial inducements employed by Congress do not become so coercive as to cross the point where pressure turns into compulsion; state waives its Eleventh Amendment immunity with regard to individual agency that accepts federal funds offered under Rehabilitation Act), cert. denied, 121 S. Ct. 2591 (2001); Stanley v. Litscher, 213 F.3d 340, 344 (7th Cir. 2000) (following Clark and holding that state waives Eleventh Amendment immunity against Rehabilitation Act claim by accepting federal funds; noting that because Rehabilitation Act is a condition on the receipt of federal funds, legislation under the spending power is not affected by Kimel).

Here, plaintiffs allege that the ODHS receives over $600 million, (presumably annually), in federal funds for the administration of its mental health program. FAC at ¶ 33. The holding in Clark that a state's receipt of federal funding under the Rehabilitation Act acts as a waiver of the state's sovereign immunity under the Eleventh Amendment as to Rehabilitation Act claims, is independent from any Congressional abrogation of Eleventh Amendment immunity and is unaffected by Garrett. I am bound by this holding and thus, plaintiffs may proceed with their Rehabilitation Act claim. Patricia N. v. Lemahieu, 141 F.

Supp. 2d 1243, 1249 (D. Haw. 2001) (refusing to depart from Clark even in light of Garrett because Garrett did not involve the Rehabilitation Act and did not discuss the waiver of sovereign immunity based on receipt of federal funds).[2]

2. ADA

As explained in the next section, Ex parte Young, 209 U.S. 123 (1908), allows plaintiffs to maintain their ADA and Rehabilitation Act claims for prospective, injunctive relief against the individually named defendants in their official capacities. However, Garrett, if it applies to Title II claims, would however bar plaintiffs' claim against the ODHS. Thus, I must consider defendants' Eleventh Amendment immunity argument to determine whether the ODHS remains a defendant as to the ADA claims.

In response to defendants' argument, plaintiffs contend that in Garrett, the Court ruled only as to Title I claims and that as long as Clark and Dare remain good law, this court is bound by those Ninth Circuit decisions. Alternatively, plaintiffs argue that Title II claims can be based on the Due Process Clause, not just the Equal Protection Clause, and that the "integration mandate" of Title II, as interpreted in Olmstead v.

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[2] District courts addressing the issue of the impact of Garrett on Rehabilitation Act claims have reached contrary holdings. Compare Pugliese v. Arizona Dep't of Health and Human Servs, No. CIV-95-0928, 2001 WL 694524, at **2-4 (D. Ariz. June 15, 2001) (applying Garrett to hold that Congress did not validly abrogate states' sovereign immunity in the Rehabilitation Act); with Maull v. Division of State Police, 141 F. Supp. 2d 463, 471-72 (D. Del. 2001) (Garrett does not extend to claims brought under the Rehabilitation Act).

L.C., 527 U.S. 581 (1999), and under which plaintiffs sue here, is a due-process based right, not an equal protection right. Accordingly, continue plaintiffs, because the integration mandate codifies the due process rights recognized in Youngberg v. Romeo, 457 U.S. 307 (1982), it is properly based on the Fourteenth Amendment. Because I agree with plaintiffs' initial argument, I decline to analyze their alternative argument based on the Due Process Clause.

As indicated, Garrett does not directly overrule Clark and Dare because those cases addressed Title II, not Title I. See Garrett, 121 S. Ct. at 960 n.1 (Court indicated it was not disposed to decide the constitutional issue whether Title II, "which has somewhat different remedial provisions from Title I, is appropriate legislation under § 5 of the Fourteenth Amendment). Moreover, in the Garrett opinion, the Supreme Court contrasted the lack of a documented history of discrimination in employment by the states with the Congressional record which evinced accounts of discrimination by states in the provision of public services. Id. at 966 & n.7 (Senate Committee on Labor and Human Resources Committee Report concluded that "'[discrimination still persists in such critical areas as . . . public services'"; House Committee on Education and Labor Committee Report stated that "'there exists a compelling need to establish a clear and comprehensive Federal prohibition of discrimination on the basis of disability in the areas of . . . public services'"; noting that the "overwhelming majority" of anecdotal evidence in the record (consisting of submissions made by individuals to the Task Force on Rights and Employment of

Americans with Disabilities), "pertain to alleged discrimination by the States in the provision of public services and public accommodations, which areas are addressed in Titles II and III of the ADA."). It is reasonable to read Garrett as suggesting that the Congressional record contains a sufficient documented history of discrimination in public services by the states to support Title II's remedies. Defendants point to no deficiencies in the Congressional record regarding discrimination by the states in the provision of services to the disabled.

Additionally, Dare expressly discussed the College Savings Bank opinion which was issued after Clark. Because of the issuance of College Savings Bank, the Dare court elaborated on the discussion in Clark, of Congress's appropriate exercise of power in enacting Title II. Dare, 191 F.3d at 1173-74. College Savings Bank relied on the same "abrogation" analysis used in Garrett, albeit not as to an ADA claim. Thus, when deciding Dare, a Title II ADA case, the Ninth Circuit was well aware of the proper analysis mandated by the Supreme Court and the relevant and recent cases.

The Ninth Circuit also recognized that under City of Cleburne, disability discrimination is subject only to rational review under the Equal Protection Clause. Id. at 1174. Additionally, the Ninth Circuit cited other circuits which had taken a contrary position on Title II, id. at 1173 n.2, and nonetheless concluded that Congress acted under a valid exercise of power pursuant to the Equal Protection Clause when it abrogated the states' Eleventh Amendment immunity in disability

discrimination suits under Title II of the ADA. Id. at 1173 n.2. Thus, while the court did not have the benefit of Garrett when it decided Dare, it did engage in the appropriate analysis with full recognition of the relevant factors and previous cases cited by Garrett.

At least one district court has refused to extend Garrett to Title II claims. Project Life, Inc. v. Glendening, 139 F. Supp. 2d 703, 707 n.5, 708 (D. Md. 2001) (court concluded that "nothing about the Garrett decision alters" its previous conclusion that the plaintiff was entitled to an injunction in a Title II ADA action, and permitting a jury award against the state to stand); see also Edwards v. California Dep't of Corrections, No. C-00-0813-VRW, slip op. at 4-10 (N.D. Cal. July 30, 2001) (following Clark and Dare as binding Ninth Circuit precedent and not obvious that Garrett mandates the same conclusion with respect to Title II as it reached with respect to Title I); Patricia N., 141 F. Supp. at 1249-50 (court concluded that it was bound by Clark and Dare because Garrett was not a Title II case); but see Frederick L. v. Department of Public Welfare, No. 00-4510, 2001 WL 830480, at **12-18 (E.D. Pa. July 23, 2001) (applying Garrett to Title II of the ADA and concluding that Congress did not validly abrogate the states' sovereign immunity under Title II); Neiberger v. Hawkins, No. CIV-A-99-B-112, 2001 WL 831263, at **3-7 (D. Col. July 9, 2001) (same); Doe v. Division of Youth and Family Servs, No. CIV-00-32-5, 2001 WL 708444, at **13-18 (D.N.J. June 25, 2001) (same).

