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United States District Court, D. Connecticut.

Richard MESSIER, et al.
v.
SOUTHBURY TRAINING SCHOOL, et al.

No. 3:94–CV–1706(EBB). | Jan. 5, 1999.

Opinion

RULING ON CROSS–MOTIONS FOR SUMMARY JUDGMENT

BURNS, Senior J.

***1** This ruling addresses four cross-motions for summary judgment pursuant to Federal Rule of Civil Procedure 56 filed by plaintiffs, defendant Department of Mental Retardation ("DMR"), defendant Department of Public Health ("DPH"), and defendant Department of Social Services ("DSS"). Plaintiffs have brought a class action seeking injunctive relief against defendants Southbury Training School ("STS") and the three Connecticut state agencies named above, alleging violations of the Due Process Clause of the Fourteenth Amendment, Title II of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12132 (1997), Section 504 of the Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C. § 794 (1997), and 42 U.S.C. § 1983 (1997) for the deprivation of rights under Title XIX of the Social Security Act ("Medicaid Act"), 42 U.S.C. § 1396a *et seq.* (1997). After careful consideration, the Court makes the following rulings.

First, the Court denies plaintiffs' motion for partial summary judgment [Doc. No. 349] because several genuine issues of material fact exist regarding claims against DMR and STS for violations of substantive due process, the ADA, and Section 504. Second, the Court denies DMR's motion for partial summary judgment [Doc. No. 353] on claims brought against it under the ADA and Section 504 for the same reasons. Third, the Court grants DSS' motion for summary judgment [Doc. No. 356] regarding claims asserted against it under the ADA, Section 504, and the Medicaid Act. Finally, the Court grants DPH's motion for summary judgment [Doc. No. 359] on plaintiffs' claim that "Do Not Resuscitate" orders ("DNR orders") may be imposed on nonterminally ill class members by private physicians without due process of law and on all claims brought against it under the Medicaid Act.

These rulings have the following impact on this case at this stage of litigation: (1) plaintiffs' claims against DMR and STS for violations of substantive due process remain viable for trial; (2) plaintiffs' claims against DMR and STS for violations of the ADA and Section 504 remain viable for trial; (3) plaintiffs' claims against DSS for violations of the ADA and Section 504 are dismissed; (4) plaintiffs' claims against DSS, DPH, and DMR for violations of the Medicaid Act are dismissed; and (5) plaintiffs' claims against DPH for violations of procedural and substantive due process based on the potential issuance of DNR orders by private physicians are dismissed.

BACKGROUND

This case began in October 1994 when seven residents of STS, People First of Connecticut, Inc., ARC/Connecticut, Inc., and Western Connecticut Association for Human Rights brought a class action on behalf of all current and future STS residents against STS, DMR, DPH, and DSS.[1] Plaintiffs alleged that the defendants' administration of STS and related community placement services for persons with mental retardation violated the following federal laws: (1) the Due Process Clause of the Fourteenth Amendment; (2) Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12132; (3) Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; and (4) 42 U.S.C. § 1983 for the deprivation of rights under Title XIX of the Social Security Act, 42 U.S.C. § 1396a *et seq.* (Third Am. Compl. ¶ 1.)

***2** Plaintiffs sought an injunction to prevent new admissions to STS; to require STS professionals in conjunction with each resident and his or her guardian to develop and implement an individualized plan of treatment appropriate for that resident; to require defendants to evaluate all residents for possible community placement regardless of the severity or nature of their disabilities; to make available to each resident an individual and independent advocate; to enjoin the use of DNR orders until procedures are developed and implemented which assure that such orders will not be issued in error; and to require the defendants to develop a plan to remediate environmental and program deficiencies. (*Id.* at 29–31.)

DMR and STS jointly moved to dismiss the action for failure to state a claim upon which relief may be granted in February 1996. In denying the motion, the Court held that *United States v. Connecticut* did not preclude the plaintiffs' suit and concluded that plaintiffs properly alleged claims based on due process, the ADA, and

Section 504. The Court also decided that plaintiffs could sue under 42 U.S.C. § 1983 for a violation of the Medicaid provisions of the Social Security Act. *See Messier v. Southbury Training Sch.,* 916 F.Supp. 133 (D.Conn.1996). In that same year, the Court rejected a similar joint motion to dismiss by DPH and DSS. In so doing, the Court made two additional rulings. First, DPH could be liable for a substantive due process violation with respect to the issuance of DNR orders because its inaction may have contributed to plaintiffs' harm. Second, plaintiffs stated a claim for a denial of procedural due process based on their allegation that DNR orders were imposed without adequate process as a matter of course. *See* Ruling Mot. Dismiss by DPH and DSS.

In March 1996, seven STS residents, the Home and School Association of Southbury Training School, Inc. ("HSA"), and the Southbury Training School Foundation, Inc. ("STSF") moved to intervene on the side of the defendants pursuant to Federal Rule of Civil Procedure 24. The applicants argued that their interests would be impaired if they were not allowed to intervene because this case might result in the closure of STS or they might be forced into community placements. Although the Court denied this motion, it attempted to allay these concerns by narrowing the type of relief that plaintiffs could seek in this case. The Court found that "plaintiffs' complaint must be read as seeking to require STS [merely] to *consider* whether each resident is appropriate for community placement and to then act accordingly based upon such consideration." Ruling Mot. Intervene at 3–4. Thus, plaintiffs cannot obtain the following relief: (1) the ending of all new admissions to STS; (2) the transferring of all residents to community settings; and (3) the closure of STS.

Soon thereafter, the Court certified the plaintiff class under Federal Rule of Civil Procedure 23(b)(2) as including all current STS residents, those persons who may be placed at STS in the future, and those persons who were transferred from STS and remain under the custody and control of the Director of STS. *See* Ruling Mot. Class Certification. In June 1997, HSA and STSF moved for exclusion from the class on behalf of the same seven class members who unsuccessfully attempted to intervene. Once again, the Court denied the motion and addressed the applicants' concerns regarding the potential outcome of this case by reiterating that

> ***3** [T]he most that plaintiffs can accomplish is to require Southbury to conform with its constitutional duty to consider the appropriateness of community placement for each resident. In no way can the plaintiffs force Southbury to place in community settings those residents for whom community placement is inappropriate, or force the state of Connecticut to shut down Southbury.

Ruling Application Exclusion. Most recently, the Court denied a motion by 611 residents of STS and their respective guardians to opt out of the plaintiff class and intervene on the side of the defendants. *See* Ruling Mot. Opt Out.

Pending before the Court are four cross-motions for summary judgment by each party in this litigation. Plaintiffs move the Court for partial summary judgment against DMR and STS on their claims brought under the Due Process Clause and the ADA. They assert that no genuine issues of material fact exist with regard to DMR's and STS' failure: (1) to consider all class members for community placement, exercise professional judgment in making placement decisions, and implement those decisions in conformity with due process; and (2) to provide services to class members in the most integrated setting appropriate to their needs in contravention of the ADA. (Pls.' Mot. Summ. J. at 1–2.)

Defendant DMR seeks partial summary judgment on plaintiffs' claims for violations of the ADA and Section 504. (DMR's Mot. Summ. J. at 1.) In addition, defendant DPH moves for summary judgment on: (1) plaintiffs' claim that the agency violated due process in refusing to adopt DMR's Medical Advisory # 87–2 to eliminate the possibility that a DNR order might issue on a nonterminally ill class member; and (2) plaintiffs' claim that DPH violated its facility inspection duties under the Medicaid Act. (DPH's Mot. Summ. J. at 1–21.) Lastly, defendant DSS moves for summary judgment and asserts the following arguments: (1) that plaintiffs failed to plead that the agency violated the ADA and Section 504, and that even if properly pleaded, the plaintiffs have not produced enough evidence to withstand summary judgment; and (2) that the Balanced Budget Act of 1997 eliminated any duties that DSS previously owed under the Medicaid Act, and that even if the agency still has a legal duty, the plaintiffs have not produced sufficient evidence to warrant a trial on this claim. (DSS' Mot. Summ. J.)

STANDARD OF REVIEW FOR SUMMARY JUDGMENT

Summary judgment should be granted if the evidence demonstrates that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). Facts are deemed material only when they might affect the

outcome of the case under the governing law. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986); *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986). Irrelevant or unnecessary factual disputes will not be considered. *See Anderson,* 477 U.S. at 248. Moreover, the mere existence of a scintilla of evidence in support of the nonmoving party's case or "metaphysical doubt as to the material facts" will not prohibit summary judgment. *See id.* at 252; *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986). To present a "genuine" issue of material fact, there must be contradictory evidence "such that a reasonable jury could return a verdict for the non-moving party." *Anderson,* 477 U.S. at 248; *First Nat'l Bank of Ariz. v. Cities Serv. Co.,* 391 U.S. 253, 288–89 (1968).

***4** Rule 56 mandates summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex,* 477 U.S. at 322. The moving party possesses the initial burden to show the absence of a genuine issue of material fact. *See Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 157 (1970). Where the non-movant has the burden of proof at trial, the moving party may discharge its initial burden by merely pointing to the "absence of evidence to support the nonmoving party's" claims or defenses.[2] *Celotex,* 477 U.S. at 325. Once the burden shifts, the nonmoving party holding the burden of proof at trial may not rest upon the mere allegations or denials of his pleadings, but rather must "designate specific facts showing there is a genuine issue for trial." *Id.* at 324; *Park Ave. Tower Assocs. v. City of New York,* 746 F.2d 135, 141 (2d Cir1984). If the evidence is "merely colorable" and "not significantly probative," the court may decide the legal issue and grant summary judgment. *See Anderson,* 477 U.S. at 249–50; *First Nat'l Bank,* 391 U.S. at 290. In sum, summary judgment is proper where no reasonable jury "could find by a preponderance of the evidence" for the nonmoving party. *See Anderson,* 477 U.S. at 248.

