IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

WALTER STEPHEN JACKSON, et al.,

Plaintiffs,

vs. No. CIV 87-839 JP/DJS

FORT STANTON HOSPITAL AND TRAINING SCHOOL, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

The subjects of this Memorandum Opinion and Order are "Intervenors' Motion for an Order Requiring IDT Review of Individuals on the Community Placement List" filed July 23, 1993, "Plaintiffs' Motion for Leave to Amend the Complaint by Interlineation" filed November 9, 1993 and "Plaintiffs' Motion to Strike Intervenors' Response to Plaintiffs' Motion to Amend" filed December 17, 1993. After careful consideration of the applicable pleadings, law, and evidence, including testimony and exhibits presented at a hearing on December 20, 1993, I find that the intervenors' motion should be denied and that both of plaintiffs' motions should be granted.

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I. "Intervenors' Motion for an Order Requiring IDT Review of Individuals on the Community Placement List"[1]

Pursuant to my orders of December 20, 1990 and April 19, 1991 and the Tenth Circuit's May 18, 1992 decision, the parties developed a process for preparing individual program plans (IPPs) and individual transition plans (ITPs) for residents of Fort Stanton Hospital and Training School (FSHTS) and Los Lunas Hospital and Training School (LLHTS). The ITP process is initiated once a resident's interdisciplinary team (IDT) has recommended planning for community placement.[2] The transition planning process involves an expanded interdisciplinary team which includes

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[1] I note at the outset that in deciding this motion I did not consider or rely on the affidavit of Dr. Sue Gant submitted by plaintiffs in connection with the December 20, 1993 hearing. Consequently, it will not be necessary for the parties to take her deposition.

[2] For purposes of this motion, only planning and placement decisions affecting those residents who were originally recommended for placement pursuant to the September 27, 1991 "Notice of Transition Planning and Placement Schedule", (original placement list), are at issue. Intervenors' Reply Brief at 2. Since that date additional residents have been added to the community placement list. Intervenors refer to this as the "modified" or "supplemental" community placement list.

I also note that it is not clear on whose behalf the intervenors have standing to bring this motion. It is obvious that intervenors have standing to bring this, or any motion, on behalf of any residents who are named intervenors. However, I broadly defined subclasses of plaintiffs and intervenors in a May 23, 1989 Memorandum Opinion and Order as "[p]laintiffs will represent the subclass that seeks community placement. Intervenors will represent the subclass that opposes closure of the institutions and community placement." Memorandum Opinion and Order at 7. At the December 20, 1993 hearing and in subsequent correspondence to the court the parties have indicated that there are problems with the current subclass definitions and that they are working on the "possibility of seeking a modification or clarification of [the May 23, 1989 order]." January 10, 1994 Letter from Steven J. Schwartz.

community clinicians and providers as well as selected institutional staff, the resident, the resident's parent or guardian and a representative of the Department of Health.

All parties also agreed to a Dispute Resolution Process (DRP) as a means of resolving disputes with respect to both IPPs and ITPs. However, of significance for purposes of resolving this motion, the DRP utilized in conjunction with an IPP is not available to residents who were on the original community placement list[3] as a result of an earlier IDT decision that community placement was appropriate. Deposition of Toni Tobey at 135. The practical effect of this is that a resident on the original community placement list cannot use the ITP dispute resolution process to challenge the concept of planning for community placement of that resident. However, the DRP can be used to challenge the adequacy of a proposed community placement plan, and if available community resources are deemed inadequate to ensure the safety and well being of a resident, placement of that resident in a community setting will not occur.

The DRP allows either an individual resident, his or her parent or guardian, or the Department of Health to raise objections to all aspects of a transition plan before a resident is transferred from FSHTS or LLHTS into the community. The ITP dispute resolution process provides for three levels of review,

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[3] As noted above, the original community placement list is the placement list submitted to me in September 27, 1991. This list is comprised of 149 individuals who had received community placement recommendations from their IDTs prior to or shortly after my order of December 28, 1990.

each by a decisionmaker who is not a member of the resident's IDT. The first level of review allows an informal conference with a representative of the Department of Health. If problems or concerns cannot be resolved at this meeting any party may request a hearing before an administrative hearing officer. If any party still has unresolved problems or concerns after a hearing before an administrative hearing officer these problems and concerns can be submitted to the court. Planning has now commenced or will soon be initiated for those residents on the original placement list.

Although concerns about decisions that are made in the ITP process affecting planning and placement can be raised in the ITP dispute resolution process, the state established a separate, preliminary administrative review mechanism to address the rationale and justification for an IDT request to remove a resident from the community placement list. State personnel from within the Jackson office[4] performed this preliminary administrative review pursuant to Policy Memorandum #009.[5]

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[4] The Jackson office is an office within the State of New Mexico Department of Health's Disabilities Division which was formed to coordinate discharge of the state's obligations in the ongoing Jackson litigation.

