ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

L.C. and E.W., BY JONATHAN ZIMRING, as guardian ad litem and next friend,	*	
Plaintiff,	*	
v.	*	Civil Action No. 1:95-CV-1210-MHS
TOMMY OLMSTEAD, Commissioner of the Department of Human Resources; RICHARD FIELDS, Superintendent of Georgia Regional Hospital at Atlanta; and EARNESTINE PITTMAN, Executive Director of the Fulton County Regional Board, all in their official capacities,	*	
Defendants.	*	

RESPONSE TO MOTION FOR PRELIMINARY INJUNCTION

I. INTRODUCTION

This case was filed by Plaintiff L.C. (hereinafter "Plaintiff") on May 11, 1995, seeking a community placement and alleging violations of her rights under the Americans With Disabilities Act (hereinafter "ADA"), of the Due Process Clause, and of her State-created liberty interest. Shortly thereafter, on June 16, 1995, E.W. (hereinafter "Intervenor") filed a motion to intervene, which was granted in January, 1996. Like Plaintiff, Intervenor also sought a community placement and alleged violations of her rights under the ADA, the Due Process Clause, and under State statutes.

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Now, over a year after this action was filed and twenty months since Intervenor was hospitalized at Georgia Regional Hospital at Atlanta (hereinafter "GRH-A"), Intervenor filed a motion for preliminary injunction, without citing any emergency or significant change in her circumstances or condition which would necessitate filing such a motion at this time. Intervenor is simply attempting to gain preference over the matters already on the Court's docket without having shown any urgency which would justify it.

Defendants believe that there is no reason for this portion of this action to be addressed in a preliminary fashion at this juncture in the case. The parties have each filed motions for summary judgment, which should be fully briefed and ready for consideration within a few weeks. Those motions address not only Intervenor's claim for injunctive relief under the ADA, which is the only issue raised in the motion for preliminary injunction, but also Intervenor's claims under the Due Process Clause and pursuant to her State-created liberty interests, as well as all of L.C.'s claims. The relief being sought in all these claims is the same relief being sought in this motion for preliminary injunction. A preliminary decision could foreclose the Court's being able to decide this action on its full record.

Further, the motion for preliminary injunction is not warranted on its merits. As will be shown below, none of the factors which would allow this extraordinary remedy are present in this case. Therefore, Defendants urge that Intervenor's motion be denied.

III. STATEMENT OF THE CASE

A. FACTS

Defendants will not attempt to respond to every inaccurate factual statement included in Intervenor's brief. However, three statements regarding expert opinions are incorrect and require a response.

First, Intervenor cites extensively but extremely selectively from Dr. DeBacher's evaluation to support her position that Defendants' professionals believe she needs community-based rather than institution-based services. (Intervenor's Brief, p. 3) To the contrary, however, Dr. DeBacher concluded that Intervenor "will probably require a closed, inpatient environment in the near term" and that the hospital had provided services that were "minimally adequate" and that had worked with other similar patients and had worked to stabilize Intervenor in the past. (Ex. 12 to Intervenor's Motion, pp. 5 and 7)

Second, Intervenor cites to a report by Dr. Kaufman (who evaluated Intervenor at her attorney's request) stating that "Dr. Kaufman also concluded that E.W. 'needs to have a highly structured residential home. . . .'". Intervenor omitted key words from Dr. Kaufman's report, however, which state, "<u>If she is discharged from Georgia Regional she</u> needs to have a highly structured residential home. . . ." (Emphasis added). Thus, Dr. Kaufman did not conclude that Intervenor needed to leave GRH-A as was stated by Intervenor.

Third, Intervenor states that "Joseph Steed, a behavioral consultant with the Defendant Fulton County Regional Board who is responsible for making placement assessments, concluded that E.W. could be placed in a group home. . . ." (Brief, p. 5). In fact, Steed concluded that Intervenor should not be placed in the community and that she needed to remain at GRH-A. (Affidavit of Pittman, Ex. A, attached to Defendants' Motion For Summary Judgment). Further, Intervenor omitted any mention of the opinion of Gloria Sheppard, a member of the Board's Comprehensive Evaluation Team, who concluded that Intervenor needed to stay in the hospital. Id.

Based on the above inaccuracies, Intervenor concluded that "the weight of the opinion" was that Intervenor "can and should be provided an appropriate community placement." (Intervenor's Brief, p. 6). In fact, Dr. DeBacher, Joseph Steed, and Gloria Sheppard concluded that she should not be placed in the community. Additionally, Dr. Patel, a board certified psychiatrist who treated Intervenor, concluded that she could be placed in the community but that she was receiving adequate treatment at GRH-A. (Affidavit of Patel attached to Defendants' Motion For Summary Judgment as Exhibit A). It was only Dr. Elliott, Intervenor's retained expert, who now states that she should be placed in the community. (See report of Dr. Elliott filed by Intervenor, which states only that she could have been placed in the community).

Defendants rely on the fact submitted with their Motion For Summary Judgment, but wish to highlight the following:

GRH-A is a state hospital in DeKalb County near Atlanta, Georgia, where patients with mental illness, mental retardation and substance abuse problems are treated. At the times relevant to this motion, the Treatment Unit at GRH-A was a 60-bed psychiatric unit treating voluntary and involuntary patients with long-term and acute mental illness. (Affidavit of Patel, p. 3, attached to Defendants' Motion For Summary Judgment as Exhibit A).

On December 20, 1994, Intervenor was involuntarily admitted to the Treatment Unit based in part on a Form 1013, which is an "Emergency Admission Certificate" signed by a licensed physician, psychologist or clinical social worker. The certificate stated that Intervenor appeared to be mentally ill, that she had auditory and visual hallucinations, was paranoid, and was too "loose" to care for herself. Id. at Para. 10.