In deciding a summary judgment motion, the Court must view the record as a whole and in the light most favorable to the nonmoving party. *See Matsushita Elec.,* 475 U.S. at 587; *Adickes,* 398 U .S. at 158–59. Either party may submit as evidence "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits" to support or rebut a summary judgment motion. Fed.R.Civ.P. 56(e). Supporting and opposing affidavits must be based on personal knowledge and set forth facts that would be admissible in evidence. *See id.* General averments or conclusory allegations of an affidavit do not create specific factual disputes. *See Lujan v. National Wildlife Fed'n,* 497 U.S. 871, 888–89 (1990). In addition, unsworn statements and affidavits composed of hearsay and nonexpert opinion evidence "do not satisfy Rule 56(e) and must be disregarded." *Dole v. Elliott Travel & Tours, Inc.,* 942 F.2d 962, 968–69 (6th Cir.1991); *accord Adickes,* 398 U.S. at 158 n.17. Nor may a party create a factual issue by filing an affidavit, after a motion for summary judgment has been made, which contradicts earlier deposition testimony. *See Reid v. Sears Roebuck & Co.,* 790 F.2d 453, 460 (6th Cir.1986).

When the parties submit cross-motions for summary judgment, the court is not required to grant judgment as a matter of law for one side or the other. *See Heublein, Inc. v. United States,* 996 F.2d 1455, 1461 (2d Cir.1993); *S Indus., Inc. v. Stone Age Equip., Inc .,* 12 F.Supp.2d 796, 803 (N.D.Ill.1998). The court must evaluate each party's motion on its own merits, resolving factual uncertainties and drawing all inferences against the party whose motion is under consideration. *See id.*

DISCUSSION

I. *Clarification of Parties and Claims*

***5** Before proceeding to the substantive merits of the parties' respective motions, the Court notes that some confusion exists regarding which of the plaintiffs' claims apply to each defendant. The Court explicitly will clarify these issues. Plaintiffs essentially assert four claims.

The first claim alleges that DMR[3] and STS violated substantive due process based on their failure: (1) to maintain adequate habilitation to help STS residents retain self-care skills and keep them free from restraints; (2) to provide adequate shelter, clothing, nutrition, and medical care; (3) to provide individual advocates to STS residents; and (4) to exercise professional judgment in making placement decisions for STS residents. (Third Am. Compl. ¶¶ 48–64, 69–75, 83, 86(a)-(i).)

Plaintiffs' second claim charges DMR, STS, and DSS with violating the ADA and Section 504 in two distinct ways: first, by failing to implement the ADA's "integration mandate;" second, by discriminating on the basis of severity of disability against certain profoundly and severely mentally retarded STS residents. Specifically, plaintiffs contend that DMR and STS have not integrated STS residents into the community and have not considered those residents with more severe disabilities for community placement. In addition, plaintiffs allege that DSS contravenes Section 504 by refusing to consider more severely mentally retarded STS residents for vocational services.[4] (*Id.* ¶¶ 81, 83, 87.)

Plaintiffs' third claim alleges that DMR, DPH, and DSS violate the Medicaid Act based on: (1) DPH's and DMR's failure to conduct adequate inspections of the care, treatment, and living conditions of 600 class members

living in buildings certified to participate in the state's Medicaid program and report findings of noncompliance to DSS, the state Medicaid agency, pursuant to 42 C.F.R. § 456.600 *et seq.,* (*Id.* ¶¶ 45, 65, 66, 88.); and (2) DSS' failure to adequately supervise such inspections and take necessary corrective actions.[5] (*Id.* ¶¶ 47, 66, 88.)

Plaintiffs' final claim declares that DPH violates substantive and procedural due process by maintaining standards which permit private physicians employed by DPH-licensed hospitals to write and implement DNR orders inconsistent with the wishes of nonterminally ill class members. (*Id.* ¶¶ 46, 76, 86(j).) Specifically, plaintiffs complain that nonterminally ill class members may be exposed to a risk of death against their wishes unless the Court orders DPH to adopt DMR's Medical Advisory # 87–2.[6]

To avoid any future complications as to the parties and claims alleged against them, the parties are hereby instructed to identify which specific defendants they are referring to in all future court filings in accordance with this ruling. With these preliminary clarifications out of the way, the Court turns to the merits of each party's motion.

II. *Substantive Due Process Claims Against DMR and STS*

A. Elements of Substantive Due Process Claim

***6** In *Youngberg v. Romeo,* 457 U.S. 307 (1982), the Supreme Court established the contours of the right of mentally retarded residents in state-operated institutions to sue under the Due Process Clause of the Fourteenth Amendment. The Court found that residents possess a constitutional right to adequate food, shelter, clothing, medical care, safe conditions of confinement and freedom from unreasonable bodily restraints, and training necessary to protect these guarantees. *See id.* at 315–18. Although the Court did not decide whether institutional residents have a due process right to other types of training, the Second Circuit holds that residents must receive "training sufficient to prevent basic self-care skills from deteriorating." *Society for Good Will to Retarded Children v. Cuomo,* 737 F.2d 1239, 1249 (2d Cir.1984). However, patients do not have a due process right "to an ideal environment or an ideal treatment plan, or even a guarantee that the patient will be cured." *Cameron v. Tomes,* 783 F.Supp. 1511, 1515 (D.Mass.1992), *aff'd,* 990 F.2d 14 (1st Cir.1993); *accord Feagley v. Waddill,* 868 F.2d 1437, 1440 (5th Cir.1989); *Geiseking v. Schafer,* 672 F.Supp. 1249, 1266 (W.D.Mo.1987).

Under *Youngberg,* state actors must utilize "professional judgment" in their provision of services to institutional residents in order to satisfy due process. *See* 457 U.S. at 321–22. *Youngberg* provides in relevant part:

> [A] decision if made by a professional, is presumptively valid; 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. This necessarily constitutes a deferential standard. Indeed, the Third Circuit holds that negligence cannot be the basis of a constitutional violation so long as professionals made the decision in question. *See Shaw v. Strackhouse,* 920 F.2d 1135, 1143 (3d Cir.1990). A professional is defined as "a person competent, whether by educational training or experience, to make the particular treatment decision at issue." *Youngberg,* 457 U.S. at 323 n.30. No deference will be accorded to decisions made by nonprofessionals. *See Thomas S. v. Flaherty,* 902 F.2d 250, 252 (4th Cir.1990); *Cameron,* 783 F.Supp. at 1520.

Under the professional judgment standard, courts may not specify which of several professionally acceptable choices should have been made. *See P.C. v. McLaughlin,* 913 F.2d 1033, 1043 (2d Cir.1990) (providing that courts should not "ascertain whether in fact the best course of action was taken"); *Scothorn v. Kansas,* 772 F.Supp. 556, 561 (D.Kan.1991). No violation of due process may be found where a plaintiff only proves a difference of professional opinion as to which practices are appropriate and which are not. *See Society for Good Will,* 737 F.2d at 1248; *Die v. Gaughan,* 617 F.Supp. 1477, 1487 (D.Mass.1985), *aff'd,* 808 F.2d 871 (1st Cir.1986). In this sense, the Court may not "weigh the decisions of treating professionals against the testimony" of plaintiffs' experts to decide which of several acceptable standards should apply. *See Thomas S.,* 902 F.2d at 252.

***7** Although no constitutional right to community placement exists, *see P.C.,* 913 F.2d at 1042, state actors must comply with the *Youngberg* professional judgment standard in deciding if mentally retarded residents should be placed at an institution or in the community. *See Society for Good Will,* 737 F.2d at 1249; *Thomas S.,* 902 F.2d at 252; *S.H. v. Edwards,* 886 F.2d 292, 293 (11th Cir.1989); *Messier,* 916 F.Supp. at 140; *Hughes on Behalf of David v. Cuomo,* 862 F.Supp. 34, 37 (W.D.N.Y.1994). Thus, due process requires STS and DMR to make a rational decision based on professional judgment when determining placement of STS residents. Ultimately, plaintiffs must prove that either the defendants failed to exercise professional judgment, or that their professional decisions constitute such an extremely radical 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.

B. Material Facts in Dispute

The Court denies plaintiffs' motion for partial summary judgment on their substantive due process claim brought against DMR and STS because a genuine issue of material fact exists regarding whether defendants satisfy the *Youngberg* professional judgment standard when making placement decisions for STS residents. This conclusion arises from the vast amount of contrary evidence presented by the parties and the deferential nature of the professional judgment standard.

Several genuine issues of material fact preclude summary judgment. For example, plaintiffs argue that DMR has instructed STS interdisciplinary teams ("IDTs") to stop discussing community placement at residents' meetings, and that those teams currently do not discuss community placement. (Mulvey Dep. Ex. K at 76.) However, DMR counters that staff merely were instructed to stop routinely writing "in the community" in the vision portion of the Overall Plan of Service ("OPS") without supporting information. (*Id.* at 75, 78; Mulvey Aff. Ex. A ¶¶ 1–7.) Next, plaintiffs suggest that STS maintains no formal process to determine whether residents should live in the community. (Ale Dep. Ex. C at 62.) The defendants respond that IDTs maintain a formal process which clearly identifies the needs of residents. (Mulvey Aff. ¶¶ 3–8.)