[5] The review panel was comprised of at least three persons, with up to four persons serving at any one time. Seven different individuals from the Jackson office were involved with panel reviews in the course of the 20 reviews; Toni Tobey, Nancy Pieters Albert Ericson, Erin Leff, Marilyn Price, Jennifer Thorn-Lehman and Philip Blackshear. The reviewers, perhaps with the exception of Toni Tobey, all had various levels of education, training and experience in working with the developmentally disabled including case management and direct care.

Policy #009 was rescinded on December 3, 1993 apparently because, due to its limited application to individuals on the 1991 placement list, it was no longer needed. Defendants' Exhibit 10.

Review under Policy #009 occurred when an IDT requested removal of a resident from the original placement list.[6] The review panel, following the dictates of Policy Memorandum # 009, automatically determined that planning for community placement, based on an initial IDT recommendation, should continue unless the IDT later requesting removal provided written documentation that (1) there ha[d] been an "[e]xtraordinary change in the individual's condition which directly relates to the person's ability to live safely in the community"; and (2) there [was] a "[s]ubstantial likelihood that change in the individual's condition is long term." The administrative review panel reviewed 20 cases under Policy # 009 in which an IDT had recommended removal of a resident from the community placement planning process. The review panel rejected the IDT's recommendation for removal in 16 of the 20 cases.

Intervenors now request "an order prohibiting defendants from: (1) denying consideration by any IDT of availability of community services when making treatment decisions; (2) overriding, directly or indirectly, any IDT determination of appropriateness of institutional placement; (3) transferring any class member to a community placement when the IDT has determined institutional placement to be appropriate, including those instances where

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However, I disagree with any suggestion by the plaintiffs that this renders the intervenors' motion moot. See Plaintiffs' Sur-reply at 6, n. 9.

[6] As noted above, residents were placed on the original placement list upon recommendation of an IDT at a time prior to or soon after my December 28, 1990 order. Removal from the list was requested in twenty cases by a different IDT convening on a later date.

availability of community services was a consideration." "Intervenors' Motion for an Order Requiring IDT Review of Individuals on the Community Placement List" at 1.

At base, the intervenors' motion seeks to prohibit defendants from reviewing the recommendation of an IDT to remove a resident's name from the community placement list. However, the intervenors' motion, albeit less clearly, also apparently challenges the ongoing community planning and placement process by proffering a belated argument that the original community placement list which was submitted to me in September of 1991 is invalid as to most or all of the individuals on the list. This argument is untimely and without a factual basis. In addition, as discussed above with respect to this motion as a whole, it is not clear on behalf of which residents, other than specifically named intervenors, the intervenors have standing to challenge the original list.

The intervenors also argue that in determining the appropriateness of community placement the IDTs are not properly considering the availability of resources as directed by the Tenth Circuit. See Jackson, 964 F.2d 980. This argument also lacks a factual basis. The intervenors presented no evidence, either with their briefs or at the December 20, 1993 hearing, to support this argument. In contrast, the defendants, through the testimony of Paula O'Connor, showed that IDTs are in fact taking into account the availability of community resources in making decisions about community placement. Moreover, the Tenth Circuit did not mandate that resources in the community always be considered - only that

teams could not be precluded from considering their availability. Jackson, 964 F.2d at 992.

I also will deny the intervenors' requested relief that I prohibit the defendants from "transferring any classmember to a community placement when the IDT has determined institutional placement to be appropriate." As defendants correctly note "an IDT determination that continued institutional placement is 'appropriate' does not require institutional placement." Defendants' Response Brief at 7. A team need not find institutional placement inappropriate before community placement is a constitutionally acceptable alternative. Rather, as I emphasize below, the state in deciding where it will provide care for a developmentally disabled citizen can elect any option from the "universe of constitutionally acceptable alternatives." Jackson, 964 F.2d at 992.

Ultimately, and most significantly, I find that the state's use of an administrative review panel to evaluate an IDT recommendation to remove a resident from the community placement list does not violate, or even implicate, any constitutional rights of the residents of FSHTS and LLHTS. Rather, the review and, in most cases, rejection of the recommendation to remove from the community list, merely allows planning for placement to proceed. Moreover, I find that the review panel exercised professional judgment to which I must show deference.