Other courts have declined to reach the issue. Frazier v.

Simmons, Nos. 00-3131, 00-3148, 2001 WL 748050, at *13 (10th Cir. July 3, 2001) (expressing no opinion on the validity of the Title II claims); Shaboon v. Duncan, 252 F.3d 722, 737 (10th Cir. 2001) (remanding the Title II Eleventh Amendment question to the district court to decide in the first instance).

Finally, I note that in Wroncy v. Oregon Dep't of Transp., No. 00-35356, 2001 WL 474550, at *1 (9th Cir. May 4, 2001), the Ninth Circuit declined to apply Garrett to a claim under Title II of the ADA. I note this decision, but do not rely on it, as it is unpublished.[3]

As the court recognized in Patricia N., because Garrett did not address Title II of the ADA and expressly recognized the distinction between Title II and Title I, I am bound by the Ninth Circuit decisions in Clark and Dare holding that Congress validly abrogated the states' sovereign immunity in enacting Title II of the ADA. I recommend that defendants' motion to dismiss both the Rehabilitation Act and Title II ADA claims, be

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[3] Following oral argument in this case, defendants informed the court of a new Ninth Circuit case in which the court, citing Garrett, concluded that Congress did not validly abrogate the states' sovereign immunity to suit in enacting Title V of the ADA. Demshki v. Monteith, No. 00-15599, 2001 WL 736010, at *2 (9th Cir. July 2, 2001). I find no conflict between the holdings in Demshki and Wroncy. In Demshki, the plaintiff alleged that he had been discharged from his employment in retaliation for advocating on behalf of a disabled job applicant who had been rejected for a position. Such retaliation claims may be brought under Title V of the ADA. The court recognized that Garrett was a Title I case, but reasoned that because the Title V claim before it was predicated on an alleged Title I violation, the Garrett holding applied. Id. In contrast, neither Wroncy nor the instant case implicate Title I.

denied.

B. Individual Defendants Subject to Suit

Plaintiffs' ADA and Rehabilitation Act claims are brought against all three defendants, two of whom are individuals sued in their official capacities. Defendants move to dismiss the ADA and Rehabilitation Act claims against these individuals because Title II of the ADA and Section 504 of the Rehabilitation Act operate against public entities, not individual actors. 42 U.S.C. § 12132 (Title II of 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. § 12131(1) (defining "public entity" to mean any state or local government, any department, agency, special purpose district, or other instrumentality of a state or states or local government, and the National Railroad Passenger Corporation, and any commuter authority (as defined in section 502(8) of Title 45)); 29 U.S.C. § 794 (Section 504 prohibits discrimination against the disabled by public entities that receive funding from the federal government).

Defendants argue that because there is no individual liability under Title II of the ADA or Section 504, plaintiffs' claims here cannot be maintained against the individual defendants. In support of this argument, defendants cite cases from a number of jurisdictions holding that individual defendants are not proper defendants in a Title II ADA claim or a Section 504 claim. See, e.g., Walker v. Snyder, 213 F.3d 344,

346 (7th Cir. 2000) (in suit for damages, court assumed individuals were sued in their official capacities, but held that under Title II of the ADA, the proper defendant usually is an organization rather than a natural person and, relying on Alsbrook v. City of Maumelle, 184 F.3d 999 (8th Cir. 1999) (en banc), concluded there is no personal liability under Title II), cert. denied, 121 S. Ct. 1188 (2001); Alsbrook, 184 F.3d at 1005 n.8 (in suit seeking compensatory and punitive damages as well as injunctive relief against individuals in official and individual capacities, plaintiffs could not maintain Title II ADA claim against individuals in individual capacities); Candelaria v. Cunningham, No. 98-CIV-6273, 2000 WL 798636, at *2 (S.D.N.Y. June 20, 2000) (in action against prison officials, no individual liability, either in individual or official capacity, under Title II of the ADA or the Rehabilitation Act).

In response, plaintiffs argue that because they are bringing their claims for prospective injunctive relief against the individuals in their official capacities, them claims are permissible under Ex parte Young.

First, plaintiffs point to footnote nine in Garrett where the Court stated:

> Our holding here that Congress did not validly abrogate the States' sovereign immunity from suit by private individuals for money damages under Title I does not mean that persons with disabilities have no federal recourse against discrimination. Title I of the ADA still prescribes standards applicable to the States. Those standards can be enforced by the United States in actions for money damages, as well as by private individuals in actions for injunctive relief under Ex parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908).

Garrett, 121 S. Ct. at 968 n.9 (emphasis added). Plaintiffs

argue that this is precisely what they are doing here: bringing a claim for prospective injunctive relief against state officials in their official capacities, which they argue, is exactly what is allowed by Ex parte Young.

Next, plaintiffs cite two Ninth Circuit decisions where the court held that Ex parte Young suits are permissible under both Title II of the ADA and Section 504 of the Rehabilitation Act. In Armstrong v. Wilson, 124 F.3d 1019 (9th Cir. 1997), disabled state inmates brought an action against state prison officials alleging violations of both the Rehabilitation Act and Title II of the ADA. In response to the defendants' argument that sovereign immunity barred claims against the named prison officials, the court held that the "exception to Eleventh Amendment immunity set forth in Ex parte Young, 209 U.S. 123 (1908) . . . squarely applies to allow this action against named individuals in their official capacity." Id. at 1025.

In a later case under the ADA and the Rehabilitation Act, also brought by state inmates against the state and some of its officials, the court, citing Armstrong, reiterated that the suit against the officials could go forward under the Ex parte Young doctrine. Clark, 123 F.3d at 1271.

