1991 WL 58494
Only the Westlaw citation is currently available.
United States District Court, E.D. Pennsylvania.

DANIEL B., et. al.
v.
John F. WHITE, Stephen Eidelman, and the City of Philadelphia.

CIV. A. No. 79–4088. | April 11, 1991.

Attorneys and Law Firms

Paul M. George, Developmentally Disabled Advocacy Project Philadelphia, Pa., for plaintiffs

Alan J. Davis, City Solicitor, Joseph M. Davidson, Shelly Yanoff and Marc H. Myers, Asst. City Sols., Richard J. Gold and Pauline C. Cohen, Chief Asst. City Sols., Philadelphia, Pa., for Leon Soffer Ph.D. and City of Philadelphia.

Michael Harvey, Deputy Atty. Gen., Pennsylvania Dept. of Justice, Civ. Litigation Div., Harrisburg, Pa., for Helen O'Bannon

Opinion

FINDINGS OF FACT AND CONCLUSIONS OF LAW

SHAPIRO, District Judge.

***1** Before the court is plaintiffs' motion for a preliminary injunction. For the reasons stated below, the motion will be granted.

I. HISTORY OF THE CASE

This class action was brought by a group of mentally retarded persons who claimed a statutory and constitutional right to be deinstitutionalized and placed in community living arrangements ("CLAs"). On March 13, 1986, the court approved a Settlement Agreement and entered final judgment. The judgment certified a class comprised of 117 mentally retarded individuals residing at Woodhaven Center, a seventy-acre residential institution.

Under the terms of the Settlement Agreement, the Secretary of the Department of Public Welfare for the Commonwealth of Pennsylvania agreed to allocate sufficient funds to the City of Philadelphia to provide CLAs to at least 23 members of the plaintiff class each year for a five year period. *See* Settlement Agreement at ¶ 1. This promise to provide funding was consistent with the Department of Public Welfare ("DPW") plans for state-wide expansion of community services and was to be in addition to any expenditures for CLAs ordered by other federal or state courts. However, the parties acknowledged that implementation of the Settlement Agreement was "contingent upon the availability of sufficient funds for a reasonable number of placements on a state-wide basis." *Id.* at pp. 1–2. If funding were available, the City of Philadelphia was required to provide CLAs and community services to members of the plaintiff class until they were no longer necessary. *Id.* at ¶ 2. The Settlement Agreement guaranteed that the parents and/or guardians of the class members would have a significant role in any placement decision. *Id.* at ¶ 9.

The Settlement Agreement provided that it, "shall not be construed to constitute a consent decree enforceable by the Court's power of contempt." *Id.* at ¶ 7. If defendants failed to abide by the Settlement Agreement, the court could reinstate the action without prejudice to any party. *Ibid.* The Settlement Agreement is to terminate on June 30, 1991 and the action dismissed on that date.

More than four years after the Settlement Agreement was approved, the plaintiff class moved for a hearing to determine DPW's compliance with the Agreement. Plaintiffs claimed that DPW had placed less than 40 class members in CLAs. Plaintiffs did not make any claims against the City of Philadelphia.

The court held a three-day evidentiary hearing. Plaintiffs maintained that although the Settlement Agreement did not permit exercise of the court's power of contempt, it did contemplate specific performance. Accordingly, the class moved that the court order DPW to fund CLAs for the 77 class members remaining in Woodhaven. DPW contended that it was not obliged to comply with the Settlement Agreement because sufficient funds for a reasonable number of community-based placements had not been available on a state-wide basis. DPW also argued that the court could not order specific performance because plaintiffs' exclusive remedy under the Settlement Agreement was reinstatement of the case.

***2** Because plaintiffs' motion raised difficult and complex questions of law and fact that would take time to decide, the court reinstated the litigation to extend its jurisdiction beyond the June 30, 1991 termination of the Settlement Agreement. *See* Order of March 14, 1991. Plaintiffs then moved for a preliminary injunction requiring the defendants to fund some community placements *pendente lite*. *See* Plaintiffs' Supplemental Pleading and Proposed Conclusions of Law. The court, granting the motion,

makes findings of fact and conclusions of law in accordance with Fed.R.Civ.P. 52(a).