On admission to GRH-A, she was examined by a psychiatrist who stated that she "reports visual hallucinations (demons)," and also that she "reports hearing the voice of her grandfather." Id. at Para. 11.

At the times relevant to the Complaint, Dr. Dilipkumar Patel was the Medical Director of the Treatment Unit where Intervenor was treated. He is a Board Certified Psychiatrist licensed to practice in Georgia. Id. at Para. 2, 3.

Dr. Patel diagnosed her as having a Borderline Personality Disorder and Mild Mental Retardation. Id. at Para. 12.

Intervenor consented to voluntary treatment on December 30, 1995. A treatment plan was developed for her by the treatment team, including Dr. Patel, the case manager/social worker, nurse, activity therapist, and social work supervisor. Id. at Para. 13.

Dr. Patel and the treatment team treated Intervenor as a voluntary patient at GRH-A. In March, in response to a complaint about Intervenor's mental retardation services from Intervenor's attorney, Dr. Patel consulted with four other persons with extensive experience in treating persons with mental retardation. Three persons, including two psychologists and a social worker, were from the Developmental Learning Center, GRH-A's Intermediate Care Facility For the Mentally Retarded (ICF/MR). They concluded that Intervenor was a very challenging patient and agreed with Dr. Patel that the mental retardation component of her diagnosis did not appear to be the area requiring focused treatment, but rather her personality disorder. Similarly, the Chief of the Psychology Staff, Dr. DeBacher, concluded that Intervenor's behavior problems appeared mainly related to her borderline personality structure and to her depression and not to insufficient mental retardation services. Id. at Para. 17, 18.

Dr. Patel and the treatment team first attempted the treatment methods in the Treatment Plan, including medication,

activity therapy, structure, group therapy, hygiene class, and other classes. In Dr. Patel's opinion this treatment was professionally acceptable and had proved successful with other patients with similar problems. They also attempted to discharge Intervenor to the community to personal care homes, where other patients with similar problems have been successful. Id. at Para. 13, 22.

When Intervenor's mental condition did not significantly improve and when she repeatedly was returned from placement in personal care homes, other professionals at the hospital suggested additional professionally acceptable choices for treatment, and her treatment plan was adjusted at various times to try to address her problems. Id. at Para. 23.

Intervenor's mental condition and her behavior improved slowly and she became more compliant with treatment. These improvements make it more likely that she would be able to be successful in the community. Id. at Para. 24.

In Dr. Patel's opinion: (1) Intervenor's treatment at GRH-A since December 20, 1994, has been adequate and appropriate to her needs; (2) it is appropriate to treat a patient with the level of severity of problems of Intervenor in a hospital; and (3) it was appropriate and professionally acceptable for her to be at GRH-A. Id. at Para. 27.

Dr. Patel is competent to make the treatment decisions he made for Intervenor and he exercised his professional judgment and made professionally acceptable choices. Id. at Para. 29.

It should be noted that currently Intervenor is being treated at Grady Memorial Hospital for medical problems.

Earnestine Pittman is the Director of the Fulton County Regional Board. The Regional Board is responsible for establishing policy and direction for disability services planning, delivery, and evaluation within Fulton County, O.C.G.A. § 37-2-5(a), which is Intervenor's region. (Affidavit of Earnestine Pittman, Para. 2, attached to Defendants' Motion For Summary Judgment as Exhibit B).

The regional boards are also authorized by the legislature to access funds which are appropriated by the legislature to the Department of Medical Assistance (DMA), for matching federal funds from Medicaid for providing community mental retardation services. These are used to create Medicaid waiver slots, meaning that the region is authorized to serve persons with mental retardation services in the community under the Medicaid waiver program. Id. at Para. 4.

The Medicaid waiver program is a primary funding source in Fulton County for community residential services for persons with mental retardation. Id. at Para. 5.

The Fulton County Regional Board does not currently have any uncommitted Medicaid waiver funding available and therefore cannot provide these services to Intervenor under that program. The funding which was appropriated by the legislature to DMA for the Medicaid waiver program for the Board is being used to provide services for other disabled persons. Id. at Para. 6.

The Board does not currently have sufficient annualized unallocated state funds available to provide community residential mental retardation services to Intervenor. The state funds which have been appropriated to the Board for community retardation services are being used to provide services for other disabled persons. Id. at Para. 7.

The Board, through its Comprehensive Evaluation Team (CET), is responsible for recommending the consumers who may be served under the Medicaid waiver program in the county. The CET is composed of persons with special training and experience in the assessment of needs and provision of services for mentally retarded person. Id. at Para. 8.

The CET evaluated E.W. in March of this year and recommended against moving her from Georgia Regional Hospital at Atlanta into the community. Since, as stated above, funding is not available, the CET's recommendation did not affect whether services were provided to E.W. Id. at Para. 9.

B. GEORGIA'S STATUTORY FRAMEWORK FOR PROVIDING DISABILITY SERVICES

Intervenor is but one of many persons in Georgia receiving disability services that are publicly funded. In this State, the planning and delivery of mental health, mental retardation, and substance abuse services are accomplished through a coordinated system of State, regional, and community agencies. The services themselves are delivered in a broad spectrum of programs and placements, in State hospitals and other

institutional facilities as well as in the community. See, e.g., O.C.G.A. §§ 37-1-2 (providing for a "comprehensive range of quality services"), 37-2-2(7) (defining "hospital" as including inpatient and other care), 37-2-5.1(c)(1) (authorizing funding for hospitals and community services), 37-4-40 (providing for admission to a facility or to an alternative placement), 37-5-3 (listing some types of community placements).

