UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

TERESITA CAREY, by and through her guardian, Jim Carey, et al.	:	
Plaintiffs,	:	**CIV. NO.: 1:12-cv-02522**
v.	:	
CHRISTOPHER CHRISTIE, as Governor of the State of New Jersey, et al.,	:	
Defendants.	:	

PLAINTIFFS' BRIEF IN OPPOSITION TO MOTION TO DISMISS

Plaintiffs, a class of individuals residing at Vineland Developmental Center, through their counsel, file this Response to Defendants' Motion to Dismiss pursuant to Fed. R. Civ. P. 12.

I. INTRODUCTION

The Plaintiffs brought this action to address serious and ongoing violations of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101, *et seq.*, the Rehabilitation Act ("Rehab Act"), 29 U.S.C. § 794(a), *et seq.*, the Medicaid Act, 42 U.S.C. § 1396, *et seq.*, and the United States Constitution. The Plaintiffs have named the state agencies and officials responsible for violating Plaintiffs' rights and failing to provide basic protections to Plaintiffs.

Defendants' Motion to Dismiss [Dkt. # 33] and supporting arguments fail for the following reasons: (1) Plaintiffs' claims are made independent of Defendants' public pronouncements recommending the closure of the Vineland Developmental Center ("VDC") or any other facility, and the Defendants have discharged and continue to attempt to discharge Plaintiffs from VDC in violation of Plaintiffs' rights secured by the Olmstead decision; (2) as long as Defendants continue to take federal funds and operate large, public ICFs/IID (intermediate care facilities for individuals with intellectual disabilities), Plaintiffs do have a

right to receive services at such facilities if Plaintiffs' treating professionals independently recommend receiving services in those settings and Plaintiffs consent to receiving services there; (3) Plaintiffs have not alleged that they are entitled to receive services in a particular location, but the Medicaid Act and ADA require Defendants to provide Plaintiffs with services in the most integrated setting appropriate to the needs of the Plaintiffs, which often is a state-operated ICF/IID (formerly referred to as "ICF/MR") (*See* Olmstead v. Zimring, et al., 527 U.S. 581, 605 (1999)); (4) this Court cannot rely on the State of New Jersey's administrative process to ensure that Plaintiffs' federal rights are protected, because the State's system for assessing and discharging Plaintiffs from VDC specifically fails to comply with federal law; and (5) Defendants improperly include Individual Habilitation Plans (IHP's) of each of the named Plaintiffs as well as the declarations of Eloise Hawkins and Gerard Hughes as exhibits to their Motion to Dismiss which cannot be properly considered by this Court for purposes of a Rule 12(b)(6) Motion to Dismiss, as these documents were not attached to the Amended Complaint, nor do Plaintiffs' claims rest on the content of these documents.

The allegations in Plaintiffs' Amended Complaint meet the requirements of the Federal Rules of Civil Procedure, the ADA, Rehab Act, Medicaid Act, and the United States Constitution. The Defendants' Motion should be denied.

II. ARGUMENT

A. EXHIBITS REFERRED TO IN DEFENDANTS' MOTION TO DISMISS SHOULD NOT BE CONSIDERED BY THE COURT

Defendants inappropriately attached several exhibits to their Motion to Dismiss Plaintiffs' Amended Complaint, including Task Force Legislation and Final Report (Exhibit A, B),[Dkt. #33-3]; Individual Habilitation Plans ("IHP") for each of the Plaintiffs in this case (Exhibits C-I); Certification of Eloise Hawkins. These documents and attachments can not be

considered by this Court for purposes of a motion to dismiss pursuant to Rule 12(b) of the Federal Rules of Civil Procedure.