II. FINDINGS OF FACT

Of the 117 original class members, 77 are still residing at Woodhaven. N.T. 1/11/91 at 19–21. All 77 class members remaining at Woodhaven were referred for discharge between 1979 and 1985. *See* Pl.Ex. 10.[1] A person is referred for discharge after a clinical team concludes that continued institutionalization is no longer necessary. N.T. 1/11/91 at 21.

Mary DiNunzio, a class representative, was referred for discharge in 1979. She has continually requested placement in a group home since July 1986. *Id.* at 25. DiNunzio lives in a Woodhaven unit with 31 women, shares a bedroom with three women, and shares a bathroom with eight women. *Id.* at 30. Institutionalization caused her emotional distress.

DiNunzio would benefit from placement in a CLA. She has developed all her secondary self-care skills and cannot achieve further development without experiencing life outside an institution. *Id.* at 29–30.

Eileen Friel, another class member, has lived in Woodhaven since 1975. N.T. 2/21/91 at 18. During her first few years at Woodhaven, she became toilet trained and learned to feed and dress herself. *Id.* at 20. Friel was referred for discharge in 1983. *See* Pl.Ex. 10.

Friel has not continued to improve since then. When she is at home, she does not assert freedoms that her parents allow. For example, she will not choose her own clothes; at Woodhaven, her clothes cabinets are locked. N.T. 2/21/91 at 21.

Friel has regressed in some respects. She does not interact with non-disabled people as well as she did before entering Woodhaven. Her speech skills have deteriorated and she is unable to climb stairs. Now she mimics the aggressive behavior of other patients and hits herself in the head with the base of her hand. She no longer knows how to set the table as she did before entering Woodhaven. *Id.* at 22–15.

III. DISCUSSION

At closing argument on plaintiffs' motion to compel compliance with the Settlement Agreement, plaintiffs requested that the court order DPW to place 39 class members in CLAs by March 1, 1992, and the remaining 38 class members in CLAs by March 1, 1993.[2] N.T. 3/14/91 at 4. Plaintiffs' prayer for a preliminary injunction does not request specific relief. Plaintiffs presumably intended to request preliminary relief similar to the remedy proposed on the motion to compel compliance—that DPW be ordered to fund CLAs for the class members. If DPW provides funding, the City of Philadelphia is obligated under the Settlement Agreement to plan and develop CLAs. *See* N.T. 2/21/91 at 11; 3/14/91 at 35.

***3** Plaintiffs' motion for preliminary injunction is unopposed and could be granted for that reason alone. However, because this case raises important issues of law and directly affects the lives of many people, the court will address the merits.

In considering a motion for a preliminary injunction, the court must weigh the probability of irreparable injury to the moving party in the absence of relief, the possibility of harm to the nonmoving party if preliminary relief is granted, the likelihood of success on the merits, and the public interest. *Alessi v. Department of Public Welfare,* 893 F.2d 1444, 1447 (3d Cir.1990).

Continued institutionalization of the class members, even for a short time, will cause irreparable harm. All class members have been eligible to leave Woodhaven and move into CLAs since the Settlement Agreement was entered in 1986. The clinical teams responsible for the class members' care believe that each class member remaining in Woodhaven is capable of living in a less restrictive environment. The poignant testimony about the condition of Mary DiNunzio and Eileen Friel demonstrated that confining these women in Woodhaven has not only impeded their development but caused them to regress. Litigating this case to final judgment may take over a year. The failure to provide interim relief to class members during this time period would cause them irreparable harm.

DPW will suffer little, if any, harm from a preliminary injunction requiring it to fund three CLAs per month. The court is confident that funding for three new CLAs per month is available in DPW's fiscal year 1990/91 budget and will be available in any future budget. DPW's budget process for mental retardation services is, to put it mildly, fluid. The Pennsylvania legislature sets the total budget for maintaining current community-based placements and developing new ones. After the initial appropriation is made, additional funding for expanding community-based placements is available from various sources. It is common practice for DPW to shift funds designated for non-residential placements to community-based placements. N.T. 2/21/91 at 59, 67–68. Funding for community-based placements also can be made available through "supplemental appropriations" (mid-year requests by DPW for additional state funding), "carryover funds" (state funds that are appropriated in one fiscal year but are spent in the following fiscal year), and the "rebudget process" (reallocations within the DPW budget based on

changing needs and circumstances). *See* N.T. 2/21/91 at 45, 72–76. Funding can be provided through these mechanisms for the CLAs that must be developed under the proposed injunction during the present fiscal year. As counsel for defendant aptly stated at closing argument, "obviously the funds can be made available." N.T. 3/14/91 at 30.