State-wide programs and State facilities for these services are established and maintained by the Department of Human Resources, acting through its Division of Mental Health, Mental Retardation, and Substance Abuse, which was ordained by statute in 1964. O.C.G.A. §§ 37-1-20, 37-2-2.1. The Division also makes and administers budget allocations to regional mental health, mental retardation, and substance abuse boards (O.C.G.A. § 37-1-20(b)(8); establishes minimum funding amounts for each regional board (§ 37-2-5.1(c)); and establishes guidelines for the regional boards' allocations to their respective community service boards (§ 37-2-5.1(c)).

Regional boards were created by statute in 1993. O.C.G.A. § 37-2-4.1(b). These boards administer disability services within their particular region of the State. Each region consists of one or more counties, and each regional board consists of members from each county within the region. O.C.G.A. §§ 37-2-4.1(a), -5. The board establishes the policy and direction for disability services within its region

(O.C.G.A. § 37-2-5(a), exercises "responsibility and authority within the region in all matters relating to the funding and delivery of disability services" (§ 37-2-5.2(a)(2)), contracts with providers for these services (§ 37-2-5.2(a)(5)), and prepares "an annual plan and mechanism for the funding and provision of all disability services in the region." § 37-2-5.2(a)(1).

Community mental health, mental retardation, and substance abuse service boards were also created by the 1993 legislation. O.C.G.A. § 37-2-6. Each community service board, which is composed of members appointed by the county governing authorities within the community's area (O.C.G.A. § 37-2-6(b)), governs "publicly funded programs by providing certain disability services not provided by other public or private providers under contract with the regional board." (O.C.G.A. § 37-2-6(a)). It may make contracts for the provision of such services. O.C.G.A. § 37-2-6.1(b)(9).

Thus, all three levels of government, state, regional, and community, play roles in the delivery of disability services. The regional boards, though, perform at least two of the most critical functions. First, they control the flow of allocated funds generally:

> State, federal, and other funds appropriated to the department, the division, or both, and available for the purpose of funding the planning and delivery of disability services shall be distributed in accordance with this subsection. After July 1, 1995, <u>all funds</u>

> associated with services to clients residing within a given region shall be allocated through the appropriate regional board; "all funds" shall include funding for hospitals, community service boards, private and public contracts, and any contracts relating to service delivery for clients within the given region; provided, however, that nothing shall prohibit the allocation of funds through any regional board prior to July 1, 1995.

O.C.G.A. § 37-2-5.1(c) (emphasis supplied); see also § 37-2-5.2(a)(2), supra, (regional board controls "all matters relating to funding"). Second, the regional boards authorize which individuals receive services; these boards are "[t]o provide, as funds become available, for client assessment and service authorization and coordination for each client receiving services within the region or funded by the regional board." O.C.G.A. § 37-2-5.2(a)(2) (emphasis supplied).

The statements about fund availability in both of the above provisions are not incidental; an individual's right to adequate disability services under Georgia law is limited not only by that individual's condition as to disability but also by the availability of funds. The statute provides elsewhere, for example, that "the department through the division shall, to the maximum extent possible, allocate funds available for services so as to provide an adequate disabilities services program available to all citizens of this state." O.C.G.A. § 37-2-11(a) (emphasis supplied). Similarly, the statute provides that "[t]he division shall establish a minimum funding amount for regional boards conditioned upon the amount of funds

appropriated and a supplemental funding formula to be used for the distribution of available state funds in excess of the minimum funding amount. O.C.G.A. § 37-2-5.1(c)(1) (emphasis supplied).

Funding availability also has a direct impact on individual cases. An individual's access to services is governed by O.C.G.A. chapters 37-3; 37-4 and 37-5; and 37-7. These chapters respectively concern mental health services, mental retardation services, and substance abuse services. As to mental retardation services, chapter 37-4 provides that "[a]ny person may file a petition for a court ordered program of services from the department for a mentally retarded citizen of this state." O.C.G.A. § 37-4-40(a). The statute provides further that the probate court must review the petition and, if it finds reasonable cause, order that the allegedly mentally retarded person be examined by a comprehensive evaluation team. O.C.G.A. § 37-4-40-b). This multidisciplinary team must examine the person and file with the court a report opining whether or not the person is retarded and also in need of services. O.C.G.A. § 37-4-40(c). If the report does find that the person is retarded and needing services, the court holds a full and fair hearing on those issues. O.C.G.A. § 37-4-40~d).

If the court finds at the hearing that the person is retarded and needs community (alternative) services, the court may order the community program to be provided if such an alternative program is available and if it presents a

reasonable expectation of accomplishing the habilitation goals for the person. O.C.G.A. § 37-4-40(e). If the court finds that the person is retarded and "that the least restrictive available alternative which would accomplish the goals of the plan is for the client to be admitted to a facility," then the court may order such an admission, but only if the court also finds that

> (1) The client requires direct medical services;
>
> (2) The client needs 24 hour training in a residential care facility; and
>
> (3) The court has been notified by the department that a bed appropriate to the specific needs of the client is available and that the services indicated in the individualized program plan submitted to the court by the comprehensive evaluation team or by the client can be provided.

Id. The statute carefully points out that "least restrictive alternative" means "that which is the least restrictive available alternative, environment, or appropriate habilitation, as applicable, within the limits of state funds specifically appropriated therefor." O.C.G.A. § 37-4-2(b)(10) (emphasis supplied).