While the plaintiffs propose that STS makes "top down" decisions by administrators or "by a corporate guardian with a heavy axe to grind," rather than relying on the consensus of case managers, (Moriarity Dep. Ex. B at 121; Moore Dep. Ex. D at 45.), DMR produces affidavits showing that it makes placement decisions on a "person by person basis evaluating the individual needs of each resident." (Hamad Aff. Ex. B ¶¶ 1,2,5; Mulvey Aff. ¶ 9.) Plaintiffs contend that no documents report "what consideration DMR professional teams have given each STS resident for community placement," (DMR's Resp. Req. Admis. Ex. A ¶ 22; O'Meara Dep. Ex. E at 102, 147, 150), nor do any documents describe the STS population, their needs, and their suitability for community placement. (DMR's Resp. Req. Admis. ¶¶ 68, 72.) Yet, this is directly contradicted by a DMR affidavit stating that STS does utilize documents that describe the needs of the STS population. (Mulvey Aff. ¶¶ 7, 8.) Both sides additionally disagree as to whether the Commissioner of DMR receives sufficient information to determine the number of community placements that should be funded, whether community placements are limited to existing service slots, and whether STS employees solely rely on guardian surveys to make placement decisions. *Compare* (Pls.' Mem. Supp. Summ. J. at 4; O'Meara Dep. at 104–05, 147, 150; Ale Dep. at 30, 50, 53–54) *with* (Defs.' State. Mat. Facts ¶¶ 59–60; Hamad Aff. ¶¶ 2, 3, 5.)

***8** As the preceding discussion makes clear, plaintiffs' evidence does not prove conclusively whether DMR and STS fail to utilize professional judgment in making placement decisions for each STS resident. Reasonable minds could differ on crucial issues such as the extent to which IDTs consider community placement as an option for STS residents and whether placement and funding decisions are based on professional judgment according to the needs of each individual resident. These questions have a direct bearing on the proof required to establish a substantive due process violation, and thus, preclude summary judgment.

Plaintiffs' evidence that community placement is not specifically discussed at every resident's meeting proves nondispositive because there is no constitutional right to community placement. *See Society for Good Will,* 737 F.2d at 1248–49; *P.C.,* 913 F.2d at 1042. In addition, plaintiffs' evidence that STS administrators participate in placement decisions does not necessarily mean that they failed to exercise professional judgment. Due process does not prevent IDTs from considering the availability of community services and the costs of providing such services when making treatment decisions. *See Jackson v. Fort Stanton Hosp. and Training Sch.,* 964 F.2d 980, 992 (10th Cir.1992). Moreover, administrators may be professionals in their own right. (Defs.' Br. Opp. Summ. J. at 15.) Finally, DMR correctly notes that plaintiffs have not come forward with any specific examples where a recommendation of community placement for a resident by STS treating professionals was not followed. (*Id.* at 17, 24.)

Given this set of facts, a reasonable trier of fact could find for either side concerning whether the *Youngberg* professional judgment standard has been met. *See Anderson,* 477 U.S. at 248. Therefore, the Court declines to award summary judgment to plaintiffs on their substantive due process claims against DMR and STS.

III. *ADA and Section 504 Claims Against DMR, STS, and DSS*

A. Elements of ADA and Section 504 Claims

Congress enacted the ADA to remedy discrimination against people with disabilities and to end the segregation of such persons. *See* 42 U.S.C. § 12101(a); H.R.Rep. No. 101–485 (1990), *reprinted in* 1990 U.S.C.C.A.N. at 445, 449; 136 Cong. Rec. H2603, H2627 (daily ed. May 22, 1990) (statement of Rep. Dellums and statement of Rep. Collins). Title II of the ADA provides that:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. To establish a prima facie violation of section 12132, a plaintiff must show that: (1) he or she is a "qualified individual with a disability;" (2) he or she is being excluded from participation in or being denied the benefits of some service, program, or activity by reason of his or her disability; and (3) the entity which provides the service, program, or activity is a public entity.[7] *See Civic Ass'n of Deaf of New York City, Inc. v. Giuliani,* 915 F.Supp. 622, 634 (S.D.N.Y.1996); *Clarkson v. Coughlin,* 898 F.Supp. 1019, 1037 (S.D.N.Y.1995).

***9** As the following discussion illustrates, plaintiffs can prove a violation of 42 U.S.C. § 12132 in one of two ways. First, they may demonstrate that DMR and STS violated the ADA's "integration mandate" contained in 28 C.F.R. § 35.130(d) (1997) by not treating patients in the most integrated setting appropriate to their needs. Second, plaintiffs may show that DMR, STS, and DSS refuse to consider certain severely handicapped STS residents for community placement or vocational rehabilitation services based solely on the degree of their disabilities.

1. 28 C.F.R. § 35.130(d): Integration Mandate

Pursuant to 42 U.S.C. § 12134(a), the Attorney General promulgated the following enforcement regulation relating to Title II's prohibition against discrimination: "[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d).[8] Interpretive regulations by an agency charged with the administration of a statute should be given substantial deference and controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 844 (1984); *Blum v. Bacon,* 457 U.S. 132, 141 (1982); *Harris v. H & W Contracting Co.,* 102 F.3d 516, 521 (11th Cir.1996); *Helen L. v. DiDario,* 46 F.3d 325, 332 (3d Cir.1995). Because section 35.130(d) finds direct support in the ADA's plain language, its legislative history, and the Act's congressional findings, this Court must apply its integration mandate to this case. *See L.C. by Zimring v. Olmstead,* 138 F.3d 893, 899 (11th Cir.1998), *cert. granted,* 67 U.S.L.W. 3259 (U.S. Dec. 14, 1998), *order am. by,* 67 U.S.L.W. 3386 (U.S. Dec. 17, 1998) (No. 98–536).

At the outset, the Court notes that while Congress intended to decrease segregation and promote integration, neither the ADA nor Section 504 confers an absolute right to mentally retarded individuals to be placed in the community. *See Olmstead,* 138 F.3d at 902 (concluding that the ADA "does not mandate the deinstitutionalization of individuals with disabilities"); *Helen L.,* 46 F.3d at 336; *Conner v. Branstad,* 839 F.Supp. 1346, 1357 (S.D.Iowa 1993) (reasoning that the ADA's legislative history does not indicate an intent to require all residents of institutions be placed in the community). Instead, section 35.130(d) requires placement "in a setting that enables disabled individuals to interact with non-disabled persons to the fullest extent possible." 35 C.F.R. Pt. 35, App. A at 450. It also prohibits states from providing services to individuals with disabilities in an unnecessarily segregated setting, even absent a showing of differential treatment between disabled and nondisabled persons. *See Olmstead,* 138 F.3d at 893, 897–99 (ruling that 42 U.S.C. § 12132's "by reason of such disability language" does not alter the integration mandate); *Helen L.,* 46 F.3d at 333–35.

***10** However, the ADA seeks to achieve a delicate balance. Cases make clear that the most integrated setting appropriate to the needs of mentally retarded individuals may be an institution or a community placement. *See Olmstead,* 138 F.3d at 902; *Cable v. Department of Dev. Servs. of the State of Cal.,* 973 F.Supp. 937, 941–42 (C.D.Cal.1997). Where "a disabled individual's treating professionals find that a community based placement is appropriate for that individual, the ADA imposes a duty to provide treatment in a community setting—the most integrated setting appropriate to that patient's needs." *Olmstead,* 138 F.3d at 902. On the other hand, where there is no such finding, "nothing in the ADA requires the deinstitutionalization of that patient." *Id.*

Accordingly, plaintiffs may establish a prima facie violation of 28 C.F.R. § 35.130(d) by proving that DMR places certain residents at STS, even though the IDTs exercising professional judgment have determined previously that the most integrated setting for those residents is a community placement. Plaintiffs need not demonstrate intentional discrimination. However, they must point to specific examples where individuals currently reside at STS, despite the fact that STS professionals recommend community placement for such persons.

2. Discrimination Based on Severity of Disability

Plaintiffs also may show that DMR, STS, and DSS violate the ADA and Section 504 by refusing to consider severely handicapped STS residents for community placement or vocational rehabilitation services based on the degree of their disabilities. ADA regulations state in relevant part:

> A public entity, in providing any aid, benefit, or service, may not ... [p]rovide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others.

28 C.F.R. § 35.130(b)(1)(iv).[9] Courts hold repeatedly that the ADA and Section 504 prohibit discrimination on the basis of severity of disability. *See, e.g., Martin v. Voinovich,* 840 F.Supp. 1175, 1191–92 (S.D.Ohio 1993); *Conner,* 839 F.Supp. at 1356; *Jackson v. Fort Stanton Hosp. & Training Sch.,* 757 F.Supp. 1243, 1299 (D.N.M.1990), *rev'd on other grounds,* 964 F.2d 980 (10th Cir.1992); *Garrity v. Gallen,* 522 F.Supp. 171, 214–15 (D .N.H.1981); *Lynch v. Maher,* 507 F.Supp. 1268, 1278–79 n.15 (D.Conn.1981). Defendants will violate the ADA or Section 504 if they fail to consider profoundly or severely mentally retarded STS residents for community placement or vocational services, while considering less handicapped individuals for such services, thereby discriminating solely on the degree of one's disability.

3. Option to Decline Accommodation

Nothing in the ADA "shall be construed to require an individual with a disability to accept an accommodation, aid, service, or benefit ... which such individual chooses not to accept." 28 C.F.R. § 35.130(e)(1). While integration is fundamental to the ADA's purposes, regulations clearly state that disabled individuals "must be provided the option of declining to accept a particular accommodation" such as community placement or vocational services. 28 C.F.R. Pt. 35, App. A at 450. Thus, if plaintiffs satisfy the elements of 42 U.S.C. § 12132 or Section 504, the defendants may rebut by producing evidence that they offered appropriate community placements or vocational services to STS residents but those residents exercised their statutory right to decline.

4. "Fundamental Alteration" Defense

***11** The ADA and Section 504 provide an affirmative defense to a violation if a defendant proves that making a modification would fundamentally alter its service or program. *See Alexander v. Choate,* 469 U.S. 287, 300 (1985). 28 C.F.R. § 35.130(b)(7) states in relevant part:

> A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the services, program, or activity.