Youngberg v. Romeo, 457 U.S. 307 (1982) established the right of the developmentally disabled in state custody to (1) safe

conditions of confinement; (2) freedom from bodily restraints; and (3) training or rehabilitation. Consequently, under Youngberg a developmentally disabled person in state custody has substantive due process rights relating to the conditions of his or her environment and the nature of care provided within that environment. Neither Youngberg nor any other authority of which I am aware established a substantive due process right to be free from a state's planning for non-institutional placement.[7] The constitutional rights established by Youngberg are only implicated once the state has made a final decision to transfer a resident from an institution into the community. Only then can I evaluate whether the state has chosen a constitutionally acceptable alternative. The decision by the state of New Mexico, via the Jackson office review panel, to continue planning for community placement of persons it now holds in custody in institutions is simply an administrative function which does not implicate an individual's constitutional rights.

As noted above, the Tenth Circuit made clear that the state must be allowed to choose between constitutionally acceptable alternatives in caring for the developmentally disabled. Here in 16 cases a review panel has made an administrative decision to proceed with planning for community placement, contrary to the

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[7] While intervenors do not express it as such, their claim that the review process has violated their constitutional rights could arguably be a claim that residents subject to the Policy #009 review had their procedural due process rights violated. However, even if intervenors had expressly articulated such an argument, I would have rejected it. The planning process and accompanying dispute resolution process afford adequate procedural protections.

recommendation of one of two or more IDTs which made conflicting recommendations regarding community placement.[8] During the course of the planning process residents and their parents or guardians may use the dispute resolution process to raise concerns about the adequacy of a community setting. Because this established process appears to afford protection against unprofessional placement decisions, I agree with plaintiffs' and defendants' argument that the intervenors' motion is premature. The prematurity of intervenors' request for relief is illustrated by their statement that "[i]mproper placements, contrary to IDT recommendations, will result in costly litigation . . . ." Intervenors' Brief at 4. There is currently no issue of "placement" before me. Rather, as described above, what is at issue now is a decision to go forward and plan for placement. Community placement is a constitutionally acceptable alternative which the state can, in its discretion, ultimately choose if providing care in a community setting for a particular person conforms to the requirements of Youngberg. The propriety of a community placement decision obviously must be determined after a decision is made. Jackson, 964 F.2d at 992.

Moreover, the evidence presented at the December 20, 1993 hearing demonstrated the usefulness of the review of an IDT recommendation to remove an individual's name from the community

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[8] I note that of the 20 individuals for whom a Policy #009 review was conducted only 8 were named intervenors. Of these 8 the review panel approved 2 of the requests for removal from the list and disapproved 6 of the requests. Again, I question on whose behalf the intervenors have standing to challenge Policy #009 reviews.

list. The evidence at the hearing showed that many of the decisions to remove from the community placement list were based on parental concerns about the ability of an individual to function in a community setting. However, as noted above, inclusion on the list is not a definitive decision to place an individual in the community. Rather, it is just a decision to commence planning for placement and, based on the availability of appropriate community resources, determining the feasibility of community placement. As the state articulates, "no placements are made unless a team of professionals develops a plan and believes that the individual placement in the community is appropriate." Defendants' response brief at 7. The state's position is supported by the deposition testimony of Toni Tobey which was submitted as an exhibit by all the parties:

> We have an obligation to plan for the transition of an individual. And our focus is on getting and meeting those obligations and planning to develop a plan. It does not mean that they are immediately placed [in the community] or that the obligation is necessarily to place [in the community].

I wish explicitly to note that I am deeply sympathetic with the concerns of the intervenor parents about the safety and welfare of their children. However, at this juncture I find that the process the state has chosen to follow is constitutionally acceptable. It would behoove the state, though, to ensure that parents remain an integral part of the planning and placement decision process and to make sure that their concerns are fairly considered. I am disconcerted with the following language the

state has used in communicating with parents regarding community placement; "The individual's move to a less restrictive, community-based living arrangement is mandated by recent court action and is not negotiable." This language apparently is on the cover sheet of individual transition plans. The "mandate" in my December 28, 1990 order was not intended to make community placement "non-negotiable." Rather, community placement must be based on the implementation of a transition plan derived from the exercise of considered professional judgment throughout the ITP process. The ultimate decision to place in the community must be premised on a current assessment of a resident's ability to function in the community given the available community resources. The factors which should be considered in determining the appropriateness of community placement are obviously fluid, not static, and need up to date assessments to ensure constitutionally acceptable community placement decisions. The ITP process certainly should be open to negotiation. If a resident cannot be reasonably safe and receive adequate rehabilitation in a community setting, then that individual should not be placed in the community. The very existence of the DRP belies the state's position that community placement is "non-negotiable." While the decision to plan for community placement may in some instances be "non-negotiable", in the sense that the state may consider various alternative places at which the state will offer services for its developmentally disabled citizens, the ultimate decision to place in the community should be the subject of much discussion among professionals,

parents, guardians and the state.