Plaintiffs cite cases from other circuits which allow ADA and Rehabilitation Act claims seeking prospective injunctive relief to be asserted against individual defendants in their official capacities under Ex parte Young. See, e.g., Roe #2 v. Ogden, No. 00-1302, 2001 WL 686443, at *7 (10th Cir. June 19, 2001) (individual may bring an ADA or section 1983 action against a state official in federal court for injunctive relief

under Ex parte Young); Randolph v. Rodgers, No. 00-1897, 2001 WL 641559, at *4 (plaintiff may proceed under Ex parte Young to seek prospective injunctive relief on his ADA and Rehabilitation claims against individual defendant in her official capacity); Nelson v. Miller, 170 F.3d 641, 646-47 (6th Cir. 1999) (in action by blind voters under the ADA and the Rehabilitation Act, claims could proceed against individual defendants in their official capacity for prospective injunctive relief under Ex parte Young); Brennan v. Stewart, 834 F.2d 1248, 1251-53, 1260 (5th Cir. 1988) (Rehabilitation Act claim against state official dismissed as to damages but allowed as to prospective injunctive relief under Ex parte Young).

In reply, defendants argue that plaintiffs' reliance on Ex parte Young is misplaced. First, defendants note that the Garrett footnote is dictum and means only that the disabled have recourse by other means, including a suit brought by the United States or by a private litigant under Ex parte Young, if such relief is otherwise available. Defendants point out that the availability of Ex parte Young relief for the plaintiffs in Garrett was not briefed or decided by the Court.

Next, defendants argue that plaintiffs confuse the relationship between Ex parte Young and the Eleventh Amendment. While acknowledging that under Ex parte Young, suits against state officers in their official capacities are not barred by the Eleventh Amendment if they seek only prospective injunctive relief rather than monetary relief, see Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 n.10 (1989), defendants contend that Ex parte Young does not create a cause of action where one

otherwise does not exist; it merely removes a barrier to filing suit. Defendants argue that Ex parte Young does not change the underlying law upon which a claim is based. Here, defendants argue, the only proper defendant in an action under the ADA and the Rehabilitation Act is the public entity.

Defendants specifically refer to Walker, where, as noted above, the Seventh Circuit concluded that there was no individual liability, either in an individual or official capacity, under Title II of the ADA because the proper defendant is the "public entity." 213 F.3d at 345. The plaintiff there relied on Ex parte Young to argue that he could bring his claim against the state officials in their official capacities to the extent it concerned prospective rather than monetary relief. The court rejected the argument and held that

> a suit based on Young is a suit against state officers as individuals, not against the state itself. We held above that the only proper defendant in a action under the provisions of the ADA at issue here is the public body as an entity. A suit resting on the Young approach is not a suit against the public body and therefore cannot support relief.

Id. at 347.

While I understand the reasoning expressed by the Seventh Circuit in Walker, I am not bound by it and, based on other Ninth Circuit cases, I am not persuaded that the Ninth Circuit would follow suit. While the Ninth Circuit cases cited above may not have expressly disposed of defendants' argument here, the cases have expressly held that a plaintiff may rely on Ex parte Young to bring a claim for prospective injunctive relief under Title II of the ADA and the Rehabilitation Act, against individual defendants as long as they are named in the official

capacities. See, e.g., Armstrong, 124 F.3d at 1026 ("[s]overeign immunity presents no bar to this suit against state officials seeking prospective injunctive relief against ongoing violations of the ADA and [Rehabilitation Act] . . . .").

Additionally, the Armstrong holding comports with the Ninth Circuit's cases addressing an issue analogous to that raised by defendants, under Title VII. In Miller v. Maxwell's International, Inc., 991 F.2d 583, 587-88 (9th Cir. 1993), the court held that employees could not be liable in their individual capacities under Title VII. In a later case, the Ninth Circuit made clear, however, that if the employees were sued in their official capacities, they could be proper defendants in a Title VII claim. Ortez v. Washington County, 88 F.3d 804, 808 (9th Cir. 1996). There, the district court had erroneously dismissed the individual defendants because they had not been named in the administrative complaint. As the court explained:

> Even though the district court dismissed the Title VII claims against the ten individual defendants for the wrong reason, we affirm the dismissal of those claims because employees cannot be held liable in their individual capacities under Title VII. See Miller v. Maxwell's International, Inc., 991 F.2d 583 (9th Cir. 1993), cert. denied, 510 U.S. 1109, 114 S. Ct. 1049, 127 L. Ed. 2d 372 (1994). However, we conclude that Ortez did state a Title VII claim against [the individually named defendants] in their official capacities[.]

Ortez, 88 F.3d at 808.

Thus, under analogous Ninth Circuit cases, regardless of Ex parte Young, even when the statute provides only for employer liability, a plaintiff may nonetheless name an individual

employee or supervisor as a defendant if that individual is named in his or her official capacity. Thus, under Title II of the ADA and the Rehabilitation Act, while those statutes provide only for public entity liability, a plaintiff in the Ninth Circuit may maintain an action against individual agents of the public entity if the individual is named in his or her official capacity.

This was the result reached recently by the Eighth Circuit in Randolph where the defendants raised the same argument as defendants do here. The defendants argued that "because the statutory language of the ADA provides only for 'public entity' liability, an Ex parte Young claim against the state officials in their official capacities, premised upon an ADA violation, must fail." 2001 WL 641559, at *4. The court agreed that the public-entity limitation precludes ADA claims against state officials in their individual capacities but, the court explained, it never had held that the public-entity limitation in the ADA prohibited Ex parte Young claims against state officers in their official capacities. Id. Nor, the court continued, had it held that the underlying federal statute relied upon in an Ex parte Young claim must provide explicit statutory authority to sue a state official in his official capacity. Id. The court then affirmed the district court's ruling allowing plaintiff to proceed under Ex parte Young to seek prospective injunctive relief under the ADA and the Rehabilitation Act against the individual defendant in her official capacity. See also Frederick L. v. Department of Public Welfare, No. 00-4510, 2001 WL 830480, at 19-20 (E.D. Pa.

July 23, 2001) (in suit seeking prospective, injunctive relief for Title II ADA and Rehabilitation Act claims, plaintiff may proceed against defendant named in official capacity because being sued in official capacity "makes all the difference").

Accordingly, in this case, plaintiffs' reliance on Ex parte Young to sustain their claims against the individual defendants in is not in conflict with the underlying statutes at issue. I recommend that the motion to dismiss the individual defendants from the ADA and Rehabilitation Act claims be denied.

C. Ripeness

An argument that a claim is not ripe challenges the court's subject matter jurisdiction. See Ecology Center, Inc. v. United States Forest Serv., 192 F.3d 922, 926 (9th Cir. 1999) (dismissal affirmed because district court lacked subject matter jurisdiction when claims not ripe); Gemtel Corp. v. Community Redev. Agency, 23 F.3d 1542, 1544 n. 1 (9th Cir. 1994) (mootness and ripeness properly challenged under Rule 12(b)(1)). Thus, I consider this motion to have been brought under Rule 12(b)(1) and not under Rule 12(b)(6).