To establish this affirmative defense, the defendants must prove that plaintiffs' requested relief would: (1) alter the essential nature of its program; or (2) impose an undue burden or hardship in light of the overall program. *See Easley by Easley v. Snider,* 36 F.3d 297, 305 (3d Cir.1994); *Williams v. Wasserman,* 937 F.Supp. 524, 531 (D.Md.1996); *Dees v. Austin Travis County Mental Health and Mental Retardation,* 860 F.Supp. 1186, 1190 n.7 (W.D.Tex.1994). The reasonableness of plaintiffs' proposed relief must be evaluated in light of the purpose of the ADA and Section 504 to assist the handicapped and the need to impose reasonable boundaries in accomplishing this legislative goal. *See Helen L.,* 46 F.3d at 337.

Inadequate funding ordinarily will not excuse noncompliance with the ADA or Section 504. *See Olmstead,* 138 F.3d at 902. "The fact that it is more convenient administratively or fiscally, to provide services in a segregated manner, does not constitute a valid justification for separate or different services." H.R.Rep. No. 101–485 (1990), *reprinted in* 1990 U.S.C.C.A.N. at 473; *accord Helen L.,* 46 F.3d at 337 (rejecting defendants' argument that it could not transfer funds from an institution to a community placement due to a contrary state law). Yet, integration cannot be achieved at any cost. Where plaintiffs' requested relief would be so unreasonable, given the demands of the state's mental health budget and resources, that it would alter the essential nature of its service, defendants may avoid making an accommodation. *See Conner,* 839 F.Supp. 1358–59 (refusing to order a state to create or expand community programs currently in existence); *Williams,* 937 F.Supp. at 531 (finding that courts may not require states to transfer millions of dollars from institutions to the community); *Cable,* 973 F.Supp. at 941.

B. Viability of Claims Alleged in the Complaint

In its motion for summary judgment, DMR erroneously contends that this Court previously narrowed plaintiffs' ADA and Section 504 claims to allow relief only if they prove discrimination on the basis of severity of disability. (DMR's Mem. Supp. Summ. J. at 2.) Essentially, DMR argues that the Court precluded plaintiffs from demonstrating a violation of section 35.130(d)'s

integration mandate. Additionally, DSS proposes that plaintiffs have not pleaded that it discriminated against STS residents based on severity of disability in the provision of vocational rehabilitation services. Each of these claims is without merit.

***12** Count II of the Third Amended Complaint states in relevant part:

> By failing to provide residents of Southbury Training School the opportunity to receive state support in the community rather than in a segregated institution *and* by failing to provide the most severely handicapped residents of Southbury Training School with the same opportunity to benefit from programs and community living as are provided residents of STS with mild disabilities, defendants have violated plaintiffs' rights secured by the Americans with Disabilities Act, 42 U.S.C. § 12132, and the Rehabilitation Act, 29 U.S.C. § 794.

(Third Am. Compl. ¶ 87.) (emphasis added). The first portion of Count II alleges that the defendants violated section 35.130(d) by unnecessarily segregating STS residents. The second portion claims that they have discriminated impermissibly on the basis of severity of disability.

In regard to DMR's contention, the agency correctly observes that the Court stated in its ruling on defendants' motion to dismiss that:

> [P]laintiffs allege that defendants, by failing to consider certain severely handicapped residents for community placement, have practiced discrimination on the basis of severity of disability. This Court considers whether relief may be granted based upon such a claim.

Messier, 916 F.Supp. at 140. However, DMR attempts to distort this statement's plain meaning. Clearly, the Court merely addressed whether plaintiffs could maintain ADA and Section 504 claims based upon their allegation of discrimination based on the degree of disability. Contrary to DMR's assertion, the Court did not foreclose plaintiffs' option to show that it violated section 35.130(d)'s integration mandate. Both of these claims remain viable at the present time.

Plaintiffs also have properly pleaded that DSS violated the ADA and Section 504 by allegedly discriminating against the most severely mentally retarded STS residents in the administration of vocational services. The Federal Rules of Civil Procedure implement the policy of notice pleading, whereby plaintiffs need only make a plain statement of their claims in the complaint. Using this as a guide, Count II can be read to include the allegation that DSS fails "to provide the most severely handicapped residents of Southbury Training School with the same opportunity to benefit from programs," such as vocational services, "as are provided residents of STS with mild disabilities."

C. Claims Against DMR and STS

The Court denies plaintiffs' and DMR's motions for summary judgment on claims brought under the ADA and Section 504 because two important genuine issues of material fact remain. First, neither party's evidence is conclusive regarding what constitutes the most integrated setting appropriate to the needs of STS residents—STS or the community. Otherwise stated, neither party's evidence clearly establishes whether the defendants currently are providing services to STS residents in an unnecessarily segregated setting. Second, a genuine issue exists concerning whether DMR and STS refuse to consider profoundly or severely mentally retarded residents for community placement according to the degree of their disability.

***13** Regarding the first question, both sides dispute the extent to which STS enables its disabled residents to interact with non-disabled persons. In addition, both parties disagree as to whether specific cases exist where the defendants placed residents at STS, even though IDTs recommended community placement as the most appropriate placement. (Defs.' Br. Opp. Summ. J. at 34.) If such cases exist, then issues of fact arise concerning whether DMR offered these residents a choice of moving to the community, and whether the residents accepted or refused. Furthermore, both sides dispute the reasons behind DMR's development of fewer community placements in recent years. *Compare* (Pls.' Mem. Supp. Summ. J. at 7) *with* (Defs.' Br. Opp. Summ. J. at 44; DMR's Mem. Supp. Summ. J. at 10.) (arguing that this state of affairs results naturally from the fact that only a few STS residents wish to move to the community).

Plaintiffs' attempt to draw comparisons to *Thomas S.* fails because STS is an institution tailored only to the needs of mentally retarded individuals, whereas *Thomas S.* found discrimination where mentally retarded persons were being treated in psychiatric hospitals for the mentally ill. 699 F.Supp. at 1184. The facts establishing an ADA violation in this case prove less clear than in *Thomas S.*

Plaintiffs' comparisons with *Helen L.* also ring hollow. In *Helen L.,* both parties stipulated that the plaintiff did not require institutional care, and that with attendant services, she could live with her family in her own home. *See* 46 F.3d at 329. In contrast, the defendants have made no such stipulation. The evidence is inconclusive concerning whether STS residents require institutional care or whether their needs could be met adequately in the community.

Similarly, DMR fails to establish its proposed "fundamental alteration" affirmative defense for two reasons. First, this Court has previously eliminated the possibility that it will order the closure of STS or the movement of all STS residents to the community in this case. *See* Ruling Mot. Opt Out at 4, 5, 21; Ruling Mot. Intervene at 3–4; Ruling Application Exclusion at 2. Second, DMR has produced no evidence at this juncture to show that placing STS residents in the community would impose a fundamental change to its existing programs and services.

With regard to whether DMR and STS practice discrimination on the basis of severity of handicap, DMR contends that its policy for the previous ten years has been that "no person is excluded from any particular residential placement, including community placement, solely or merely due to the severity of his or her disabilities." (DMR's State. Undis. Facts at 1; Moriarity Dep. at 51; Defs.' Resp. 2nd Set Interrogs. ¶ 10.) DMR also points to prior cases and state statutes to support this proposition. *See United States v. Connecticut,* No. N–86–252 (EBB) (Implementation Plan at 6); *Connecticut Ass'n Retarded Citizens v. Thorne,* No. H–78–653 (TEC) (Consent Decree and Final Order); Conn. Gen Stat. § 17a–210 (1997). In response, plaintiffs correctly note that prior adjudications and statutory directives do not conclusively establish whether defendants currently follow these mandates.

***14** DMR's statistical evidence[10] similarly fails to prove definitively that it does not discriminate against the most severely mentally retarded STS residents. From July 1, 1994 through May 14, 1998, there were 386 total referrals for consideration for specific community placement services. Class members with: (1) profound and severe mental retardation made up 252 (65.1%) of those referrals; (2) moderate mental retardation made up 86 (22.2%); (3) mild mental retardation made up 46 (11.9%); and (4) no mental retardation made up 2 (0.5%). Out of those 386 referrals, 61 STS residents were placed in the community. Class members with: (1) profound and severe mental retardation made up 40 (65.5%) of those placements; (2) moderate mental retardation made up 11 (18.0%); (3) mild mental retardation made up 9 (14.7%); and (4) no mental retardation made up 1 (1.6%). Indeed, this evidence reveals that defendants refer and place significant numbers of STS residents with profound and severe mental retardation in the community.

On the other hand, the evidence suggests that residents with profound and severe mental retardation possess less chance to be referred for community placement and actually placed in the community. While residents with profound and severe mental retardation constitute 78.3% of the entire STS population, they only make up 65.1% of those referred for community placement, and 65.5% of those actually placed in the community. When compared with the overall percentage of STS residents broken down by level of retardation, the percentage of residents with profound and severe mental retardation referred and placed in the community actually drops. At the same time, the percentage of STS residents with moderate and mild mental retardation rises from 21.5% to 34.1% for those referred and 32.7% for those placed.

Given the inconclusive nature of the statistical evidence, a reasonable trier of fact could find for either party on plaintiffs' ADA and Section 504 claims. *See Anderson,* 477 U.S. at 248. Therefore, the Court declines to award summary judgment to plaintiffs or DMR on these claims.