There is no possibility of harm to defendant City of Philadelphia; it has already agreed to develop CLAs for the class members so long as DPW provides funding. N.T. 2/21/91 at 21. The Chief Deputy City Solicitor stated at oral argument that the City was capable of developing at least three placements per month. *See* N.T. 3/14/91 at 33–35.

***4** If the Settlement Agreement were not enforced and the case proceeded to trial, it is likely that plaintiffs will prevail on the merits. The third amended complaint seeks declaratory and injunctive relief under 42 U.S.C. § 1983 for all Woodhaven residents who are unnecessarily institutionalized. Plaintiffs allege that defendants' failure to place the class members in suitable CLAs violates the Eighth and Fourteenth Amendments to the United States Constitution, the Rehabilitation Act of 1973, 29 U.S.C. § 794, the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. § 6001 *et. seq.,* and defendants' duty under Pennsylvania law to provide treatment in the least restrictive alternative. Third Amended Complaint at ¶¶ 48–50.

At the final pretrial conference plaintiffs withdrew their claims under the Eighth Amendment and 42 U.S.C. § 6001 because of changes in the law subsequent to the filing of the complaint. *See Daniel B. v. O'Bannon,* slip op. at 3 (E.D.Pa. June 11, 1984). The state law claim must also be dismissed. *See Pennhurst State School & Hospital v. Halderman,* 465 U.S. 89 (1984) (Eleventh Amendment bars a federal suit against state officials to enforce state law). The claims remaining are under the Rehabilitation Act and the Fourteenth Amendment. In view of the long-standing policy of considering federal statutory issues when reliance on constitutional law can be avoided, plaintiffs' Rehabilitation Act claim will be addressed first.

Plaintiffs may not prevail under section 504 of the Rehabilitation Act. It provides, in pertinent part, that:

No otherwise qualified handicapped individual in the United States * * * shall, solely by reason of his handicap be excluded from participation in, be denied the benefits of, or be subjected to discrimination under a program or activity receiving federal financial assistance.

29 U.S.C. § 794. Regulations promulgated under that statute prohibit a recipient of federal funds from providing different or separate services to handicapped people unless "such action is necessary to provide handicapped people with * * * services that are as effective as those provided to others." 45 C.F.R. § 84.4(b)(1)(iv). For services to be "equally effective" under the regulations they:

[M]ust afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.

45 C.F.R. 84.4(b)(2).

To state a claim under section 504, plaintiffs must prove that 1) they are handicapped within the meaning of the Act, 2) they are "otherwise qualified" for the services sought, 3) they were excluded from the services sought solely by reason of their handicaps, and 4) the program in question receives federal financial assistance. *Strathie v. Department of Transp.,* 716 F.2d 227 (3d Cir.1983).

Plaintiffs can easily meet factors one, two, and four, but it will be difficult, although not impossible, for plaintiffs to prove that they have been denied placements in CLAs *solely* by reason of their handicap. *Daniel B. v. O'Bannon,* slip op. at 9 (E.D.Pa. March 12, 1986).

***5** In *Clark v. Cohen,* 613 F.Supp. 684 (E.D.Pa.1985), *aff'd,* 794 F.2d 79 (3d Cir.), *cert. denied,* 479 U.S. 962 (1986), a district court rejected plaintiff Clark's request for a permanent injunction under section 504. There, Clark had been involuntarily committed without hearing to Laurelton Center, a state-run institution for the mentally retarded. Clark protested her commitment during a thirty year stay at Laurelton on the ground that she was capable of living in a less restrictive environment. Since at least 1976, Clark's clinical team had recommended that Clark be placed in a CLA. However, DPW had not allocated funds for such a placement. *Id.* at 684–690.