The statutes also make clear that the power to make determinations as to the availability of funded services resides with the Department and the regional boards. One example is the statutory provision just cited: the probate court may not order services to be delivered at a mental

retardation facility unless the Department notifies the court that a bed is available. O.C.G.A. § 37-4-40(e). A coordinate provision defines "community services" as "all community-based services deemed reasonably necessary by the department. . . ." O.C.G.A. § 37-5-3. The statute provides that "[t]he division, in compliance with the provisions of the appropriations Act and other applicable laws, is authorized to move funds to and between community and institutional programs based on need . . . ." O.C.G.A. § 37-2-5.1(c)(3) (emphasis supplied). Regional boards are to prepare annual disability services plans that include, inter alia, "[a] description in order of priority of all proposed programs and disability services to be provided in the region, and the funds associated with the provision of these services . . . ." O.C.G.A. § 37-2-5.2(a)(1)(E).

To summarize this part, Georgia statutes establish a three-tiered system of administrative agencies to deliver disability services. These services are limited by the availability of funds and other factors. The administrative agencies make the discretionary decisions that are inherent in the allocation of appropriated funds among proposed programs and in the delivery of services among eligible applicants.

C. SUMMARY OF CONTROLLING LAW UNDER THE ADA

In the present case, the substantive law that controls the disposition of this motion is Title II of the Americans With Disabilities Act and its implementing regulations. It will be

helpful, prior to presenting argument about that law, to fix clearly its purpose and parameters.

1. Purpose

The purpose of the ADA, insofar as it is pertinent to this case, has been highlighted in a preamble or introductory remarks published with the regulations. The preamble states:

> Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), which prohibits discrimination on the basis of handicap in federally assisted programs and activities, already covers those programs and activities of public entities that receive Federal financial assistance. Title II of the ADA extends this prohibition of discrimination to include all services, programs, and activities provided or made available by State and local governments or any of their instrumentalities or agencies, regardless of the receipt of Federal financial assistance.

Preamble, printed at 56 Fed. Reg. 35, 694, et seq. (1991), and as Appendix A, 28 C.F.R. Pt. 35 (1995) at 448-9. Even more specifically, the preamble notes:

> This regulation implements subtitle A of Title II of the ADA, which applies to state and local governments. Most programs and activities of state and local governments are recipients of federal financial assistance from one or more federal fudning agencies and, therefore, are already covered by section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794) ("section 504"), which prohibits discrimination on the basis of handicap in federally assisted programs and activities. Because Title II of the ADA essentially extends the nondiscrimination mandate of section 504 to those state and local governments that do not receive federal financial assistance, this rule hews closely to the provision of existing section 504 regulations.

56 Fed. Reg. 33, 694 (1991).

2. Texts

a. Statute

The text of the ADA, so far as it is pertinent to the present case, is quite brief. Substantively, that text provides:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132 (1995).

Procedurally and remedially, the text (42 U.S.C. § 12133) simply incorporates the "remedies, procedures, and rights" of the Rehabilitation Act of 1973 (29 U.S.C. § 794a), which in turn incorporates those features of Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d, et seq.). Specifically, the last-named act provides that a "State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of . . . the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance," and that legal and equitable remedies for a violation are available "to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State." These provisions are echoed in another section of the ADA. 42 U.S.C. § 12202 (1995).

Finally, the ADA requires the Attorney General to promulgate regulations "that implement this part" no later than July 25, 1991. 42 U.S.C. § 12134(a) (1995).

b. Regulations

The pertinent part of the regulations is 28 C.F.R. 35.130 (1995), entitled "General prohibitions against discrimination." It begins with a paraphrase of the substantive part of the statute (§ 35.130(a)) and then states, sometimes in great detail, five elaborations on that text. One is particularly pertinent here, and that is the shortest of the five:

> A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

§ 35.130(d).

This subpart and another one, § 35.130(b)(1)(iv)), are discussed in a preamble of the regulations, part of which is contained in Appendix A of 28 C.F.R. Part 35. The preamble notes that "the standards adopted in this part are generally the same as those required under section 504" (App. A of 28 C.F.R. Pt. 35 at 449) and then states:

> Many commenters objected to proposed paragraphs (b(1)(iv) and (d) as allowing continued segregation of individuals with disabilities. The Department recognizes that promoting integration of individuals with disabilities into the mainstream of society is an important objective of the ADA and agrees that, in most instances, separate programs for individuals with disabilities

will not be permitted. Nevertheless, section 504 does permit separate programs in limited circumstances, and Congress clearly intended the regulations issued under title II to adopt the standards of section 504. Furthermore, congress included authority for separate programs in the specific requirements of title III of the Act. Section 302(b)(1)(A)(iii) of the Act provides for separate benefits in language similar to that in § 35.130(b)(1){iv), and section 302(b)(1)(B) includes the same requirements for "the most integrated setting appropriate" as in § 35.130(d).

App. A, 28 C.F.R. Pt. 35 459.

III. ARGUMENT AND CITATIONS OF AUTHORITY

A. THIS INJUNCTION FAILS TO MEET THE ELEVENTH CIRCUIT'S MORE STRINGENT SUBSTANTIVE AND PROCEDURAL STANDARDS.

A preliminary injunction is an extraordinary and drastic remedy, United States v. Jefferson County, 720 F.2d 1511, 1519 (11th Cir. 1983), whose sole purpose is to preserve the relative positions of the parties until a trial on the merits can be held. University of Texas v. Camenisch, 451 U.S. 390, 395, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981). The traditional standards for granting preliminary injunctive relief, which are applied in this Circuit, are that the movant must show (1) a substantial likelihood that she will ultimately prevail on the merits; (2) that she will suffer irreparable injury unless the injunction issues; (3) that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) that if issued, the injunction would

not be adverse to the public interest. Baker v. Buckeye Cellulose Corp., 856 F.2d 167, 169 (11th Cir. 1988).