"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) (internal quotation omitted). As explained by the Ninth Circuit, the "basic rationale of the ripeness requirement is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." City of Auburn v. Qwest Corp., Nos. 99-36173, 99-36219, 2001 WL 823718, at *10 (9th Cir. July 10, 2001)

(internal quotations omitted). Additionally,

> [t]he ripeness inquiry contains both a constitutional and a prudential component. The constitutional component focuses on whether there is sufficient injury, and thus is closely tied to the standing requirement, . . .; the prudential component, on the other hand, focuses on whether there is an adequate record upon which to base effective review.

Portman v. County of Santa Clara, 995 F.2d 898, 902 (9th Cir. 1993) (citations omitted); see also Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc) (constitutional component requires that issues in a case or controversy be definite and concrete, not hypothetical or abstract while prudential inquiry focuses on the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration), cert. denied, 121 S. Ct. 1078 (2001).

Defendants argue that plaintiffs' allegations under the ADA and Rehabilitation Act claims are, in part, that the ODHS has failed to develop a plan to comply with the Supreme Court's decision in Olmstead. See FAC ¶¶ 56 (alleging that "[a]lthough Olmstead was decided nearly a year and half ago, . . . "[d]efendants currently have no comprehensive, effectively working plan for placing members of the class in the community."). Defendants disagree with plaintiffs' interpretation of what Olmstead requires, but, regardless of that dispute, they state that contrary to plaintiffs' allegations, the ODHS is in the process of developing a plan for mentally ill adults in state psychiatric hospitals to comply with Olmstead.

With little or no analysis, defendants then contend that

"[t]hus, plaintiffs' claims are premature, because the Olmstead plan has been commenced but not completed." Defts' Mem. at p. 16. Defendants then argue that if the present claims are not dismissed, "the court and the parties will expend substantial resources in assessing the agency's practices under the current placement scheme for adults in each state psychiatric hospital when that very scheme will change - and become substantially more detailed - in little more than three months." Id. In addition, defendants note, Olmstead mandated that a trial court should not allow a plaintiff filing suit to displace persons who are higher up on the waiting list than the plaintiff. Defendants argue that until the ODHS completes the state's Olmstead plan, which will, inter alia, identify the mentally ill adults in state psychiatric hospitals who qualify for community placement and place them on a waiting list, this court will be unable to ensure that the mandate in Olmstead is followed.

Plaintiffs argue that the case is not premature. They represent that defendants "have been studying the problem for years." Pltf's Opp. Mem. at p. 12. Plaintiffs argue that

> [t]he fact that Defendants have not yet, but may at some point in the near future, come up with a plan to address the problem --- laudable as that is -- simply means that Defendants do not yet have a defense to Plaintiffs' claims, not that the case is "premature."

Id. Plaintiffs note that when and if defendants come up with a "comprehensive, effectively working plan," they can put it before the court and the adequacy of the plan can be assessed. In the meantime, they argue, they are entitled to engage in discovery to determine the extent of the problem, the services currently being provided in the community, and the resources

available to the state to meet the needs of the plaintiff class, all of which are relevant to the adequacy of any plan proposed by the state and to the shape of the ultimate remedy approved by the court.

Finally, plaintiffs argue that defendants' assertion that the named plaintiffs will somehow displace persons higher on the waiting list, is baseless. Plaintiffs indicate that because the case was filed as a class action, it will address the needs of all patients who are ready for immediate release into community placement.

I agree with plaintiffs. First, while evidence outside of the Complaint, such as affidavits or other documents, may be considered in a motion to dismiss based on pursuant to Rule 12(b)(1), Dreier, 106 F.3d at 847, defendants fail to tender any. Rather, defendants have simply made mention of the "plan in progress" in their memorandum. Defendants submitted no affidavits or other evidence giving any indication of who is working on the plan, the timetable of the plan, or other relevant facts. Defendants' unsupported representation in their memorandum is insufficient evidence upon which to justify dismissal based on ripeness.

On August 6, 2001, defendants moved to file a supplemental brief on the ripeness issue. In the motion, defendants explained that action taken by the 2001 Oregon Legislature further strengthened defendants' ripeness claim. As defendants explain in their motion, the legislature has now required each local mental health authority in the state to determine local needs and to adopt a comprehensive local plan for the delivery

of mental health services for children, families, and adults. The local plan must show that resources are maximized for mental health consumers, including developing a process for discharge from state psychiatric hospitals and transition planning to community-based levels of care. Each local authority is to provide ODHS with a copy of its proposed comprehensive local plan no later than March 1, 2002. ODHS is then required to develop a comprehensive statewide long-term plan for providing mental health services, derived from the local plans. The ODHS plan must be presented to the Oregon Legislature no later than February 1, 2003.

I recognize that the information contained in defendants' motion to file a supplemental brief is an overview of the legislature's action and that a more comprehensive description would likely be contained in the actual memorandum. Nonetheless, even if more detail were provided, it is clear that at this point, the legislative action has created no more than a plan to develop a plan and that the ODHS plan itself will not be ready until February 2003. Thus, the recent legislative activity does not affect the ripeness analysis because at this point, there is no actual plan regarding placement of plaintiffs and similarly situated persons, into the community.

Second, neither party fully analyzed the constitutional and prudential inquiries required for a ripeness determination. In a nutshell, defendants' argument appears to address only the "prudential inquiry" prong of the analysis by suggesting that the ADA and Rehabilitation Act claims are not fit for judicial decision because, essentially, they could become moot due to the

state's plan. But, defendants' argument overlooks the constitutional inquiry and the part of the prudential inquiry which examines the hardship to the parties.

1. Constitutional Component

A case may not be heard unless "there exists a constitutional case or controversy that the issues presented are definite and concrete, not hypothetical or abstract." City of Auburn, 2001 WL 823718, at *9 (internal quotation omitted). As the court explained,

> [t]his tenet of ripeness requires us to consider whether the plaintiffs face a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement, or, by contrast, if the alleged injury is too imaginary or speculative to support jurisdiction.

Id. (internal quotation omitted); see also Thomas, 220 F.3d at 1138 (noting overlap between concepts of standing and constitutional component of ripeness but recognizing that there must be a constitutional case or controversy with definite and concrete, not hypothetical or abstract issues).