Clark maintained she was entitled to relief under section 504 because other mentally retarded people had been provided services in CLAs while she remained institutionalized. The court, concluding that Clark had not been discriminated against, observed that, "[t]here is no allegation * * * that plaintiff [was] denied a CLA because she is mildly retarded as opposed to severely retarded or borderline retarded." *Id.* at 693. The Court of Appeals affirmed, stating:

Section 504 prohibits discrimination against the handicapped in federally funded programs. It imposes no affirmative obligations on the states to furnish services.

794 F.2d at 84 n. 3 (1986).

Plaintiffs contend that their continued institutionalization is unnecessary and provides less effective services than

are available in CLAs. *See* Plaintiffs' Supplemental Pleading and Proposed Conclusions of Law at 2. But plaintiffs have not alleged that their continued institutionalization has been caused solely by discrimination against all handicapped persons or a category of handicapped persons. The testimony presented at the evidentiary hearing suggested that plaintiffs have remained in Woodhaven partly because funds appropriated by the Pennsylvania legislature for residential services have been expended on mentally retarded persons other than *Daniel B.* class members. For this reason, especially in view of *Clark,* it is unlikely that plaintiffs will succeed on their section 504 claim.

The plaintiff class is likely to prevail on its claim that continued detention of class members in Woodhaven violates the Due Process Clause of the Fourteenth Amendment. This issue, left unresolved by the lengthy *Pennhurst* litigation,[3] was also addressed by the Court of Appeals in *Clark.* Relying on *Youngberg v. Romeo,* 457 U.S. 307 (1982), the court held that due process requires "restraints be imposed only to the extent required by the judgment of professionals in charge of the involuntarily committed, and that the involuntarily committed receive minimally adequate training." 794 F.2d at 87. The court determined that DPW's failure to place Clark in a CLA, despite her clinical team's unanimous recommendation that she be released from Laurelton, violated her substantive due process right to appropriate treatment. The court affirmed the district court's order that defendants provide Clark with a CLA.[4]

***6** *Clark* is in some tension with cases from other circuits, *see e.g., Lelsz v. Kavanagh,* 807 F.2d 1243 (5th Cir.1987); *Society for Goodwill to Retarded Children v. Cuomo,* 737 F.2d 1239 (2d Cir.1984), but it presently governs plaintiffs' claim. Plaintiffs most likely will be able to prove that those responsible for the class members' care believe that the class members should be released from Woodhaven and placed in CLAs. The clinical teams of the 77 class members remaining in Woodhaven have all recommended that their patients be deinstitutionalized. *See* Pl.Ex. 10; N.T. 1/11/91 at 21. Indeed, the 77 remaining class members have been referred for discharge for at least six years.

Plaintiffs must establish that they are entitled to the same constitutional protection as persons who have been involuntarily committed. Plaintiffs voluntarily committed themselves to Woodhaven by contracts entered into with Woodhaven and each plaintiff's base service unit ("BSU"). *See e.g.,* Joint Pretrial Statement, Ex. A. BSUs are groups of administrators established by each county to ensure continuity of care for mental health and mental retardation patients and to coordinate their movement from service to service. *See* 55 Pa.Code § 4210.21. The contracts entered into by plaintiffs obligated Woodhaven to provide treatment designed to increase plaintiffs' ability to live in community settings. The contracts provided that when plaintiffs had gained sufficient skills to live in less restrictive settings, the BSUs would provide appropriate community-based placements. *See* Third Amended Complaint at ¶¶ 19–25, 30–36.

If plaintiffs are capable of living in less restrictive settings and defendants have not made appropriate placements, it is more likely than not that after a trial on the merits, the court will find plaintiffs now confined in Woodhaven against their will are entitled to the same constitutional protection as the involuntarily committed. Consequently, under *Clark,* plaintiffs will have a constitutional right to be placed in CLAs.