I also find that the Jackson office review panel exercised professional judgment in reviewing an IDT's decision to remove an individual from the community placement list. A decision made by a professional is 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 judgment." Youngberg, 457 U.S. at 323. It is within my purview to determine whether professional judgment has in fact been exercised. Youngberg, 457 U.S. 321. Several courts of appeal have held, at least implicitly, that professional judgment is properly utilized by supervisory and administrative officials where those officials are properly qualified by reason of training and experience to review decisions made by medical or other direct care professionals. Cameron v. Tomes, 990 F.2d 14, 20 (1st Cir. 1992); Houghton v. South, 965 F.2d 1532, 1533 (9th Cir. 1992); Shaw v. Strackhouse, 920 F.2d 1135, 1147 (3d Cir. 1990).

As discussed above, the panels which reviewed IDT requests to remove residents from the community placement list were selected from a pool of seven different individuals employed in the state's Jackson office. All of these persons, with the exception of Toni Tobey, had sufficient education, training and/or experience relating to the care of persons with developmental disabilities to enable them to properly conduct a professional review of IDT

recommendations. Defendants' Exhibits 4 - 9; Deposition of Toni Tobey at 72-75, 131-132, 158-160. While I would have preferred that Toni Tobey not be an active member of the review panels, I find that her presence on the panels did not vitiate the panels' otherwise sound exercise of professional judgment.[9]

II. "Plaintiffs' Motion for Leave to Amend the Complaint by Interlineation"

I also will grant plaintiffs' motion to amend the complaint to add by interlineation a claim under the Americans with Disabilities Act 42 U.S.C. § 12101 et seq. (ADA). At the time of trial the ADA was not yet effective and I denied on that basis a motion by plaintiffs to add an ADA claim noting that the motion was premature. The amendment is warranted at this juncture because final judgment has not been entered in this case as to remedial issues, because the addition of an ADA claim will not prejudice the defendants, and most importantly because I feel that plaintiffs are entitled to amend their complaint for injunctive relief to conform with the current state of the law.

This case is in a phase which involves determining appropriate remedies, following the entry of judgment on liability issues. Both "[p]ost-verdict or post-judgment amendments are [permissible except] where they may substantially prejudice the other party or are merely the result of a long and unreasonable delay, particularly if the movant was aware of the facts upon which the

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[9] As discussed above, individual review panels were comprised of at least three, and often four individuals. The panels made decisions based on consensus.

amendment is predicated and could have raised the matter before judgment . . . ." Trinity Carton Co. v. Falstaff Brewing Corp., 767 F.2d 184, 194 (5th Cir. 1985). Here, while defendants raise the specter of additional discovery and a new trial, I find such claims of prejudice to be unsupported. Plaintiffs assert that no additional discovery is necessary. Other than making general allegations of burdensome discovery, defendants do not indicate what discovery would be required or why a new trial would be necessary.

The plaintiffs have not unreasonably delayed in requesting the right to make this amendment. As noted above, plaintiffs sought leave to amend at trial prior to the effective date of the ADA. This I denied as premature. While plaintiffs clearly could have renewed their motion to amend upon the effective date of the ADA, July 26, 1992, formally renewing their motion during November 1993 has not caused any great surprise or prejudice to the defendants. Plaintiffs readily admit that the addition of the ADA claim may give rise to the need for some additional hearings, but the prospect of further hearings should not preclude amending the complaint to seek relief now available under the ADA to persons with disabilities.

Plaintiffs' ADA claim parallels and reinforces their claim under § 504 of the Rehabilitation Act. However, the ADA is not simply repetitious of plaintiffs' § 504 claim. Unlike § 504 the ADA applies to public entities regardless of whether the public entity receives federal funds. I agree with the plaintiffs that

"the measure of full relief in injunctive actions such as this is full compliance with the law. Compliance is measured in terms of the law as it exists [at] the time compliance is determined. Compliance in this case should be determined by measuring defendants' actions against the law as it exists today, including the ADA." Plaintiffs' Reply Brief at 5.

III. "Plaintiffs' Motion to Strike Intervenors' Response to Plaintiffs' Motion to Amend"

I will grant plaintiffs' motion to strike on the grounds that intervenors' response was untimely and did not contain a certificate of service as required by Fed. R. Civ. P. 5(d).

IT IS THEREFORE ORDERED THAT:

1. "Intervenors' Motion for an Order Requiring IDT Review of Individuals on the Community Placement List" filed July 23, 1993 is DENIED.

2. "Plaintiffs' Motion for Leave to Amend the Complaint by Interlineation" filed November 9, 1993 is GRANTED.

3. "Plaintiffs' Motion to Strike Intervenors' Response to Plaintiffs' Motion to Amend" filed December 17, 1993 is GRANTED.

UNITED STATES DISTRICT JUDGE