Here, plaintiffs satisfy the constitutional component of the ripeness inquiry. If their allegations are sustained and if they state a claim, they face an immediate and ongoing injury - being kept in institutions when their treating professionals have recommended them for community placement. The issues are definite and concrete and at this point in time, are not hypothetical or abstract. While the state's plan may moot the issues if and when it is finished, it does not negate a present controversy with definite and concrete issues and a realistic danger of direct injury. See Sea-Land Serv., Inc. v.

International Longshoremen's and Warehousemen's Union, Locals 13, 63, & 94, 939 F.2d 866, 869 (9th Cir. 1991) ("Mootness, of course, suggests that the live controversy has passed, while ripeness suggests that such controversy has yet to occur. . . . The ripeness inquiry asks whether there yet is any need for the court to act, while the mootness inquiry asks whether there is anything left for the court to do.") (internal quotations and citation omitted).

2. Prudential Component

If a controversy is essentially legal in nature and needs no further factual amplification, it is fit for judicial decision. City of Auburn, 2001 WL 823718, at *11. Plaintiffs' Olmstead claim is essentially legal in nature. Although some factual record will be necessary, the facts required to be developed are known and have occurred. The case does not present a hypothetical situation with hypothetical clients. Thomas, 220 F.3d at 1142.

Additionally, "postponing review must impose a hardship on the complaining party that is immediate." City of Auburn, 2001 WL 823718, at *11 (internal quotation omitted). Here, plaintiffs are currently institutionalized and allege present, ongoing harm. The hardship is obvious.

I recommend that defendants' ripeness argument be rejected because first, defendants initially submitted no evidence in support of their representation that a plan addressing Olmstead is in the works and their recent submission concerning the activity by the 2001 Oregon Legislature does not demonstrate that a plan is presently in place, and second, the fact that a

plan is in the works suggests that some of plaintiffs' claims might become moot in the future, but it does not detract from the ripeness of the claims as they are currently presented.

III. Section 1983 Claims

Defendants make three arguments against the section 1983 due process claims. First, defendants argue that neither the state, a state agency, or a state official acting within his official capacity is a "person" for purposes of section 1983 and thus, plaintiffs' section 1983 claims fail to state a claim for relief.

Second, defendants argue that the section 1983 claims are not cognizable because they are based upon violations of the ADA and the Rehabilitation Act.

Third, defendants argue that the section 1983 claims fail to state a claim for denial of a liberty interest.

A. "Persons" Within the Meaning of Section 1983

In pertinent part, section 1983 provides that "[e]very person who, under color of any statute . . . ." 42 U.S.C. § 1983 (emphasis added). Defendants argue that plaintiffs cannot maintain their section 1983 claims against Kitzhaber, Mink, or the ODHS because none of them are "persons" within the meaning of section 1983.

As explained by the Ninth Circuit, "[c]laims under § 1983 are limited by the scope of the Eleventh Amendment." Doe v. Lawrence Livermore Nat'l Lab., 131 F.3d 836, 839 (9th Cir. 1997). Thus, "'[s]tates or governmental entities that are considered "arms of the State for Eleventh Amendment purposes' are not 'persons' under § 1983." Id. (quoting Will, 491 U.S. at

70 (holding that neither state, state agency, or state officials acting in their official capacities are "persons" under section 1983). Additionally, "[s]tate officers in their official capacities, like States themselves, are not amenable to suit for damages under § 1983." Arizonans for Official English v. Arizona, 520 U.S. 43, 69 n.24 (1997); see also Lawrence Livermore Nat'l Lab., 131 F.3d at 839 ("state officials sued in their official capacities are not 'persons' within the meaning of § 1983.").

Although plaintiffs acknowledge that the general rule is that a state, a state agency, or a state official sued in his or her official capacity is not a "person" within section 1983, plaintiffs argue that this applies only to a section 1983 claim for damages and not to claims limited to injunctive or declaratory relief. Plaintiffs are correct. As explained in Lawrence Livermore National Laboratory,

> there is one exception to this general rule: When sued for prospective injunctive relief, a state official in his official capacity is considered a "person" for § 1983 purposes. [Will, 491 U.S.] at 71 n. 10, 109 S. Ct. at 2312 n. 10. In what has become known as part of the Ex parte Young doctrine, see Ex parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908), a suit for prospective injunctive relief provides a narrow, but well-established, exception to Eleventh Amendment immunity.
>
> The viability of Ex parte Young as traditionally applied survives the Supreme Court's treatment of the issue in Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 117 S. Ct. 2028, 138 L. Ed. 2d 438 (1997). There Justice Kennedy, joined in that part of his opinion only by Chief Justice Rehnquist, stated that he would not extend Ex parte Young to every case where prospective injunctive relief is sought, calling instead for a case-by-case balancing approach. Id. at ---- - ----, 117 S. Ct. at 2034-36. But the rest of the Court made it clear that Ex parte Young is available where "a plaintiff alleges an ongoing violation of federal law, and where the relief sought

is prospective rather than retrospective." Id. at ----, 117 S. Ct. at 2046.

Lawrence Livermore Nat'l Lab., 131 F.3d at 839.

Because plaintiffs' action is brought against the individual defendants in their official capacities and seeks only prospective injunctive and declaratory relief, plaintiffs may proceed against those individual defendants in their official capacities under section 1983. Because the Ex parte Young exception does not apply to the state agency, I recommend that this motion be denied as to Kitzhaber and Mink and be granted as to the ODHS.

B. Based upon Violations of the ADA and the Rehabilitation Act

Defendants argue that plaintiffs' section 1983 claims are not viable because they are based on the same alleged injuries as plaintiffs' ADA and Rehabilitation Act claims which set forth comprehensive remedial schemes for violations of those statutes. Defendants acknowledge that a plaintiff may use section 1983 to enforce not only constitutional rights, but rights defined by federal statutes. Maine v. Thiboutot, 448 U.S. 1, 4 (1980) ("the § 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law."). However, defendants rely on an exception to the general rule which applies when a comprehensive remedial scheme evidences a congressional intent to foreclose resort to section 1983 as a remedy for statutory violations. Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 19-21 (1981).

There are two exceptions to the application of section 1983 to statutory violations: (1) where Congress has foreclosed

private enforcement of that statute in the enactment itself, and (2) where the statute does not create "enforceable" rights. Id. at 19; see also Blessing v. Freestone, 520 U.S. 329, 341 (1997) (Congress may foreclose a remedy under § 1983 "expressly, by forbidding recourse to § 1983 in the statute itself, or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983."). As to the first exception, "[w]hen the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983." Middlesex County, 453 U.S. at 20.