Enjoining defendants to place three class members per month in CLAs is in the public interest. There can be little doubt that removing class members from Woodhaven is appropriate. As Steven Eidelman, the Deputy Secretary for Mental Retardation of DPW, testified at the evidentiary hearing:

I think the concept of institution * * * at this point in history is [ ] undesirable. We have institutions that are technically competent * * * at what they do, but what they do is the wrong thing. And the wrong thing is to take several hundred people with disabilities and put them all in the same buildings on the same campus, that's wrong. * * * I don't think people should live in those places. Do they get harmed in them? Not anymore. At a point in history they got harmed a lot. I think at this point people maintain their skills and develop new skills in institutions, but it's still the wrong place. I think it would be the wrong place even if it were cheaper, even if it were easier, probably even if they gained more skills. That's not how people are meant to live. I don't live that way, I don't expect people with disabilities to live that way.

***7** N.T. 2/22/91 at 215–216.

Providing prompt relief to members of the plaintiff class will prevent further irreparable harm to them, will impose no significant burden on the defendants, and is in the public interest. Plaintiffs are likely to prevail on the merits. Accordingly, plaintiffs' motion for a preliminary injunction is granted.

III. CONCLUSIONS OF LAW

1. This court has jurisdiction over the subject matter and the parties.

2. Plaintiffs have established that they will suffer irreparable harm if the preliminary injunction is not granted.

3. Plaintiffs have established a likelihood of success on

the merits.

4. There is neither a threat of irreparable injury to another interested party nor a public interest sufficient to defeat plaintiffs' request for preliminary relief.

An appropriate Order follows.

ORDER

AND NOW, this 11th day of April 1991, upon consideration of plaintiffs' unopposed motion for a preliminary injunction and following an evidentiary hearing on January 11 and February 21–22, 1991, on plaintiffs' motion to compel compliance with the Settlement Agreement, it is ORDERED that:

1. Plaintiffs' motion for a preliminary injunction is GRANTED.

2. Defendant John F. White, Secretary of the Department of Public Welfare of the Commonwealth of Pennsylvania, shall provide sufficient funds for appropriate community-based placements for at least three members of the plaintiff class every thirty days, effective April 15, 1991.

3. The City of Philadelphia shall use funds provided to it by defendant White to develop community-based placements for members of the plaintiff class. The City of Philadelphia shall also utilize such funding to provide community services as are necessary to provide the class members with minimally adequate habilitation, consistent with state regulations, until such time as the community living arrangement and/or community services are no longer necessary.

4. As soon as an appropriate community-based placement has become available, defendant White shall transfer a class member residing in Woodhaven to such a placement, if recommended by the class member's interdisciplinary team. *See* Settlement Agreement at ¶ 9.

5. Defendant White shall provide sufficient funds in subsequent years to maintain the placements provided under this Order so long as they are necessary.

6. Defendant White may provide funding for more than three community based placements every thirty days and may place class members in community-based placements outside of Philadelphia, if appropriate.

7. A status conference shall be held on *June 14, 1991* at *4:30 P.M.* to determine the defendants' compliance with this injunction.

8. Plaintiffs' motion to determine compliance with the Settlement Agreement is CONTINUED UNDER ADVISEMENT.

Footnotes

1 One class member, Caesar Gadlin was referred for discharge in 1978–1979, but, after a short stay in a group home during 1988, was readmitted to Woodhaven. N.T. 1/11/91 at 30. At that point, he again was referred for discharge. *Ibid.*

2 Plaintiff submitted an alternative proposal that called for the placement of the 77 remaining class members in CLAs by March 1, 1992.

3 For a review of the history of *Pennhurst,* see *Halderman v. Pennhurst State School & Hospital,* 610 F.Supp. 1221, 1222–1226 (E.D.Pa.1985).

4 In a concurring opinion, Judge Becker concluded that Clark was entitled to placement in a CLA on account of her present constitutional right to habilitation, rather than as a remedy for past constitutional violations. Judge Becker reasoned that because Clark was committed to Laurelton against her will, in a civil proceeding that did not encompass the procedural protections of a criminal trial, she had suffered a massive curtailment of liberty. Such a curtailment, Judge Becker maintained, can only be justified if the state agrees to give the civilly committed something in return: habilitation or minimally adequate treatment. *See* 794 F.2d at 92–95. According to Judge Becker, an involuntarily civilly committed person is constitutionally entitled to "at least such training as would match the improvement that she or he would have experienced if never committed." *Id.* at 96.