In this Circuit and the Fifth Circuit, however, these standards are applied more stringently than in all of the other circuits, in that in our Circuit and its progenitor, the movant must clearly carry the burden of persuasion on all four standards. Jefferson County, supra, 720 F.2d at 1519, citing Canal Authority v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974); Doe v. Duncanville Ind. Sch. Dist., 994 F.2d 160 (5th Cir. 1993); Roho, Inc. v. Marquis, 902 F.2d 356 (5th Cir. 1990); see 7 James Wm. Moore, Moore's Federal Practice (Part 2), ¶ 65.04[1] at 65-35, n.4, 65-45, 65-62.

The nature of the injunction sought in the present case makes other injunctive principles pertinent. These principles are aptly summarized in a Tenth Circuit case:

> In addition, the following types of preliminary injunctions are disfavored and they require that the movant satisfy an even heavier burden of showing that the four factors listed above weigh heavily and compellingly in movant's favor before such an injunction may be issued: (1) a preliminary injunction that disturbs the status quo; (2) a preliminary injunction that is mandatory as opposed to prohibitory; and (3) a preliminary injunction that affords the movant substantially all the relief he may recover at the conclusion of a full trial on the merits.
>
> A preliminary injunction that alters the status quo goes beyond the traditional purpose for preliminary injunctions, which is only to preserve the status quo until a trial on the merits may be had . . .. Mandatory injunctions are more burdensome

> than prohibitory injunctions because they affirmatively require the nonmovant to act in a particular way, and as a result they place the issuing court in a position where it may have to provide ongoing supervision to assure that the nonmovant is abiding by the injunction . . .. Finally, a preliminary injunction that awards the movant substantially all the relief he may be entitled to if he succeeds on the merits is similar to the "Sentence first -- Verdict Afterwards" type of procedure parodied in Alice in Wonderland, which is an anathema to our system of jurisprudence. Thus, in order to prevail on a motion for preliminary injunction where the requested injunction falls into one or more of these three categories, the movant must show that on balance, the four factors weigh heavily and compellingly in his favor.

SCFC ILC, Inc. v. VISA USA, Inc., 936 F.2d 1096, 1098-9 (1991) (citations and footnotes omitted).

The procedural aspects of preliminary injunctions are detailed in Rule 65 of the Federal Rules of Civil Procedure. No preliminary injunction shall be issued without notice to the adverse party (R.65(a)(1)), and typically one will not be issued without a hearing. Baker, supra. Rule 65(c) provides:

> No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof.

Security may be required for preliminary injunctions, where appropriate, in virtually any type of case, including ones raising claims of discrimination. See, e.g., Camenisch, supra (§ 504 claim).

B. **INTERVENOR IS NOT LIKELY TO PREVAIL ON THE MERITS.**

1. Intervenor Cannot Show That She Has Been Denied A Benefit Or Service By Reason Of Her Disability, As Required Under The ADA.

As stated in Part II.C.2.a. above, the pertinent text of the ADA is quite brief:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132 (1995) (emphasis added).

In order to state a claim, then, Intervenor must show the following:

1. she is a qualified individual with a disability;

2. she was denied a public benefit; and

3. that such denial of benefits or discrimination was by reason of her disability.

Kornblau v. Dade County, 86 F.3d 193 (11th Cir. 1996).

As to the first element of the claim, the ADA defines it as follows:

> The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or

> practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 USC § 12131(2). The disability which Intervenor is claiming in this case is apparently mental retardation (Intervenor's Brief, p. 3, line 1, and p. 9, para. 3; Intervenor's Complaint, para. 2, 5), although Intervenor also refers generally to her behavioral/emotional deficits (Brief, p. 4, para. 2), a personality change (Brief, p. 22, para. 1), and a "variety of mental disorders" (Complaint, para. 5). For the purpose of showing she is disabled, however, Defendants agree that Intervenor is mentally retarded and thus disabled under the ADA.

In regard to being "qualified" for a benefit, Intervenor claims that she is "a qualified individual" under the Act because she "qualifies" for the community services she seeks. (Intervenor's Brief, p. 22). This is a circular argument. Further attempting to show that she is "qualified," she merely states that she "needs" a community placement and that some professionals believe that with adequate supports she could live in one. This argument falls short of stating that she meets the "essential eligibility requirements" for a program or services, as required under the ADA cited above. 42 U.S.C. § 12131(2). Nonetheless, for the purpose of this motion, Defendants agree that Intervenor may be able to show that she would meet eligibility requirements and be qualified for certain services or programs in the community.

Intervenor totally failed, however, to allege that she has been denied services in the community by reason of her disability. Her claim is basically that she is mentally retarded, that professionals agree that her needs can be met in a community-based program, and that a provider would be willing to serve her if Defendants will pay for the program. Nowhere does Intervenor allege that Defendants are refusing to fund such a program or refusing to place her in such a program by reason of her disability.

In considering this element of the discrimination acts, the courts have most typically considered cases in which the disabled plaintiff alleges that he is being denied a benefit or service which is being made available to others who are not disabled. In Southeastern Community College v. Davis, 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979), plaintiff had a hearing impairment and sought admission to nursing school, which would require full-time, personal supervision whenever she attended patients and elimination of all clinical courses. The Court found that plaintiff's right to be integrated into society did not require such a substantial modification of the grantee's nursing program. Id.