Three Ninth Circuit cases are instructive here. First, in Meyerson v. Arizona, 709 F.2d 1235 (9th Cir. 1983), the plaintiff brought a Rehabilitation Act claim against a state university as well as a section 1983 claim based on the violation of the Rehabilitation Act. The plaintiff brought claims under both Section 504 and Section 503 of the Rehabilitation Act. Section 504, at issue in the present case, prohibits discrimination against the handicapped. Section 503 pertains to affirmative action programs for employing the handicapped. The court held that the plaintiff could not sustain his Section 504 claim. Id. at 1237. In regard to the Section 503 claim, the court first noted that there is no private right of action for such claims. Id. at 1238.

The plaintiff argued that he could assert a claim under section 1983 based on a violation of Section 503. The court rejected this argument. Id. at 1238-39. The court concluded

that because Congress intended to leave the supervision of the affirmative action programs to the United States Department of Labor, Congress intended the administrative remedies to be exclusive and thus, Congress intended to foreclose private actions under Section 503, whether they were brought directly under Section 503 or indirectly under section 1983. Id. at 1240.

In Doe v. Maher, 795 F.2d 787 (9th Cir. 1986), the court considered a case brought under the Education of the Handicapped Act (EAHCA) and Section 504 of the Rehabilitation Act. There, the plaintiffs brought due process claims under section 1983 as well as the statutory claims. The court noted, however, that the "plaintiffs grounded their due process claims only on the defendants' violations of the [statute] and Section 504." Id. at 790-91. The court "decline[d] their invitation to equate violations of statutorily established procedural rights with violations of the Constitution." Id. at 791. Nonetheless, the court made the following observation:

> We do not hold that acts in violation of the EAHCA can never amount to constitutional due process violations--quite the contrary. See, e.g., Rose v. Nebraska, 748 F.2d 1258, 1263-64 (8th Cir. 1984), cert. denied, --- U.S. ---, 106 S. Ct. 61, 88 L. Ed. 2d 50 (1985) (holding that plaintiff can maintain an independent constitutional challenge based on alleged partiality of state due process hearing). In the instant case, however, the plaintiffs' EAHCA-related due process claims simply lacked the independent constitutional basis necessary for a valid cause of action under section 1983.

Id.

Finally, in Smith v. Barton, 914 F.2d 1330 (9th Cir. 1990), the plaintiffs, blind employees of a state agency, brought suit under Section 504 of the Rehabilitation Act for constructive

discharge based on their blindness. They also brought a section 1983 claim based on an alleged violation of their First Amendment rights. In that claim, they argued that the agency's reorganization, which resulted in elimination of plaintiffs' positions, was retaliatory because of their membership in the National Federation for the Blind (NFB).

The district court held that the plaintiffs' section 1983 claim was barred by the Rehabilitation Act. The Ninth Circuit reversed. The court noted that the plaintiffs' "1983 claims are not predicated on violations of a federal statute at all, but on alleged violations of their rights under the First Amendment." Id. at 1334. The court continued: "[t]he alleged injuries suffered by plaintiffs are unrelated to their status as handicapped individuals. Their section 1983 claims allege that they suffered injury because of their activities, rather than because of their handicap." Id.

The court distinguished a Southern District of Ohio case in which the plaintiff had brought due process and equal protection claims under section 1983 in addition to a Rehabilitation Act claim. Id. (discussing Tyus v. Ohio Dep't of Youth Servs, 606 F. Supp. 239 (S.D. Ohio 1985)). There, the Barton court noted, the section 1983 claims were based on the same alleged injury as a Rehabilitation Act claim. Id. In the case before it, the Smith court held, "the section 1983 claims presented . . . could not have been brought under the Rehabilitation Act." Id. The court further remarked that the "section 1983 claims require different proof from that required to prove discrimination under the Rehabilitation Act on the basis of plaintiff's blindness."

Id. at 1335.

Several courts have addressed the question of whether the Rehabilitation Act or the ADA offers such a comprehensive remedial scheme as to preclude claims based on those statutes which are brought under section 1983. Spence v. Straw, 54 F.3d 196, 202-03 & n.3 (3d Cir. 1995) (due process and equal protection claims brought under section 1983 essentially identical to Section 504 Rehabilitation Act claim and Rehabilitation Act provides exclusive means by which litigant may raise discrimination claims based on handicap); Pona v. Cecil Whittaker's, Inc., 155 F.3d 1034, 1038 (8th Cir. 1998) (plaintiff could not sustain section 1983 claim based on ADA violation because Title II of ADA contains detailed means of enforcement which evince Congress's intent to make its remedies exclusive), cert. denied, 526 U.S. 1131 (1999); Holbrook v. City of Alpharetta, 112 F.3d 1522, 1530-31 (11th Cir. 1997) (plaintiff could not maintain section 1983 action in lieu of or in addition to ADA and Rehabilitation Act claims if the only alleged deprivation is of the rights created by the Rehabilitation Act and the ADA because both statutes provide extensive, comprehensive remedial frameworks); Davis v. Francis Howell Sch. Dist., 104 F.3d 204, 206 (8th Cir. 1997) ("comprehensive enforcement mechanisms provided under § 504 and the ADA suggest Congress did not intend violations of those statues to be also cognizable under § 1983."); Silk v. City of Chicago, No. 95-C-0143, 1996 WL 312074, at **17-19 (N.D. Ill. June 7, 1996) (plaintiff could not sustain section 1983 claim based on violations of the ADA and the Rehabilitation Act

because of the comprehensive enforcement schemes of those statutes; however, court separately analyzed section 1983 claims not based on those statutes but based on other constitutional rights such as the First Amendment (speech and religion) and the right to travel).

Notably missing from the above cited cases are any Ninth Circuit cases addressing section 1983 claims based on Section 504 of the Rehabilitation Act or the ADA. Other than Meyerson, noted above, which held that a section 1983 claim cannot be based on a violation of Section 503 of the Rehabilitation Act, the Ninth Circuit has not resolved these issues.

The cases implicate two questions. First, do plaintiffs in the instant case base their section 1983 claims on a violation of the ADA or the Rehabilitation Act, or, as in Smith v. Barton, on an independent basis unrelated to the allegations in support of the ADA and Rehabilitation Act claims. If their claims are independent, they can maintain their section 1983 claims. If not, then the second question is whether the Ninth Circuit would conclude that a section 1983 claim based on allegations amounting to a violation of Title II of the ADA and Section 504 of the Rehabilitation Act, is a cognizable claim or is precluded because of the comprehensive enforcement scheme of those statutes.