As a general matter, a District Court ruling on a motion to dismiss may not consider matters extraneous to the pleadings. San Pellegrino S.P.A. v. Aggressive Partnerships, Inc., 2009 WL 2448504 (D.N.J. Aug. 10, 2009) (citing In Re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1426 (3d Cir.1997); Angelastro v. Prudential–Bache Securities, Inc., 764 F.2d 939, 944 (3d Cir.1985). However, there are limited exceptions to this rule. In addition to the allegations of the complaint, a court may consider matters of public record, documents specifically referenced in or attached to the complaint, and documents integral to the allegations raised in the complaint. Mele v. Federal Reserve Bank of N.Y., 359 F.3d 251, 255 n. 5 (3d Cir.2004). The documents referenced above do not fall into any of these exceptions. In San Pellegrino, this Court analyzed a similar situation when exhibits were attached to defendant's motion to dismiss which were certifications of defendant's officers containing statements that contradicted allegations contained in the complaint. In declining to consider these exhibits, this Court followed the standard set forth by Third Circuit Court of Appeals: "the exhibits are documents extraneous to the pleadings, and do not fall within exceptions to the rule prohibiting this Court from considering them on a motion to dismiss." (citing Mele, 359 F.3d at 255 n. 5). An "undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss" is only deemed integral within the exceptions if the plaintiff's claims are based on the document. (citing Pension Benefit Gauranty Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1996 (3d Cir.1993)). In San Pellegrino, the District Court ruled that the plaintiff's claims were not based on the certifications of the defendant's officers. Therefore, since the certifications attached as exhibits to defendant's motion to dismiss were not integral to the pleadings and did not fall

within the exception to the general rule, they could not be considered. Like the exhibits in San Pellegrino, the exhibits attached to Defendants' Motion to Dismiss are also not integral to the Amended Complaint since the claims for relief in Plaintiffs' Amended Complaint are not based on the contents of those exhibits, but rather, are entirely independent of the content of these documents. In fact, whether or not those exhibits exist is irrelevant to the claims pursued by Plaintiffs. Also irrelevant to this matter is any statement from Eloise Hawkins presented in the form of a certification. Furthermore, the exhibits attached to Defendants' Motion to Dismiss were not authenticated and Plaintiffs have not stipulated to their authenticity. Therefore, the exhibits to Defendants' Motion to Dismiss should be disregarded by this Court.

In support of their inclusion of said exhibits, Defendants cite to three (3) Third Circuit Court of Appeals cases: Pittsburgh v. West Penn Power Co., 147 F. 3d 256, 259 (3rd Cir. 1998); Keystone Redevelopment Partners, LLC v. Decker, 631 F. 3d 89, 95 (3rd Cir. 2011); and In re Burlington Coat Factory Sec. Litig. 114 F. 3d 1410, 1426 (3rd Cir. 1997). However, each of these cases is distinguishable from the instant case in that they involve documents which were either attached to the complaint, submitted and stipulated to by both parties, or documents upon which the claims of the complaint specifically rely. For example, in Pittsburgh v. West Penn Power Co., there were documents submitted to the Court by both parties during the motion to dismiss phase. The Third Circuit Court noted "...it can be, and is in this instance, proper to consider these documents in reviewing a motion to dismiss." Citing, Pension Benefit Guar. Corp. v. White Consol. Industries, 998 F.2d 1192, 1196 (3rd Cir. 1993)(finding that "a court may consider an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document."). The parties in that case stipulated to the authenticity of the documents and submitted the documents as joint appendix in

that case. The Third Circuit noted in its opinion that, in deciding a motion to dismiss, it is the practice of the Court to "consider only the allegations contained in the complaint, exhibits attached to the complaint and matters of public record." Id. at 259. (emphasis added). However, since the authenticity of these documents was stipulated by the parties, the Court used the documents to provide context to the averments of the complaint. There is no such situation here. To the contrary, Plaintiffs have not stipulated to the authenticity of these documents, nor was a stipulation requested by Defendants. In fact, Plaintiffs cannot confirm the authenticity, relevancy, and weight of these documents because there has not been any proper discovery. Thus, there is no similarity between the circumstances here and those of Pittsburgh v. West Penn Power. Therefore, since Plaintiffs did not attach these documents as exhibits to the Amended Complaint, did not stipulate to their authenticity, and none of the Plaintiffs' claims are based on the content of these documents, they do not fall within the exception noted by the Third Circuit in Pittsburgh v. West Penn Power.

Defendants also cite to two (2) other Third Circuit Court opinions: Keystone Redevelopment Partners, LLC v. Decker, 631 F. 3d 89, 95 (3rd Cir. 2011) and In re Burlington Coat Factory Sec. Litig. 114 F. 3d 1410, 1426 (3rd Cir. 1997). In Keystone, the Court briefly noted "in considering the propriety of the District Court's ruling, this Court "may also consider matters of public record, orders, exhibits attached to the Complaint and items appearing in the record of the case." 631 F. 3d 89, 94 (citing Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F. 3d 1380, 1384 n. 2 (3rd Cir. 1994)). The Third Circuit in Keystone was reciting its standard of review, not the standard applicable to the District Court in deciding a motion to dismiss. That being said, the IHP's and other exhibits attached to Defendants' Motion to Dismiss are neither matters of public record, orders, or exhibits to the Amended Complaint. They are also not items