D. Claims Against DSS

On the other hand, the Court awards summary judgment to DSS on Count II because plaintiffs do not have standing to pursue their claim that DSS denies STS residents vocational rehabilitation services based on the severity of their disabilities. The Bureau of Rehabilitation Services ("BRS"), which is a unit of DSS, possesses responsibility to administer vocational services in the State of Connecticut. *See* Conn. Gen.Stat. § 17b–651 (1997); 29 U.S.C. § 721(a). BRS acts pursuant to General Statutes § 17b–650 *et seq.* and state agency regulations that set out bureau procedures. *See* Conn. Agencies Regs. § 10–102–20 *et seq.* (1997).

Eligible persons may apply for vocational rehabilitation services with BRS. *See* Conn. Gen.Stat. § 17b–653. "Any applicant for or recipient of vocational rehabilitation services may request an informal review of any decision made by the bureau pursuant to section 17b–653." Conn. Gen.Stat. § 654(a). In addition, "any applicant for or recipient of vocational services who is aggrieved by a decision made by the bureau pursuant to section 17b–653 may request an administrative hearing, by making a written request to the director" of BRS. Conn. Gen.Stat. 17b–654(b). Finally, an "individual who is aggrieved by a final agency decision made pursuant to subsection (b) of this section may appeal therefrom in accordance with section 4–183." Conn. Gen.Stat. § 17b–654(c). Under section 4–183, a party may seek judicial review of an administrative decision in state court when that party "has exhausted all administrative remedies" and has been "aggrieved by a final decision" by the relevant agency.

Conn. Gen.Stat. § 4–183(a).

***15** To establish their claim, plaintiffs rely on a BRS consultant's deposition testimony that BRS *likely* would not provide vocational services to profoundly retarded residents incapable of communicating above an eighteen-month-old level, (Digalbo Dep. at 132–34) (emphasis added), and point out that no STS resident currently receives vocational services. (DSS' Resp. Req. Admis. ¶ 26.) However, state law clearly requires a person to request or apply for vocational services in order to trigger BRS' duty to consider the applicant for those services. Plaintiffs have presented no evidence that any class member applied for vocational services with BRS and was denied them subsequently. Nor have plaintiffs come forward with evidence that they were aggrieved by any decision by BRS. Nothing in Connecticut statutes or case law requires BRS to affirmatively seek out every person in Connecticut who might need vocational services, without a prior application. This set of facts would prevent administrative review and judicial review under Connecticut state law, and it precludes judicial review in this Court.

The hypothetical and speculative possibility that BRS might deny serives to one or more plaintiffs in the future does not fulfill the constitutional standing requirement that plaintiffs suffer an injury in fact.[11] In the absence of proof that plaintiffs requested vocational services and were denied them by BRS, plaintiffs do not possess standing to seek relief. As a result, the Court grants summary judgment to DSS on this claim.

IV. *Social Security Act Claims Against DSS, DPH, and DMR*

The Court previously held that 42 U.S.C. § 1983 provided a right of action for plaintiffs to assert a violation of Title XIX of the Social Security Act, otherwise known as the Medicaid Act. *See Messier,* 916 F.Supp. at 142–46; Ruling Mot. Dismiss by DPH and DSS at 10–22. In this regard, plaintiffs have alleged the following:

> 45. The defendant, Stephen A. Harriman, is the Commissioner of the Connecticut Department of Public Health. As the Commissioner he is responsible for conducting periodic inspections of the care, treatment and living conditions of approximately 200 classmembers living in buildings certified under Title XIX of the Social Security Act. As such he is required to conduct inspections pursuant to 42 C.F.R. §§ 456.600 *et seq.* and report all findings of noncompliance with the program and treatment requirements of the federal regulations to the single state Medicaid Agency (the Connecticut Department of Social Services) for appropriate enforcement action under 42 C.F.R. § 456.613.
>
> 65. The defendant Harriman has failed to conduct meaningful inspections in the STS residential facilities certified under Medicaid and recommend appropriate corrective action as a result of the failure of those facilities to meet the minimum needs of classmembers living in STS residential units certified under Medicaid.
>
> 66. The minimum needs of classmembers living in Medicaid certified units to treatment and services have not been met for nearly a decade because of the failure of the Department of Public Health and DMR to conduct inspections contemplated by Medicaid and DSS's failure to take any action on the reports as required by Medicaid.
>
> ***16** 88. Defendants DMR, Department of Public Health and DSS have violated the rights of some two hundred residents of Southbury Training School by not providing active treatment as required by 42 U.S.C. [§] 1396 *et seq.* by a) failing to provide training and habilitation services to all residents regardless of the nature or severity of his or her disability; b) failing to provide the professional services to residents including physical therapy, occupational therapy, medical services and psychological services; c) failing to develop adequate activities for residents; d) failing to provide individual treatment plans; e) failing to evaluate the appropriateness of continued placement at STS; f) failing to develop meaningful discharge plans.

(Third Am. Compl. ¶¶ 45, 65, 66, 88.) Both DPH and DSS have moved for summary judgment on these claims. After describing the structure of the state's administration of the Medicaid program, the Court will address each motion in turn.

A. Administration of the Title XIX Medicaid Program

The Social Security Act and the regulations promulgated by the Department of Health and Human Services ("HHS") that implement it "present as complex a legislative mosaic as could possibly be conceived by man." *City of New York v. Richardson,* 473 F.2d 923, 926 (2d Cir.1973); *accord Beverly Community Hosp. Ass'n v. Belshe,* 132 F.3d 1259, 1266 (9th Cir.1997) (finding that "clarity is recognized as totally absent from the Medicare and Medicaid statutes"), *cert. denied,* 119 S.Ct. 334 (1998); *Rehabilitation Ass'n of Va., Inc. v. Kozlowski,* 42 F.3d 1444, 1450 (4th Cir.1994) (characterizing Medicaid as "among the most completely impenetrable texts within human experience" and "dense reading of the most tortuous kind"). In light of this unfortunate reality, the Court will endeavor to explain clearly how Title XIX's

Medicaid program operates.

Title XIX requires participating states to designate "a single state agency to administer or to supervise the administration of" its Medicaid program. 42 U.S.C. § 1396a(a)(5). DSS is the state agency responsible for administering Connecticut's Medicaid program. *See* Conn. Gen.Stat. § 17b–260. In exchange for federal funds, DSS has submitted a Medicaid state plan which has been approved by HHS. (DSS' State. Undis. Facts ¶ 5.) Under its authority, DSS determines the eligibility of applicants for medical assistance, enrolls qualified providers in the program, and pays medical assistance to enrolled providers for covered services provided to eligible recipients subject to review on questions of medical necessity. (*Id.* ¶ 6.); 42 U.S.C. § 1396a(a)(23). Participating states must provide medical assistance to the aged, blind, disabled, and needy individuals with children. *See* 42 U.S.C. § 1396a(a)(10)(A). Medicaid also allows DSS to furnish medical assistance for services provided in intermediate care facilities for the mentally retarded ("ICF/MRs"). *See* 42 U.S.C. § 1396d(a)(15).

***17** The Act requires the state's Medicaid plan to provide for "the state health agency" to establish and maintain "health standards for private or public institutions in which recipients of assistance under the plan may receive care or services." 42 U.S.C. § 1396a(a)(9)(A). DPH is the state agency responsible for determining whether ICF/MRs are qualified to participate in Medicaid. *See* 42 U.S.C. § 1396a(a)(33)(B). Qualifications for a facility's participation in Medicaid include conditions relating to client rights, facility staffing and practices, active treatment services, health care services, physical environment, and dietetic services. *See* 42 C.F.R. §§ 483.400–483.480. If an ICF/MR satisfies these requirements, it may be certified for up to twelve months. *See* 42 C.F.R. §§ 442.100–442.109(a).

DPH performs the function of determining whether ICF/MRs meet the requirements for participation in Connecticut's Medicaid plan; however, HHS retains the ultimate control over this decision. *See* 42 U.S.C. §§ 1396a(a)(33)(B), 1396a(i). Specifically, if HHS "has cause to question the adequacy of [DPH's] determinations," HHS may make "independent and binding determinations concerning the extent to which individual institutions ... meet the requirements for participation." 42 U.S.C. § 1396a(a)(33)(B). These are commonly known as "look behind surveys." ICF/MRs also retain the right to appeal adverse certification decisions. *See* 42 C.F.R. § 431.151 *et seq.*

When a facility no longer meets the certification qualifications, if the facility's deficiencies immediately jeopardize the health and safety of its patients, DPH must terminate the facility's certification and the state may refuse payments for any individuals admitted to the facility. *See* 42 U.S.C. § 1396a(i)(1)(A). Where the facility's deficiencies do not immediately jeopardize the health and safety of its patients, DPH may "establish alternative remedies if the State demonstrates to the Secretary's satisfaction that the alternative remedies are effective in deterring noncompliance." 42 U.S.C. § 1396a(i)(1)(B). However, DPH may not take these actions until the facility has been given an opportunity for a hearing and a reasonable chance to correct the deficiencies. *See* 42 U.S.C. § 1396a(i)(2).

Once DPH or HHS certifies an ICF/MR, DSS executes a Medicaid provider agreement with the facility. *See* 42 C.F.R. §§ 442.10, 442.12, 442.30. This allows the state to distribute federal monies to the ICF/MR on behalf of eligible recipients residing there. DPH has certified several ICF/MRs located at STS for participation in Medicaid and DSS has executed provider agreements with these facilities. (DSS' State. Undis. Facts ¶¶ 10–14.)