Similarly, in Alexander v. Choate, 469 U.S. 287, 105 S.Ct. 712, 83 L.Ed.2d 712 (1985), plaintiffs were Medicaid recipients who challenged Tennessee's reduction in the number of days that the state Medicaid would pay hospitals on behalf of Medicaid recipients. The Court found no violation of § 504, even though

plaintiffs alleged that the reduction from 20 days to 14 days would have a disproportionate effect on the handicapped.

Many other cases have considered the claims of disabled persons alleging exclusion from or denial of services by reason of their disability relative to non-disabled persons. Concerned Parents To Save Dreher Park Center v. City of West Palm Beach, 884 F. Supp. 487 (S.D. Fla. 1994) (disabled plaintiffs sued City for shutting down a recreational facility for the disabled while keeping other recreational facilities open); Tugg v. Towey, 864 F. Supp. 1201 (S.D. Fla. 1994) (deaf patients sought interpreter at mental health clinics); Dees v. Austin Travis County Mental Health and Mental Retardation, 860 F. Supp. 1186 (W.D. Tex. 1994) (mentally ill plaintiff alleged that trustees of a public board held meetings at times inaccessible to those suffering from certain mental illnesses); Mayberry v. Von Valtier, 843 F. Supp. 1160 (E.D. Mich. 1994) (deaf patient brought action against physician for refusing to treat patient due to cost of providing interpreter); Coleman v. Zatechka, 824 F. Supp. 1360 (D. Neb. 1993) (a university student who required a wheelchair sued the university for refusing to assign her a roommate); and Ga. Ass'n. For Retarded Citizens v. McDaniel, 511 F. Supp. 1263 (N.D. Ga. 1981) (association on behalf of mentally retarded children sought consideration of a school year of greater than the 180 days provided to nonhandicapped children).

Arguably, the ADA and § 504 apply only to discrimination against disabled persons relative to nondisabled persons, as opposed to discrimination between classes of disabled individuals. Traynor v. Turnage, 485 U.S. 535, 548, 108 S.Ct. 1372, 99 L.Ed.2d 618 (1988)("the central purpose of § 504 . . . is to assure that handicapped individuals receive 'evenhanded treatment' in relation to non-handicapped individuals"); Chiari v. City of League City, 920 F.2d 311, 315 (5th Cir. 1991); P.C. v. McLaughlin, 913 F.2d 1033 (2d Cir. 1990); Fowler v. Frank, 702 F. Supp. 143, 146 (E.D.Mich. 1988); Association for Retarded Citizens of N.D. v. Olson, 561 F. Supp. 473 (N.D.D. 1982), aff'd. on other grounds, 713 F.2d 1384 (8th Cir. 1983); and Williams v. Sec'y. of Executive Office of Human Services, 609 N.E.2d 447, 454 (1993)("the focus of the Federal disability discrimination statutes is to address discrimination in relation to nondisabled persons, rather than to eliminate all differences in levels or proportions of resources allocated and services provided to individuals with differing types of disabilities.")

Some courts, however, have considered claims by disabled persons who allege that they have been denied services or benefits relative to other classes of disabled persons. For example, in Doe v. Coluatti, 592 F.2d 704 (3rd Cir. 1979), plaintiff challenged a Pennsylvania statute which discriminated against mentally disabled relative to physically disabled persons. In this District, one judge concluded that § 504 can

apply to groups with varying degrees of handicap being treated differently. S.H. and P.F. v. Edwards, 860 F.2d 1045, 1052 (11th Cir. 1988)(District Court opinion attached as Appendix A), reh. denied, 866 F.2d 1420, cert. denied, 491 U.S. 905, 109 S.Ct. 3187, 105 L.Ed.2d 696, reh'g. granted and opinion vacated, 880 F.2d 1203, on reh'g. 886 F.2d 292 (11th Cir. 1989). At least two courts have held that plaintiffs stated a cause of action when they alleged they were excluded from community programs for the disabled based on the severity of their disabilities. Conner v. Branstad, 839 F. Supp. 1346 (S.D.Iowa 1993); Jackson v. Fort Jackson Hosp. and Training School, 757 F. Supp. 1243 (D.N.M. 1990), rev'd. in part on other grounds, 964 F.2d 980 (10th Cir. 1992).

Regardless of whether a court applies the ADA or § 504 to allegations of discrimination between classes of disabled persons, where the court finds that a disabled person is not receiving a service or benefit due to some other reason, the court finds that there has been no violation of the federal statute. Does v. Chandler, 83 F.3d 1150 (9th Cir. 1996); Sandison v. Michigan High School Athletic Ass'n., Inc., 64 F.3d 1026 (9th Cir. 1995); Daniel B.v. White, 1991 W.L. 58494 (E.D. Pa. 1991); and Clark v. Cohen, 613 F. Supp. 684 (E.D. Pa. 1985), aff'd on other grounds, 794 F.2d 79 (3rd Cir. 1986). For example, the Clark Court found that the only explanation for the failure to provide plaintiff with community services was "a chronic lack of funds or bureaucratice misplacement of

plaintiff over the years. Id. at 693. Therefore, the lack of a placement was not due to her disability and there was no § 504 violation.

In this case, Intervenor has not alleged that she has been denied the services she seeks due to her disability, as compared to other disabled persons who are provided community-based services. She has identified no particular disability, or combination of disabilities, or severity of disability as the basis for the alleged discrimination. Although she states that Defendants have "discriminated" against her based upon her disability, she does not state that they have denied services to her due to her disability. Since the only "discrimination" being alleged is the denial of services, Intervenor must show that the denial of services is due to her disability. As was stated succinctly by the Seventh Circuit,

> (Plaintiffs) appear to contend that, under (§ 504), (defendants) had the affirmative duty to create less restrictive community residential settings for them. But there is no contention that these class members, because of their handicap, are being denied access to community residential living that Illinois is affording to others. Thus, giving effect to the plain meaning of this statute, (cit. omitted), it simply has no application to (plaintiffs') claim.

