UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

STATE OF CONNECTICUT OFFICE OF PROTECTION AND ADVOCACY FOR PERSONS WITH DISABILITIES, SHANNON HEMMINGSEN, SAMUEL RIVERA, GALE YENCHA, NORMA JEAN DIAZ, and AGATHA JOHNSON, individually and on behalf of other similarly situated individuals, Plaintiffs,	:	Civil Case No.
v.	:	3:06CV00179(AWT)
THE STATE OF CONNECTICUT, MICHAEL P. STARKOWSKI, in his official capacity as Commissioner of the Connecticut Department of Social Services, THOMAS A. KIRK, Jr., PhD., in his official capacity as Commissioner of the Connecticut Department of Mental Health and Addiction Services, and J. ROBERT GALVIN, M.D., M.P.H., in his official capacity as Commissioner of the Connecticut Department of Public Health, Defendants.	:	

ORDER RE MOTION TO AMEND

For the reasons set forth below, the defendants' Motion to Amend Decision Denying Defendants' Rule 12(b)(1) and 12(b)(6) Motions to Dismiss to Add the Certification of the District Judge that the Decision Involves Controlling Questions of Law as to which there is Substantial Ground for Difference of Opinion Where Allowance of an Immediate Interlocutory Appeal May Materially Advance the Ultimate Termination of the Litigation (Doc. No. 176) is hereby DENIED.

Under 28 U.S.C. § 1292, the court can certify an order for interlocutory appeal if it is "of the opinion that such order [1] involves a controlling question of law[, 2] as to which there is substantial ground for difference of opinion and [3] that an immediate appeal from the order may materially advance the ultimate termination of the litigation . . ." 28 U.S.C. § 1292(b).

The first issue as to which the defendants seek a certification for interlocutory appeal is whether OPA has standing to sue. The defendants argue that this issue presents a controlling question of law because it goes to the subject matter jurisdiction of the court to entertain the action. However, regardless of whether the defendants' position on OPA's standing is correct, the Individual Plaintiffs will continue to prosecute this action on their own behalf and on behalf of the class certified by the court, so the defendants have not identified an issue that is controlling. For the same reason, an immediate appeal on this issue will not materially advance the ultimate termination of this litigation. In re The City of New York, - - F.3d - -, 2010 WL 2294134, *6 (2d Cir. Jan. 9, 2010)("The certification of an interlocutory appeal under that statute, which is entirely a matter of discretion for the District Court, is appropriate only when 'an immediate appeal from the order may materially advance the ultimate termination of the litigation.'" (citation omitted.)).

The second issue as to which the defendants seek a certification for interlocutory appeal is whether the First Amended Complaint sufficiently alleges facts demonstrating that each of the defendants violated the plaintiffs' rights under the ADA and Section 504 of the Rehabilitation Act, and whether the complaint asserts a claim upon which relief can be granted. The defendants disagree with the court's conclusion that, under the applicable legal standards, the plaintiffs have set forth factual allegations sufficient to state a claim based on the integration mandate, to state a methods of administration claim, and to demonstrate that the defendants harmed them. "It is a

basic tenet of federal law to delay appellate review until a final judgment has been entered. [See] Coopers & Lybrand v. Livesay, 437 U.S. 463, 475, 98 S.Ct. 2454, 2461, 57 L.Ed.2d 351 (1978)." Koehler v. Bank of Bermuda Ltd., 101 F.3d 863, 865 (2d Cir. 1996).

> As a general matter, rulings on the sufficiency of pleadings are not appropriate for interlocutory review. Decisions on the pleadings may be appropriate for interlocutory review when they present difficult questions of substantive law, rather than the technical sufficiency of the pleadings, but here the sufficiency of the pleadings is exactly the issue.

In re Pall Corp., No. 07-CV-3359(JS)(ARL), 2009 WL 4282081, *3 (E.D.N.Y. Nov. 24, 2009) (citations omitted). Here there is no difficult question of substantive law presented. While the defendants point to the fact that because their arguments attack subject matter jurisdiction, reversal of the court's decision would terminate the litigation, "it continues to be true that only exceptional circumstances [will] justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." Klinghoffer v. S.N.C. Achille Lauro, 921 F,2d 21, 25 (2d Cir. 1990)(quotation mark omitted.) No exceptional circumstances are present here.

As to each of the issues, the defendants express concern about the precedential impact of the court's order. However, the court has not granted relief to the plaintiffs. The court only determined that the plaintiffs can proceed with their claims. A review of the claims raised in this case based on a full record after dispositive motions or trial is preferable in terms of allowing the Court of Appeals to conduct a through review of the issues and also in terms of avoiding the possibility of a reversal with a remand that allows for

repleading. See, e.g., Gottesman v. General Motors Corporation, 268 F.2d 194, 196 (2d Cir. 1959)("[A] reversal at most could lead only to a remand for repleading, with possibilities of further interlocutory appeals thereafter.").

Thus, the court is not of the opinion that either of the orders that are the subject of the defendants' motion meets the criteria in § 1292(b).

It is so ordered.

Dated this 25th day of June, 2010 at Hartford, Connecticut.

/s/AWT
Alvin W. Thompson
United States District Judge