In contrast to the certification and survey inspections conducted by DPH which focus on whether facilities as a whole are qualified to participate in Medicaid, Title XIX imposes administrative responsibilities on DSS which focus on the services provided to each individual Medicaid recipient. First, DSS must initially evaluate each recipient's need for admission at an ICF/MR prior to approving Medicaid payments for treatment. *See* 42 C.F.R. § 456.372. This control assures that patients will not be admitted to an ICF/MR unnecessarily. Second, DSS must prescribe requirements to govern a periodic review of residents' needs for continued stay in an ICF/MR ("utilization review" or "continued stay review") every six months. *See* 42 U.S.C. § 1396a(a)(30); 42 C.F.R. §§ 456.431–456.438. The purpose of these reviews is to "safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care." 42 U.S.C. § 1396a(a)(30)(A). Finally, DSS was formerly responsible to ensure that independent professional reviews ("IPRs") were conducted on each resident of an ICF/MR pursuant to former 42 U.S.C. § 1396a(a)(31) and to "take corrective action as needed" based on these findings under 42 C.F.R. § 456.613. DSS formerly fulfilled these responsibilities by arranging for DMR to conduct the IPRs and make the requisite findings. However, DMR ceased conducting IPRs when Congress amended 42 U.S.C. § 1396a(a)(31) in the Balanced Budget Act of 1997. (DSS' State. Undis. Facts ¶¶ 18–19.)

B. Certification Inspections and Surveys

***18** In a prior ruling, the Court may have suggested that plaintiffs could assert claims against DPH for a violation of their certification inspection duties, and against DSS for a failure to take corrective actions based on such findings.[12] Upon further consideration, the Court now

holds that neither DPH nor DSS may be liable based on these claims.

Several reasons dictate that DPH, DSS, and DMR cannot be liable for any alleged failure to discharge their certification duties. First, the Secretary of Health and Human Services retains ultimate control over all certification decisions. *See* 42 U.S.C. §§ 1396a(a)(33)(B), 1396a(i)(1)(B). Where HHS "has cause to question the adequacy of [DPH's] determinations," HHS may make "independent and binding determinations concerning the extent to which individual institutions ... meet the requirements for participation" in Medicaid. 42 U.S.C. § 1396a(a)(33)(B). Moreover, a facility's certification may last no longer than twelve months. *See* 42 C.F.R. § 442.109(a). Assuming *arguendo* that DPH breached its survey duties under the Medicaid Act, HHS retains complete authority to conduct look-behind surveys every twelve months to correct such problems. Plaintiffs have not brought suit against HHS in this case.

Second, several courts hold that the Medicaid Act does not afford recipients of assistance the right to seek relief against the state Medicaid agency or the state health agency based on a failure to comply with certification regulations. *See, e.g., Evelyn V. v. Kings County Hosp. Ctr.,* 956 F.Supp. 288, 296–98 (E.D.N.Y.1997) (concluding that state agencies may not be sued in connection with their enforcement of state standards on state-operated hospitals); *Evelyn V. v. Kings County Hosp. Ctr.,* 819 F.Supp. 183, 196–98 (E.D.N.Y.1993) (same); *Graus v. Kaladjian,* 2 F.Supp.2d 540, 541–44 (S.D.N.Y.1998) (denying a right to sue for a state's failure to ensure that the city complied with Medicaid laws); *Nicoletti v. Brown,* 740 F.Supp. 1268, 1279–80 (N.D.Ohio 1987) (holding that the Medicaid Act does not create enforceable rights against state officials for the continued provision of services that meet the requirements for certification).

For these reasons, the Court is persuaded that plaintiffs may not succeed on their claims for violations of defendants' certification and survey duties under Title XIX.

C. Independent Professional Reviews

In its motion for summary judgment, DSS acknowledges that the Court previously ruled that plaintiffs stated a claim for DSS' alleged failure to take corrective action based upon the findings of IPRs pursuant to 42 C.F.R. § 456.613. *See* Ruling Mot. Dismiss by DPH and DSS. However, DSS now contends that section 4751(b)(1) of the Balanced Budget Act of 1997 ("BBA"), which was enacted subsequent to the Court's ruling, eliminated its legal duty to supervise IPRs and to "take corrective action as needed" based on these findings. The Court agrees.

***19** 42 U.S.C. § 1396a(a)(31) formerly constituted the statutory authority pursuant to which HHS promulgated regulations in 42 C.F.R. §§ 456.600–456.613 governing IPRs. Prior to being amended by the BBA, section 1396a(a)(31) provided the following:

> A state plan for medical assistance must—with respect to services in an [ICF/MR] provide—
>
> (A) with respect to each patient receiving such services, for a written plan of care, prior to admission to or authorization of benefits in such facility, in accordance with regulations of the Secretary, and for a regular program of independent professional review (including medical evaluation) which shall periodically review his need for [ ] services;
>
> (B) with respect to [ICFs] within the State, for periodic onsite inspections of the care being provided to each person receiving medical assistance, by one or more independent professional review teams (composed of a physician or registered nurse and other appropriate health and social service personnel), including with respect to each such person (i) the adequacy of the services available to meet his current health needs and promote his maximum physical well-being, (ii) the necessity and desirability of his continued placement in the facility, and (iii) the feasibility of meeting his health care needs through alternative institutional and noninstitutional services; and
>
> (C) for full reports to the State agency by each independent professional review team of the findings of each inspection under subparagraph (B), together with any recommendations.

42 U.S.C. § 1396a(a)(31) (1992).

The BBA amended several provisions of the Medicaid Act. Specifically, section 4751(b)(1) of the BBA amended section 1396a(a)(31). After being amended, this provision now reads as follows:

> A state plan for medical assistance must—with respect to services in an [ICF/MR] provide, with respect to each patient receiving such services, for a written plan of care, prior to admission to or authorization of benefits in such facility, in accordance with the regulations of the Secretary, and for a written program of independent professional review (including medical evaluation) which shall periodically review his need for such services.

42 U.S.C. § 1396a(a)(31) (1998). Thus, the BBA deleted from section 1396a(a)(31) those provisions under former subsections (B) and (C) requiring IPR teams to inspect the adequacy of care provided to each recipient of assistance and report findings and recommendations to the state's Medicaid agency.

The legislative history of the BBA indicates that Congress intended to eliminate the obligation of state Medicaid agencies to supervise IPRs and to take corrective action based on them. H.R.Rep. No. 105–149 (1997) provides the following evidence of this intent:

> **Section 3451. ELIMINATION OF DUPLICATIVE INSPECTION OF CARE REQUIREMENTS FOR ICFS/MR AND MENTAL HOSPITALS**
>
> Under current law, States that provide services in mental hospitals and in intermediate care facilities for the mentally retarded (ICFs/MR) must provide for periodic inspections of care for each Medicaid beneficiary who receives services in the institution. Inspections of care have been conducted to assure that persons are receiving the appropriate level of care of adequate quality. The Department of Health and Human Services has established a new survey outcome-oriented process for mental hospitals and ICFs/MR. *Section 3451 eliminates inspection of care reviews in mental hospitals and ICFs/MR* and retains survey and certification reviews for the facilities.
> ***20** H.R.Rep. No. 105–149 (emphasis added). Another piece of legislative history explains the same intent by providing:
>
> **ELIMINATION OF DUPLICATIVE INSPECTION OF CARE REQUIREMENTS FOR ICFS/MR AND MENTAL HOSPITALS**
>
> **Section 3451**
>
> **HOUSE BILL**
>
> Eliminates Inspection of Care reviews in mental hospitals and ICFs/MR. Survey and certification reviews for the facilities would remain in place.
>
> Effective on date of enactment.
>
> **SENATE AMENDMENT**
>
> No provision.
>
> **CONFERENCE AGREEMENT**
>
> The conference agreement includes the House bill. H.R. Conf. Rep. 105–217, at 891–92 (1997), *reprinted in* 1997 U.S.S.C.A.N. 176, 512–13.

Congress' clear statement of its intent indicates that the BBA amended 42 U.S.C. § 1396a(a)(31) to eliminate IPRs. In the absence of statutory authority from Congress, HHS regulations embodied in 42 C.F.R. §§ 456.600–456.613 are no longer valid. Even though the Court's prior ruling indicated otherwise, the Court remains bound to enforce Congress' subsequent expression of its will to discontinue IPRs. The Eleventh Amendment prohibits federal courts from granting retroactive relief, whether it be for damages or an injunction, against states and state officials. *See Edelman v. Jordan,* 415 U .S. 651, 664–68 (1974) (holding that *Ex parte Young,* 209 U.S. 123 (1908) only allows for prospective injunctive relief). In addition, the Eleventh Amendment forbids federal courts from entering retroactive injunctive relief to remedy past violations of law which have been mooted by an amendment to a federal law. *See Green v. Mansour,* 474 U.S. 64, 73 (1975); *Marbley v. Bane,* 57 F.2d 224, 232 (2d Cir.1995). Even assuming that DSS breached its IPR duties under prior law, the BBA's subsequent amendment of 42 U.S.C. § 1396a(a)(31) prohibits the Court from granting any relief for such violations.

For the foregoing reasons, the Court dismisses all of plaintiffs' claims asserted against DPH, DSS, and DMR under Title XIX of the Social Security Act.

V. *Due Process Claims Against DPH Based on DNR Orders*

Plaintiffs declare that DPH's current policies relating to DNR orders violate procedural and substantive due process because private physicians may write such orders on nonterminally ill class members against their wishes. The Complaint provides in relevant part:

> [T]he defendant Harriman has violated the right of plaintiff classmembers to life without due process of law by developing and enforcing standards which permit community hospitals to write and implement DNR Orders on

> nonterminally ill classmembers without any process to ensure that the decision to withhold routine medical care is consistent with the wishes of the classmember.

(Third Am. Compl. ¶ 86(j).) DMR's Medical Advisory # 87–2 does not allow physicians to write DNR orders unless the patient is terminally ill based upon the opinion of two physicians including a specialist, the patient or guardian consents, and a DMR official reviews the order. (DPH's Mot. Summ. J. Ex. 5.) Medical Advisory # 87–2 applies to DMR-licensed facilities, but does not bind DPH-licensed facilities. In contrast, DPH permits physicians to write DNR orders if they serve the patient's best interests and they obtain informed consent from the patient or guardian. Thus, DPH does not require the presence of a terminal illness. Plaintiffs urge the Court to force DPH to adopt DMR's Medical Advisory # 87–2. (Pls.' Mem. Opp. Summ. J.)