As indicated above, and as distinguished from most of the cited cases, plaintiffs here do not expressly base their section 1983 claims on violations of the ADA or the Rehabilitation Act. Rather, they couch their claims as due process claims under the Fourteenth Amendment. Nonetheless, an examination of the nature

of the claims is required. The cases suggest that regardless of the label, if the section 1983 allegations are in the nature of statutory violations, the constitutional claim may not be independent of the statutory claim. See Spence, (examining nature of due process and equal protection allegations to determine if identical to claims brought under section 1983); Barton, 914 F.2d at 1334 (looking at nature of injury alleged and type of proof required).

Plaintiffs' first due process claim reads as follows:

> 82. Plaintiffs, by being confined in state psychiatric hospitals against their wills, are being denied the less restrictive community-based residential placements that are appropriate for their proper care or treatment. They are thus denied a liberty interest to which they are entitled under the Due Process Clause of the Fourteenth Amendment. Further, by continuing to segregate Plaintiffs in state hospitals, Defendants are subjecting Plaintiffs to conditions that damage their mental health.
>
> 83. Defendants have also violated and are violating Plaintiffs' liberty interest, guaranteed to them by the Due Process Clause of the Fourteenth Amendment, by failing to implement the professional judgment of its treating professionals and to release Plaintiffs into the community.

FAC at ¶¶ 82, 83.

Plaintiffs' second due process claim reads as follows:

> 85. Defendants have failed and are failing to provide Plaintiffs with treatment that is minimally adequate, in violation of their rights under the Due Process Clause of the Fourteenth Amendment, and as a result Plaintiffs are suffering, and will continue to suffer[] harm.

Id. at ¶. 85.

Defendants argue that the rights plaintiffs seek to vindicate in these claims are created by the integration mandate of the ADA as interpreted by the Supreme Court in Olmstead.

Defendants state that the injury complained of by plaintiffs is discrimination against the disabled "by continuing to segregate plaintiffs [in state hospitals] without justification; and by failing to provide plaintiffs, . . . , with mental health services in the community, the most integrated setting appropriate to their needs." Defts' Mem. at p. 20 (brackets in original). Defendants assert that unlike Barton, plaintiffs' alleged injuries from the due process claims are not unrelated to the alleged discrimination against them by failing to place them in community-based residential facilities. Defendants argue that because the rights asserted are created, if at all, by the ADA and the Rehabilitation Act, they must be vindicated through the procedural system established in those acts.

Plaintiffs acknowledge that the factual predicate for their due process claims is much the same as that for the ADA and Section 504 claims. However, plaintiffs argue, the same set of facts may give rise to multiple causes of action. Plaintiffs argue that defendants' failure to release plaintiffs from the hospitals, contrary to the professional judgment of their treating professionals, not only violates Title II of the ADA and Section 504, but also separately violates their independent constitutional rights to due process as set forth in Youngberg. Plaintiffs argue that they are not using section 1983 to enforce statutory rights, but to assert constitutional claims implicating their liberty interest which could not be brought under the ADA or the Rehabilitation Act.

As explained in the next section, I conclude that plaintiffs have stated cognizable and independent liberty interest claims

under Youngberg. Thus, I find this case analogous to Smith and distinguishable from the other cases which find the section 1983 claim to assert, either expressly or impliedly, ADA or Section 504 statutory claims, and not independent constitutional claims. Accordingly, I recommend that this motion be denied.

C. Failure to State a Claim

Defendants argue that plaintiffs' due process claims should be dismissed for failure to state a claim because there is no constitutionally protected liberty interest in community placement or to care or treatment in the least restrictive environment. Plaintiffs contend that they state a claim based on Youngberg. Both parties appear to agree that Youngberg and the cases interpreting it control this question.

Youngberg involved the civil commitment of Nicholas Romeo, a severely mentally retarded man who was institutionalized. He argued that he had a constitutionally protected liberty interest in safety, freedom of movement (e.g. in not being physically restrained), and in "training" within the institution. 457 U.S. at 315. The state conceded that Romeo had a constitutional right to adequate food, shelter, clothing, and medical care. Id. The Court easily concluded that he also had a due process liberty interest in safe conditions and in freedom from bodily restraint. Id. at 315-16.

More troubling to the Court was the issue of a constitutional right to "minimal" training.[4] The Court noted

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[4] The Court noted that in regard to the mentally retarded, "training" or "habilitation" were the appropriate terms. See id. at 309 & n.1. The Court also noted, however,

that Romeo asserted that he had a right to "minimal" training, but that "he would leave the type and extent of training to be determined on a case-by-case basis in light of present medical or other scientific knowledge[.]" Id. at 317 (internal quotation omitted).

The Court first noted that while the state conceded it had the constitutional duty to provide certain services and care, "a State necessarily has considerable discretion in determining the nature and scope of its responsibilities." Id. Then, in closely examining the record, the Court determined that Romeo's primary needs were bodily safety and a minimum of physical restraint, and that training may be necessary to avoid unconstitutional infringement of those rights. Id. at 318. Thus, the court indicated,

> [i]f, as seems the case, respondent seeks only training related to safety and freedom from restraints, this case does not present the difficult question whether a mentally retarded person, involuntarily committed to a state institution, has some general constitutional right to training per se, even when no type or amount of training would lead to freedom.

Id. Based on this observation, the Court concluded that Romeo's liberty interests "require the State to provide minimally adequate or reasonable training to ensure safety and freedom from undue restraint." Id. at 319. Finally, the Court held that the standard for assessing such constitutional requirements must reflect the proper balance between the "legitimate interests of the State and the rights of the involuntarily

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that the Chief Judge of the lower court had used the word "treatment." Id. at 319-20 & n.24.

committed to reasonable conditions of safety and freedom from unreasonable restraints." Id. at 321. The Court thus held that the Constitution requires only that professional judgment be exercised and it is inappropriate for the courts to specify which of several professionally acceptable choices should be made. Id. As a result, decisions by a professional are presumptively valid and "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.