Phillips v. Thompson, 715 F.2d 365 (7th Cir. 1983).

2. Intervenor's Reliance On The "Integration Regulation" Is Misplaced.

Intervenor's entire claim is based on the rationale, stated in Helen L. v. Didario, 46 F. 3d 324 (3rd Cir. 1995), that the "integration regulation" requires the State to provide services for her in the community. According to Intervenor, "the failure to integrate is discrimination by itself" and she thus bypasses the requirement in the ADA that a plaintiff prove that the State's failure to provide a particular service is due to her disability. (Intervenor's Brief, p. 19). This argument is flawed for several reasons.

First, in the context of this case, Intervenor is essentially arguing that the integration regulation mandates deinstitutionalization, whereby everyone who could be treated in the community must be treated in the community. She has not claimed that she is being denied a placement due to a particular disability which distinguishes her from others receiving placements. Thus, she is simply arguing that the State must treat mentally disabled persons in community-based programs instead of in institutionally-based programs.

This argument has been put forth often under the ADA or § 504 but has rarely met with favor by the courts. As stated above, the Seventh Circuit held that § 504 did not require the State to provide community residential placements for institutionalized plaintiffs, as plaintiffs had contended. Phillips, supra. Similarly, the Sixth Circuit has held that § 504 does not include a legislative mandate for

deinstitutionalization. Kentucky Ass'n. For Retarded Citizens, Inc. v. Conn., 674 F. 2d 582, 585 (6th Cir. 1982), cert. denied, 459 U.S. 1041, 103 S. Ct. 457, 74 L.ED. 2d 609 (1982).

In this Circuit, in S.H. and P.F., supra, the district court found that § 504 did not require defendants to provide habilitation in the community where plaintiffs could not show that they were being denied these services due to their disability. Other courts have denied plaintiffs' contentions that § 504 or the ADA mandated deinstitutionalization. Jackson v. Fort Stanton Hosp. and Training School, 964 F.2d 980 (10th Cir. 1992); Conner v. Branstad, 839 F. Supp. 1346 (S.D. Iowa 1993); Daniel B. v. White, 199 W.L. 58494 (E.D.Pa. 1991); Clark v. Cohen, 613 F. Supp., 684 (E.D. Pa. 1985), aff'd. on other grounds, 794 F.2d 79 (3rd Cir. 1986), cert. denied, 479 U.S. 912.

Second, in light of the active litigation on this issue, it seems reasonable that if Congress believed the courts were incorrect in interpreting its intent on the issue of deinstitutionalization and had wished to clarify it, it would have surely done so when it passed the ADA. Yet neither the explicit language of the ADA nor the legislative history call for or require deinstitutionalization of mentally retarded individuals. If Congress had intended such a radical step, it surely would have clearly stated it.

To the contrary, in the legislative history of the ADA Congress indicated that it did not intend any radical departure

from § 504. Title II of the ADA was intended to "extend the nondiscrimination policy in § 504 of the Rehabilitation Act of 1973 to cover all State and local governmental entities." H.R.Rep.No. 101-485(II), 101st Cong., 2d Sess. 84 (1990), reprinted in 1990 U.S.C.C.A.N. 267. Again, Title II "essentially simply extends the antidiscrimination prohibition embodied in § 504 to all actions of state and local government." Id. at 367.

Further, the integration regulation under the ADA is substantially identical to the § 504 integration regulation which had been in effect since 1981. 28 C.F.R. § 35.130(d), 28 C.F.R. § 41.5(d) (1981). Thus, Congress did not intend a substantive extension of § 504 to include entirely new mandates such as deinstitutionalization. Rather, it simply extended the existing requirements to additional entities.

Third, the regulations do not define what is meant in 28 C.F.R. § 35.130(d) by "integration." If the regulation meant that it was no longer necessary to show discrimination under the ADA or that the ADA required deinstitutionalization, surely it would have said so.

It is anticipated that Intervenor may argue that she is not seeking deinstitutionalization, but as was contended in Helen L., simply that since she allegedly qualifies for a community program, the State's failure to provide her treatment in the most integrated setting appropriate to her needs (without a proper justification) violates the ADA. Helen L. v. Didario, 46 F.3d 325, 336 (3rd Cir. 1995).

Of course, in this case, unlike in Helen L., the professionals did not agree that Intervenor should leave GRH-A. Joseph Steed, Dr. DeBacher, and Gloria Shepherd all believed that she needed inpatient care, thus, GRH-A was the most integrated setting appropriate to her needs. Additionally, Defendant Pittman stated that there were no funds to provide a community residential placement for Intervenor and that existing funds were being used to service other disabled persons.

More significantly, however, this distinction stated in Helen L. between "deinstitutionalization" on the one hand and providing services "in the most integrated setting appropriate" on the other, is extremely elusive at best, and in most situations is non-existent. Further, the Helen L. Court requires the state to justify its decisions to fund a certain mix of programs and services, which is generally beyond the reach of the federal courts.

Additionally, where there has been no finding or allegation that plaintiff was denied services due to a disability, courts have not applied the "reasonable accommodation" analysis to the state's provision of services. Conner, supra; Phillips, supra; Jackson, supra; SH and PF, supra; and Daniel B., supra.