***21** DPH makes three arguments in opposition. First, it maintains that plaintiffs do not have standing to bring this claim. Second, DPH proposes that it owes plaintiffs no duty of care. Finally, the agency submits that plaintiffs fail to show that DNR orders are written in violation of the Fourteenth Amendment. The Court does not reach these last two arguments because it holds that plaintiffs lack standing to obtain an injunction against DPH.

A. Constitutional Elements of Standing

Article III provides that the jurisdiction of federal courts extends only to "cases and controversies." The requirement of justiciability remains open throughout all stages of litigation and may be raised by the parties at any time. *See National Org. for Women, Inc. v. Scheidler,* 510 U.S. 249, 255 (1994); *Bender v. Williamsport Area Sch. Dist.,* 475 U.S. 534, 546–47 (1986). The doctrine of standing is "an essential and unchanging requirement of Article III," *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992), which along with the other justiciability doctrines "defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded." *Allen v. Wright,* 468 U.S. 737, 750 (1984).

To satisfy the constitutional requirements of standing, the party invoking federal jurisdiction must demonstrate the following elements:

> (1) injury in fact, by which we mean an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) a causal relationship between the injury and the challenged conduct, by which we mean that the injury fairly can be traced to the challenged action of the defendant, and has not resulted from the independent action of some third party not before the court; and (3) a likelihood that the injury will be redressed by a favorable decision, by which we mean that the prospect of obtaining relief from the injury as a result of a favorable ruling is not too speculative.

Northeastern Fla. Chapter Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 663 (1993) (citations, footnotes, and internal quotation marks omitted); *see also Lujan,* 504 U.S. at 560–61. These elements are the "irreducible minimum" required by the Constitution. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 472 (1982).

Because plaintiffs seek equitable relief instead of damages, they need not show actual injury, but rather must demonstrate a likelihood of imminent future injury. *See City of Los Angeles v. Lyons,* 461 U.S. 95, 101–02, 105 (1983); *Golden v. Zwickler,* 394 U.S. 103, 109–10 (1969). The threat of future injury must be real and immediate, not conjectural or hypothetical. *Lyons,* 461 U.S. at 102. A mere showing that the plaintiff has in the past been subject to the type of injury at issue, without anything more, is insufficient to establish a likelihood of future injury. *Id.* at 105–06. Litigants seeking to enjoin the activity of a government agency also must contend with "the well-established rule that the Government has traditionally been granted the widest latitude in the dispatch of its own internal affairs." *Allen,* 468 U.S. at 761 (quoting *Rizzo v. Goode,* 423 U.S. 362, 378–79 (1976)). Parties may not use the judicial system to "seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties." *Allen,* 468 U.S. at 761. Rather, a case or controversy exists only when parties attempt to enforce specific legal obligations.

1. Standing at the Summary Judgment Stage

***22** Each element of standing "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i .e., with the manner and degree of evidence required at the successive stages of the litigation." *Lujan,* 504 U.S. at 561 (citing *Simon v. Eastern Ky. Welfare Rights Org.,* 426 U.S. 26, 45 n.25 (1976)). When a defendant raises standing on a motion to dismiss, "general factual allegations of injury resulting from the defendant's conduct may suffice." *Lujan,* 504

U.S. at 561. "In response to a summary judgment motion, however, the plaintiff can no longer rest on such 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts,' Fed.R.Civ.P. 56(e), which for purposes of the summary judgment motion will be taken to be true." *Lujan,* 504 U.S. at 561. As a result, the mere fact that the Court considered this issue in its prior Ruling on Motion for Class Certification[13] does not prohibit reconsideration at summary judgment, since plaintiffs must meet a higher burden at this stage.

2. Standing in the Context of a Class Action

Standing cannot be acquired through the back door of a class action. "[N]amed plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other unidentifiable members of the class to which they belong and which they purport to represent." *Simon,* 426 U.S. at 40 n.20; *Warth v. Seldin,* 422 U.S. 490, 502 (1975); *accord National Org. for Women,* 510 U.S. at 802; *Bailey v. Patterson,* 369 U.S. 31, 32–33 (1962). Thus, "if none of the named plaintiffs purporting to represent a class establishes a requisite case or controversy with the defendant, none may seek relief on behalf of herself or himself or any other member of the class." *O'Shea v. Littleton,* 414 U.S. 488, 494 (1974); *accord Rizzo,* 423 U.S. at 371; *Allee v. Medrano,* 416 U.S. 802, 829 (1974) (Burger, C.J., concurring) (stating that "a named plaintiff cannot acquire standing to sue by bringing his action on behalf of others who suffered injury which would have afforded them standing had they been named plaintiffs").

B. Application of Standing Requirements

1. Injury in Fact

Plaintiffs fail to establish by affidavits or other evidence that they will suffer a likelihood of imminent future injury by being subjected to a DNR order not written in accordance with the Constitution. Instead, they set forth a scenario full of speculation insufficient to invoke federal jurisdiction. *See, e.g., Lyons,* 461 U.S. at 105–06; *Lujan,* 504 U.S. at 561; *Simon,* 426 U.S. at 44.

The evidence reveals that only a small percentage of STS residents were subjected to a DNR order, proper or improper, in recent years. Less than one and a half percent of current STS residents have been subjected to a DNR order. (Pls.' Resp. Req. Admis. Ex. 1 ¶ 11.) From 1995 to 1997, a DNR order was issued by a physician in four percent of all admissions at private hospitals. (McDonald Aff. Ex. 2 ¶ 9.) While plaintiffs allege that improper DNR orders are written as a matter of course, their own expert does not subscribe to this view. (Kugel Dep. at 260.) Furthermore, plaintiffs have failed to come forward with a single example where physicians wrote a DNR order on a nonterminally ill patient or where one issued without consent of the resident's guardian.[14] (*Id.* at 263.) Even assuming that plaintiffs could demonstrate that some members of the class will likely suffer injury in the future, they have not presented any named plaintiff fitting this description. *See Warth,* 422 U.S. at 502; *O'Shea,* 414 U.S. at 494. Plaintiffs concede that no named plaintiff has ever been subjected to a DNR order of any kind. (Pls.' Resp. Req. Admis. ¶ 7 .)

***23** Just as importantly, DPH's evidence confirms that the four hospitals which handle 97% of all hospital admissions of STS residents have adopted DMR's Medical Advisory # 87–2 as part of their DNR protocol. (Policies of Waterbury Hosp., New Milford Hosp., Danbury Hosp., and St. Mary's Hosp. Ex. 6.) Hence, plaintiffs' contention that DPH's policies result in an inconsistency with DMR's Medical Advisory # 87–2 is inapplicable 97% of the time.

In seeking an injunction, plaintiffs must demonstrate a likelihood of imminent future injury. As *City of Los Angeles v. Lyons,* 461 U.S. 95 (1983) illustrates, this proves to be a high burden. In that case, the plaintiff alleged that police officers injured him by applying a chokehold without provocation or resistance. In addition to seeking damages, the plaintiff requested an injunction against the city to prevent police officers from applying chokeholds in the future. The Court reasoned that in order to establish an actual controversy

> [P]laintiff would have had not only to allege that he would have another encounter with the police but also make the incredible assertion either (1) that all police officers in Los Angeles always choke any citizen with whom they happen to have an encounter ... or (2) that the City ordered or authorized police officers to act in such a manner.

Id. at 106. Accordingly, the Court denied the injunction because plaintiffs' claim of future injury was too speculative to establish injury in fact. *See id.* at 108.

Given the high burden set forth in *Lyons,* plaintiffs cannot meet the injury requirement of standing. To credit plaintiffs' assertion that they face a substantial likelihood that a DNR order will issue on a nonterminally ill STS resident without proper consent, the Court must assume that: (1) physicians likely will violate their hospitals' internal policies, (Kugel Dep. at 261); (2) physicians likely will ignore federal and state regulations requiring patients or guardians to give informed consent to

treatment and procedures, *see* 42 C.F.R. § 489.102(a)(4); Conn. Agencies Regs. § 19–13–D3(d)(8); (Joint Comm'n Accreditation Health Care Orgs. Standard RI Ex. 8 1.2.); and (3) physicians likely will risk being charged with medical malpractice by issuing a DNR order without the presence of a terminal illness. *See Van Steensburg v. Lawrence & Mem'l Hosp.,* 194 Conn. 500, 506 (1984) (holding that a violation of hospital rules constitutes direct evidence of negligence). Based on the evidence, the Court finds that plaintiffs do not fulfill Article III's injury in fact requirement.

2. Causation

Plaintiffs also have not established that their risk of harm is fairly traceable to DPH's refusal to adopt Medical Advisory # 87–2. Instead, the class members' alleged risk of injury results directly from the independent actions of two third parties not before the court: (1) physicians at private hospitals not subject to DMR's policy regarding DNR orders; and (2) guardians of STS residents.

***24** DPH does not issue DNR orders. The agency merely licenses certain private hospitals that employ physicians who may someday issue a DNR order on an STS resident. No employer-employee relationship exists between DPH and the physicians. As a result, private physicians issue DNR orders without any affirmative action, coercion, consultation, or guidance of DPH. (Kugel Dep. at 261.; Pls' Updated Resp. Interrogs. Ex. 4 1.h.)[15] The evidence also indicates that DNR orders on STS residents only occur with the consent of the residents or their guardians. (Kugel Dep. at 263.) This conforms with state tort law and regulations that mandate informed consent. Even if a physician wrote an improper DNR order, it could not be carried out without the informed consent of the plaintiffs or their guardians.