that have previously appeared in the record in this case. Thus, even if this were the proper standard of review for this Court, these documents would still be inappropriately attached. Defendants use of In re Burlington Coat Factory Sec. Litig. 114 F. 3d 1410, 1426 (3rd Cir. 1997) is also misplaced. In Burlington, the District Court considered an annual report in its decision to dismiss plaintiff's complaint. The Third Circuit ruled that the District Court's consideration of the annual report was not improper because plaintiff's claims were based on the content of the annual report, thus, it was proper for them to consider its contents. In its opinion, the Third Circuit clearly lays out the standard for when a District Court may consider matters extraneous to the pleadings. "[A]n exception to the general rule that a 'document integral to or explicitly relied upon in the complaint' may be considered 'without converting the motion [to dismiss] into one for summary judgment.'" (citing Shaw v. Digital Equipment Corp., 82 F.3d 1194, 1224 (1st Cir. 1996)). The important distinction between Burlington and the instant case is that the plaintiff's claims in Burlington were dependent upon and relied upon the contents of the annual report. In fact, the plaintiff's complaint in Burlington contained claims that relied upon the information that was contained in the annual reports, so the Court found it appropriate to consider the actual content of the annual reports. The Plaintiff's claims in the instant case are distinguishable because they stand on their own regardless of what is written in the IHP's or what the Task Force Report determined, thus, they are not dependent or reliant upon the documents attached to Defendants' Motion to Dismiss. Further, there is nothing in the exhibits attached to Defendants' Motion to Dismiss that would provide this Court with information that has not already been supplied by the allegations in Plaintiffs' Amended Complaint. Thus, these documents do not fall within the exception stated by Shaw and applied by the Third Circuit in Burlington, and this Court should disregard these documents.

B. PLAINTIFFS' CLAIMS ARE RIPE FOR ADJUDICATION

Despite what Defendants may wish for this Court to believe, Plaintiffs' claims do not hinge on any contingencies and are ripe for adjudication. Defendants' suggestion to the contrary underscores their disregard for the important rights that Plaintiffs seek to pursue in this matter. Those rights, for the Plaintiffs, literally could mean the difference between life and death.

In cases where a plaintiff seeks injunctive or declaratory relief only, standing will not lie if "adjudication ... rests upon 'contingent future events that may not occur as anticipated or indeed may not occur at all.' " Hodgers-Durgin v. De La Vina, 199 F.3d 1037, 1044 (9th Cir.1999) (quoting Texas v. United States, 523 U.S. 296 (1998)). Indeed, in "ADA cases, courts have held that a plaintiff lacks standing to seek injunctive relief unless he alleges facts giving rise to an inference that he will suffer future discrimination by the defendant." Shotz v. Cates, 256 F.3d 1077, 1081 (11th Cir.2001) (citations omitted); *see also* Armstrong World Indus., Inc. v. Adams, 961 F.2d 405, 422 (3d Cir.1992) (discussing how courts should dismiss action on ripeness grounds when a complaint seeking declaratory relief rests on the contingency that some future act will occur). As discussed below, Plaintiffs in this case have properly alleged facts giving rise to an inference that they will suffer future discrimination, thus, they have presented a ripe claim and have proper standing to do so.

In essence, the Defendants argue in their Brief in Support of Motion to Dismiss Plaintiffs' Amended Complaint that Plaintiffs' claims are hypothetical since there is no immediate plan to close Vineland Developmental Center and the Task Force recommended that DHS close two other centers. [Dkt. #33-1 at 20-21]. Defendants also attempt to show that the recommendation of the Task Force has rendered Plaintiffs' Amended Complaint unripe. [Dkt.

#33-1 at 21]. Some courts have rejected similar attempts by parties to render a case unripe. *See* Malama Makua v. Rumsfeld, 136 F.Supp.2d 1155, 1161 (D.Haw.2001) ("Ripeness is an element of jurisdiction and is measured at the time an action is instituted; ripeness is not a moving target affected by a defendant's action."). *See also* Travelers Ins. Co. v. Obusek, 72 F.3d 1148, 1154 (3d Cir.1995) ("[R]ipeness requires that the threat of future harm must remain 'real and immediate' throughout the course of the litigation.") (quoting Salvation Army v. Dep't of Cmty. Affairs, 919 F.2d 183, 192 (3d Cir.1990)). In this case, Plaintiffs have suffered adverse consequences of Defendants' policies and procedures. Plaintiffs allege that these policies have been detrimental to Plaintiffs' ability to obtain sound professional judgment by treating professionals. The decisions of the Task Force referenced by Defendant will not affect the policies and procedures followed by the State's treating professionals at Vineland, and, thus, these claims have not been rendered unripe by the Task Force decisions. The Plaintiffs' claims will remain ripe until this Court mandates that the policies and procedures be changed to comply with the ADA, Medicaid Act and the United States Supreme Court's Olmstead decision.