Several courts have interpreted Youngberg to hold that civilly institutionalized citizens who are either mentally retarded or mentally ill, possess no due process liberty interest in community placement. E.g., S.H. v. Edwards, 860 F.2d 1045, 1046, 1051-53 (11th Cir. 1988) (notwithstanding plaintiffs' evidence that certain professionals had recommended that members of the alleged class of mentally retarded persons institutionalized by the state be placed in the community as opposed to institutional facilities, affidavits submitted by state showed that keeping the plaintiffs in institutional settings until community facilities could be made available did not deviate from professionally accepted standards and thus, there was no due process violation); Society for Good Will to Retarded Children, Inc. v. Cuomo, 737 F.2d 1239, 1247-49 (2d Cir. 1984) (relevant question is whether retaining mentally retarded persons in institution 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 judgment" and thus, with evidence in the record demonstrating that experts appear to disagree on the appropriateness of institutionalization, court could not say it was professionally unacceptable, even in the face of expert testimony that the institutionalized persons would be safer, happier, and more productive in small community residences and that transfers to such facilities should be made as soon as they are available) (internal quotation omitted); Phillips v. Thompson, 715 F.2d 365, 367 (7th Cir. 1983) (rejecting claim that mentally retarded patients at state institutions possessed due process liberty right to care in a community residential setting); Messier v. Southbury Training Sch., No. 3:94-CV-1706, 1999 WL 20910, at *6 (D. Conn. Jan. 5, 1999) ("[institutionalized] patients do not have a due process right to an ideal environment") (internal quotation omitted).[5]

In contrast to the these cases, the Third Circuit has found that when the treating professionals of a mentally retarded resident of a state institution unanimously recommended

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[5] Other courts have applied Youngberg to mentally ill, as opposed to mentally retarded, individuals. See Kulak v. City of New York, 88 F.3d 63, 75 (2d Cir. 1996) (discussing Youngberg in case brought by mentally ill as opposed to mentally retarded individuals); Estate of Conners v. O'Connor, 846 F.2d 1205, 1207 (9th Cir. 1988) (noting that Youngberg sets forth the constitutional rights afforded to patients who have been involuntarily committed to a state mental hospital); K.L. v. Edgar, 941 F. Supp. 706, 709 (N.D. Ill. 1996) (discussing Youngberg in case brought by mentally ill as opposed to mentally retarded individuals).

community placement, the resident stated a substantive due process claim under section 1983 under Youngberg. Clark v. Cohen, 794 F.2d 79, 87 (3d Cir. 1986).

Additionally, in two Fourth Circuit cases, the court also found for the plaintiffs. First, in Thomas S. v. Morrow, 781 F.2d 367 (4th Cir. 1986) (Thomas S. I), the Fourth Circuit held that the district court did not err when it required community placement of a mentally retarded individual when his treating professionals recommended that he be transferred from the hospital to a group home in the community. Id. at 374-75. The court noted that the district court "followed Youngberg's precepts" because it identified as a constitutional predicate to its decree the individual's liberty interests in safety and freedom from personal restraint. Id. at 375. The court rejected the state's assertion that the individual had received minimally adequate treatment consistent with professional judgment. Id. The court noted that the presumption of validity accorded the professionals' decision about the individual's appropriate treatment had not been rebutted. Id. The court then noted that while Youngberg "points out that lack of funds is an absolute defense to an action for damages brought against a professional in his individual capacity[,]" the Court did not apply this precept to prospective injunctive relief. Id.

While Thomas S. I dealt with a single individual's claim, Thomas S. v. Flaherty, 902 F.2d 250 (4th Cir. 1990) (Thomas S. II), concerned allegations brought by a class of mentally retarded individuals confined in state psychiatric hospitals. The district court ordered placement of class members in

community settings based on recommendations of the treating professionals. The Fourth Circuit affirmed. The circuit court noted that the district court did not weigh the decisions of the treating professionals against the testimony of the class members' professionals to decide which of several acceptable standards should apply. Id. at 252. Rather, as required by Youngberg, the district court had presumed that the decisions of the treating professionals were valid. However, it found that many of the decisions of those treating professionals had not been implemented. Id. The district court had concluded that the state's continued confinement of mentally retarded persons with no diagnosis of mental illness in state psychiatric hospitals, and continued failure to implement the community placement recommendations of the state's treating professionals, substantially departed from accepted professional standards. Id. Because the district court had identified the accepted professional standards based on the state's written policies and the testimony of the plaintiffs' and defendants' experts, the Fourth Circuit affirmed the district court's conclusion that the state substantially departed from the identified standards and thus, violated plaintiffs' due process rights. Id.

Based on the relevant cases, I deny defendants' motion as to the due process claims at this early point in the proceedings. Plaintiffs' allegations, when viewed under Youngberg and the cases interpreting it, adequately state a claim. Plaintiffs essentially make four due process arguments: (1) failure to place in less restrictive community based residential placements which are appropriate for proper care or

treatment; (2) continuing to segregate in state hospitals; (3) failure to implement the professional judgment of treating professionals and to release into the community; and (4) failure to provide minimally adequate treatment. Additionally, prior allegations, which are incorporated by reference into the due process claims, FAC at ¶¶ 80, 84, contend that treating professionals have assessed each plaintiff as being ready for community placement. Id. at ¶¶ 11, 13, 15, 17, 19, 21, 23, 25, 27, and 29.

As the cases suggest, if the treating professionals recommend community placement, that recommendation is presumed valid. Plaintiffs' allegations regarding those recommendations are presumed valid at this stage of the case. Moyo, 40 F.3d at 984 (allegations of material fact must be taken as true on Rule 12(b)(6) motion). Failure to follow such recommendations can be the basis of a due process claim under Youngberg. I cannot conclude, at this juncture, that it appears beyond doubt that plaintiffs can prove no set of facts in support of their due process claims that would entitle them to relief. Williamson v. General Dynamics Corp., 208 F.3d 1144, 1149 (9th Cir.), cert. denied, 121 S. Ct. 309 (2000) ("A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle it to relief.").

On a motion for summary judgment or at trial, the state may come in with additional evidence, as in S.H. or Good Will, which shows that keeping plaintiffs in institutionalized settings is also within accepted standards of professional judgment. Or,

plaintiffs may demonstrate the contrary. Those are issues that must be resolved at a later date. At this point, plaintiffs state a claim with their allegations that they have each had community placement recommended for them. Their claims are in the nature of those recognized as cognizable under Youngberg because they challenge the failure to implement their treating professionals' recommendations and the failure to provide minimally adequate treatment which has not yet been defined for these plaintiffs. I recommend that this motion be denied.

CONCLUSION

I recommend that defendants' motion to dismiss (#16) be granted as to the section 1983 claim against the ODHS and denied in all other respects.

SCHEDULING ORDER

The above Findings and Recommendation will be referred to a United States District Judge for review. Objections, if any, are due August 27, 2001. If no objections are filed, review of the Findings and Recommendation will go under advisement on that date. If objections are filed, a response to the objections is due September 10, 2001, and the review of the Findings and Recommendation will go under advisement on that date.

DATED this 10th day of August, 2001.

/s/

Dennis James Hubel
United States Magistrate Judge