Plaintiffs seek to challenge DPH's failure to promulgate regulations to control the actions of these third parties who may cause harm to the residents. The Supreme Court utilizes a higher burden than normal to govern the standing inquiry in such cases:

> When, however, as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well. The existence of one or more of the essential elements of standing 'depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict,' and it becomes the burden of the plaintiff to adduce facts showing that these choices have been or will be made in such manner as to produce causation and permit redressability of injury. Thus, when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish.

Lujan, 504 U.S. at 561–62 (citations omitted); *accord Allen,* 468 U.S. at 758; *Simon,* 426 U.S. at 44–45. Thus, plaintiffs must demonstrate that DPH's action or inaction "is more than only one of the many factors whose relative influence may affect the third parties' behavior. The facts alleged must show that the agency action is at least a substantial factor motivating the third parties' actions." *Community for Creative Non–Violence v. Pierce,* 814 F.2d 663, 669 (D.C.Cir.1987) (citations omitted).

Plaintiffs fail to show that DPH's policies are a "substantial factor" motivating the actions of physicians at private hospitals. Plaintiffs' expert witness acknowledges that no DNR orders "were instigated at the request or through affirmative action or coercion or pressure or guidance of" DPH. (Kugel Dep. at 261.) Nor do plaintiffs possess any basis "to allege that DNR orders on these individuals were issued at the direction or in consultation with officials or employees of the Department of Public Health." (Pls.' Updated Resp. Interrogs. Ex. 4 1.h.) Where a risk of injury is caused by the independent action of some third party not before the court, standing ordinarily is not satisfied. *See, e.g., Whitmore v.. Arkansas,* 495 U.S. 149, 155–56 (1990); *Allen,* 468 U.S. at 757–59; *Lyons,* 461 U.S. at 105; *Simon,* 426 U.S. at 41–42; *Rizzo,* 423 U.S. at 362; *Warth,* 422 U.S. at 504–05. Two Supreme Court cases demonstrate this principle.

***25** In *Simon v. Eastern Ky. Welfare Rights Org.,* 426 U.S. 26 (1976), plaintiffs brought a class action on behalf of residents unable to afford hospital services against the Secretary of the Treasury and the Commissioner of Internal Revenue. They claimed that a revenue ruling extending favorable tax treatment to hospitals encouraged the hospitals to deny medical care to indigents. The Supreme Court held that "injury at the hands of a hospital is insufficient by itself to establish a case or controversy in the context of this suit, for no hospital is a defendant." *Id.* at 41.

Rizzo v. Goode, 423 U.S. 362 (1976) presented a similar situation. In that case, the plaintiffs alleged that the police department's disciplinary policies resulted in unconstitutional actions of "individual police officers *not named as parties* to the" suit aimed at minorities and other city residents. *Id.* at 371 (emphasis in original). The Court stated in relevant part:

> As the facts developed, there was

> no affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by petitioners—express or otherwise—showing their authorization or approval of such misconduct. Instead, the *sole* causal connection found by the District Court between petitioners and the individual respondents was that in the absence of a change in police disciplinary procedures, the incidents were likely to continue to occur, *not* with respect to them, but as to members of the classes they represented.

Id. (emphasis in original). The Court found no causation and held that plaintiffs lacked standing. *Id.* at 371–72.

As these cases and the evidence in this case make clear, plaintiffs lack standing to enjoin DPH and force them to adopt DMR's Medical Advisory # 87–2. Rather than enforcing a specific legal obligation of DPH, plaintiffs' "seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties." *Allen,* 468 U.S. at 761. In effect, plaintiffs ask the Court to decide that Medical Advisory # 87–2 is better than DPH's policy. This decision should be left to Connecticut's legislative and executive branches.

CONCLUSION

For the foregoing reasons, plaintiffs' motion for partial summary judgment [Doc. No. 349] is denied, defendant DMR's motion for summary judgment [Doc. No. 353] is denied, defendant DSS's motion for summary judgment [Doc. No. 356] is granted, and defendant DPH's motion for summary judgment [Doc. No. 359] is granted.

SO ORDERED.

APPENDIX

Level of Retardation	STS Population (April 1996)	Referrals to Community Placement ('94—'98)	Community Placements ('94—'98)
Severe and Profound	78.3%	252 (65.1%)	40 (65.5%)
Moderate	14.9%	86 (22.2%)	11 (18.0%)
Mild	6.6%	46 (11.9%)	9 (14.7%)
None	0.025%	2 (0.5%)	1 (1.6%)

Footnotes

1 The defendants are involved in similar litigation relating to STS. In 1986, the United States Department of Justice sued the State of Connecticut under the Civil Rights of Institutionalized Persons Act ("CRIPA"), 42 U.S.C. § 1997 *et seq.* (1997) to remedy unconstitutional conditions at STS. The two parties negotiated a Consent Decree providing for a comprehensive remedial plan to

ameliorate conditions at the institution. This Court approved the Consent Decree on December 22, 1986. *See United States v. Connecticut,* No. N–86–252 (EBB) (D.Conn. Dec. 22, 1986) (Order Approving Consent Decree).

> In 1990 and 1991, the Court approved two additional Consent Orders, which were negotiated in response to continuing deficiencies in the care and treatment of STS residents. When more deficiencies were discovered in 1993, the Court ruled the State in contempt of its prior orders. To correct the problem, the Court appointed a special master to evaluate the State's compliance and oversee the implementation of a remedial plan. The special master's role continues at the present time.

2 In contrast to the usual situation where the moving party is the defendant, when a plaintiff moves for summary judgment, a higher initial burden of going forward must be satisfied. In such cases, plaintiffs must show not only that no genuine issues of material fact exist, but also that the evidence establishes each element of its prima facie case. Only then will the burden shift to the defendant to rebut this showing. In moving for partial summary judgment, plaintiffs must meet this standard.

3 DSS correctly notes that a state may not be sued in federal court under the Eleventh Amendment. *See Hans v. Louisiana,* 134 U .S. 1 (1890). As a result, the State of Connecticut and any of its agencies are not proper defendants in this case. However, prospective injunctive relief may be awarded against state officers in their official capacity to halt violations of federal law under the doctrine of *Ex parte Young,* 209 U.S. 123 (1908). While acknowledging this reality, the Court nonetheless will refer to the defendants by their state agency names for the sake of simplicity, with an understanding that the state officials are the true parties in the case.

4 In this ruling, the Court grants summary judgment in favor of DSS on this claim. *See infra* Part III.

5 The Court grants summary judgment in favor of DSS, DPH, and DMR on all claims asserted against them under the Social Security Act. *See infra* Part IV. Because all claims against DSS have been dismissed, the agency is no longer a defendant in this case.

6 The Court grants summary judgment in favor of DPH on this claim. *See infra* Part V. Because all claims against DPH have been dismissed, the agency is no longer a defendant in this case.

7 The elements of a Section 504 prima facie case are virtually identical, except that Section 504 covers entities receiving federal financial assistance, whereas Title II of the ADA covers public entities. *See Rothschild v. Grottenthaler,* 907 F.2d 286, 289–90 (2d Cir.1990).

8 This regulation is almost identical to Section 504's integration regulation.

9 Pursuant to Section 504, the former Department of Health, Education and Welfare, now the Department of Health and Human Services, promulgated similar regulations:

> A recipient [of federal funding], in providing any aid, benefit or service, may not ... [p]rovide different or separate aid, benefits or services to handicapped persons or to any class of handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits or services that are as effective as those provided to others.

45 C.F.R. § 84.4(b)(1).

10 *See* (Moore Aff.App. Community Referral Placement Report, 7/1/94–5/14/98) reprinted in Appendix.

11 *See infra* Part V for a complete discussion of the constitutional elements of standing.

12 The Court stated that:

> [P]laintiffs' claims relating to community placement are not brought against DSS and DPHAS, except to the extent that 42 U.S.C. § 1396a(a)(31) and 42 C.F.R. § 456.609 require inspection teams to determine whether it is 'necessary and desirable' that ICF/MR residents' remain in their current placement, and whether it is feasible to meet their needs through 'alternative institutional or noninstitutional services.' 42 C.F.R. § 456.609.
>
> [I]t is unclear to the Court whether plaintiffs assert violations by DPHAS of its facility inspection duties .... If plaintiffs in fact assert violations of DPHAS' inspection duties in addition to DSS' inspection duties, then plaintiffs must promptly seek to amend their complaint to reflect this distinction. However, whether or not plaintiffs assert such violations by DPHAS, the statutory scheme clearly requires DSS to take the corrective actions outlined in 42 U.S.C. § 1396a(i) and 42 C.F.R. §§ 442.117–442.119 upon a finding of deficiencies found pursuant to *either* DPHAS' facility inspections *or* DSS' IR inspections.

Ruling Mot. Dismiss by DSS and DPH at 10 n.7, 20–21 n.12 (emphasis in original).

13 The Court previously allowed plaintiffs to establish standing based on their allegation that at some point one of the named members of the class would be transferred to a community hospital and subjected to an improper DNR order. *See* Ruling Mot. Class Certification at 4–5. Actual evidence is needed at the summary judgment stage.

14 In plaintiffs' opposition, they "dispute" whether there has been informed consent. However, they provide no citation to any

evidence to support this proposition. (Pls.' Mem. Opp. Summ. J. at 21.) While conclusory allegations may suffice earlier in the case, plaintiffs must present actual evidence at the summary judgment stage. *See Lujan,* 504 U.S. at 561.

15 In response to interrogatories, plaintiffs stated that they "have no basis, based on currently available information, to allege that DNR orders on these individuals were issued at the direction or in consultation with officials or employees of the Department of Public Health." (Pls.' Updated Resp. Interrogs. Ex. 4 1.h.)