The Helen L. Court alone bypasses the requirement under the ADA that plaintiff must allege that she has been denied a service by reason of her disability. Intervenor cites to

"Halderman v. Pennhurst State School and Hosp., 784 F. Supp. 215, 224 (E.D. Pa. 1992), aff'd., 977 F.2d 568 (3rd Cir. 1992)" to support her assertion that courts other than Helen L. have reached this conclusion. (Intervenor's brief, p. 24). Yet this citation is erroneous, because the Circuit Court affirmed the decision of the district court on other grounds and specifically did not reach the § 504 issue. In the other cases cited here by Intervenor, the courts found that the plaintiff was being denied a benefit or service due to his disability and did not base the decision simply on a failure to integrate. Coleman, supra; Jackson, supra; and Ga. Assn. of Retarded Citizens v. McDaniel, 511 F. Supp. 126, 128 (N.D. Ga. 1981).

Clearly, it was not Congress' intent in the ADA to mandate that states provide services for the disabled in the "least restrictive environment." To the extent that the "integration regulation" is interpreted to require such a result it would exceed the scope of the ADA.

C. INTERVENOR HAS NOT BEEN IRREPARABLY HARMED.

It is still viable law that a "basic doctrine of equity jurisprudence [is] that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." O'Shea v. Littleton, 414 U.S. 488, 499, 94 S. Ct. 669, 38 L.Ed.2d 674 (1974) (denial of injunction against

prosecutions alleged to violate civil rights), quoting Younger v. Harris, 401 U.S. 37, 43-44, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) (same). In the present case, Intervenor seeks a mandatory injunction forcing the defendants to discharge her from a facility and to pay for a residential and habilitation placement in the community.

Even assuming for argument's sake that Intervenor is harmed by her current situation, however, she cannot bear her heavy burden of clearly showing that she will be irreparably harmed. For each harm claimed, there is an adequate legal remedy, and this is so even if her remedies were to be restricted just to those provided by the State's mental health, mental retardation, and substance abuse statutes.

To the extent that Intervenor claims that she is being harmed by her continued treatment at GRH-A, she has two State judicial remedies. First, as a voluntary patient, she or her representative can request discharge and, if the chief medical officer denies her request, she must be either involuntarily committed or released through a probate court proceeding. O.C.G.A. § 37-3-22. Second, whether she is voluntary or involuntary, she or her representative could file in the probate court a petition alleging that she is being unjustly denied a right or privilege granted by the mental health statute or that a procedure authorized by that statute is being abused. O.C.G.A. § 37-3-148(b). In both proceedings, the patient has a right to a full and fair hearing, including

effective assistance of counsel, and she may appeal the probate court's decision. O.C.G.A. §§ 37-3-1(8),-150.

To the extent that Intervenor claims that she requires mental retardation services in the community, she or anyone else can file in the probate court a petition to receive such services. O.C.G.A. § 37-4-40. Again, the petition is determined by the court upon a full and fair hearing, with the patient retaining the right to appeal that court's decision. O.C.G.A. §§37-4-2(7),-110. Intervenor has not shown that she has utilized any of these remedies. She thus can show no irreparable harm.

D. THE BALANCING OF HARMS AND CONSIDERATION OF THE PUBLIC INTEREST FAVOR DENIAL OF THE INJUNCTION.

In the present case, the balancing of harms to the respective parties and proper consideration of the public interest are not clearly separable from the factors already discussed. The harm to Defendants from a mandatory injunction is that the State would have to pay a considerable sum (including possibly capital expenditures) for Intervenor's community placement, just as though the Court had entered a final judgment, and regardless of an ultimate finding that there was no ADA violation. The public interest is not served by the expenditure of limited funds for a person who has no legitimate entitlement to this funds. Nor is that interest served by intrusion into the discretionary zone entrusted by law to the professionals within the state administrative agencies.

IV. CONCLUSION

For the above-stated reasons, Defendants respectfully request that Intervenor's Motion For Preliminary Injunction be denied.

Respectfully submitted,

MICHAEL J. BOWERS 071650
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CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing RESPONSE TO MOTION FOR PRELIMINARY INJUNCTION, prior to filing the same, by depositing a copy thereof, postage prepaid, in the United States Mail, properly addressed upon:

Susan C. Jamieson
ATLANTA LEGAL AID SOCIETY, INC.
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340 West Ponce de Leon Avenue
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Sylvia B. Caley
Steven D. Caley
ATLANTA LEGAL AID SOCIETY, INC.
151 Spring Street
Atlanta, GA 30303

This 30th day of August, 1996.

Patricia Downing

PATRICIA DOWNING
Senior Assistant
Attorney General

ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

L.C. and E.W., BY JONATHAN ZIMRING, as guardian ad litem and next friend,	*	
Plaintiff,	*	
v.	*	Civil Action No. 1:95-CV-1210-MHS
TOMMY OLMSTEAD, Commissioner of the Department of Human Resources; RICHARD FIELDS, Superintendent of Georgia Regional Hospital at Atlanta; and EARNESTINE PITTMAN, Executive Director of the Fulton County Regional Board, all in their official capacities,	*	
Defendants.	*	

NOTICE OF FILING ORIGINAL DISCOVERY

COME NOW Defendants in the above-styled action and respectfully give Notice of the filing of the original, sealed depositions of Dr. Richard Elliott taken on April 9, 1996 and June 4th, 1996.

(63)

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing NOTICE OF FILING ORIGINAL DISCOVERY, prior to filing the same, by depositing a copy thereof, postage prepaid, in the United States Mail, properly addressed upon:

Susan C. Jamieson
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340 West Ponce de Leon Avenue
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Sylvia B. Caley
Steven D. Caley
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151 Spring Street
Atlanta, GA 30303

This 3rd day of September, 1996.

Patricia Downing

PATRICIA DOWNING
Senior Assistant
Attorney General