Defendants argue that "Plaintiffs' claims hinge on a litany of contingencies." [Dkt. # 33-1 at 17]. However, Defendants identify no such contingencies, no litany, and fail to even cite Plaintiffs' Amended Complaint to support their frivolous proposition. To the contrary, a cursory review of Plaintiffs' Amended Complaint [Dkt. #30] will show that Plaintiffs have alleged facts that give rise to an inference that Plaintiffs will suffer future discrimination by Defendants. These facts, as stated in the Amended Complaint, state a valid cause of action which is ripe for adjudication. The alleged facts of the Amended Complaint are not hypothetical and do not hinge on contingencies or conjecture and are completely independent of any Task Force recommendations. For example, Plaintiffs' Amended Complaint alleges the following:

[T]reating professionals often have routinely and inappropriately stated that Plaintiff's would best be served in alternative settings that do not provide ICF/IID-level of care. [Dkt. #30, ¶ 41].

For a significant period of time from 2010 to 2012, the Defendants openly stated their intent to close Vineland, and in fact greatly downsized Vineland by closing one (1) of its two (2) campuses. [T]he treating professionals at Vineland continue to make routine and inappropriate recommendations for placements outside of Vineland due to the illegal and unsound policies and practices of the Defendants encouraging the closure of development centers. [Dkt. #30, ¶ 42].

Defendants seek to compel Plaintiffs' discharge from Vineland Developmental Center to other settings, including non-ICF/IID-certified settings. [Dkt. #30, ¶45].

Defendants' policies and procedures have interfered with or usurped the ability of Plaintiffs' treating professionals to make independent and sound professional judgments. The treating professionals are now often following a political or administrative agenda rather than accepted professional standards. [Dkt. #30, ¶46].

Defendants' policies and procedures have unduly influenced or compelled Plaintiffs' treating professionals to recommend transfer or discharge of Plaintiffs to settings that are not the most appropriate for Plaintiffs' needs, solely for the purpose of conforming to Defendants' political policy decisions. [Dkt. #30, ¶47].

Defendants have precluded treating professionals at the Vineland Development Center from fully and fairly considering whether Vineland best meets the needs of the Plaintiffs, and have prevented those treating professionals from acknowledging the rights of Plaintiffs to receive treatment and services at Vineland Development Center or in another ICF/IID. [Dkt. #30, ¶54].

Plaintiffs have not had the benefit of their respective treating professionals' independent judgment about whether they should continue to reside at Vineland Developmental Center or at another state-operated ICF/IID. [Dkt. #30, ¶55].

Defendants have instructed or inappropriately encouraged Plaintiffs' treating professionals to include language in Plaintiffs' individual habilitation plans indicating that Plaintiffs are capable of being served in settings other than Vineland Development Center, regardless of whether Plaintiffs are actually capable of being served in alternative settings. [Dkt. #30, ¶65].

These treating professional are likely intimidated and fearful of retaliation, including the possible loss of their jobs, and likely will only be forthcoming with information to support the position of Plaintiffs if protected by or compelled by appropriate discovery in this case. [Dkt. #30, ¶67].

As is clear to see, the facts alleged in Plaintiffs' Amended Complaint are not hypothetical in nature, do not hinge on events that have not yet occurred, including the closure of Vineland Developmental Center, and have no relation to whether or not placements are offered. The allegations contain facts which indicate that Defendants' policies and procedures are negatively affecting professionals and their ability to provide sound professional judgments to Plaintiffs regarding the least restrictive setting appropriate to each of the Plaintiffs' needs. Plaintiffs have alleged that these policies and procedures are currently active and, until changed, they will hinder professionals from making sound judgments.

Federal Rules of Civil Procedure 8(a)(1) and (2) require only that a complaint contain "a short and plain statement of the grounds for the court's jurisdiction" and "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(1)-(2). When enacted, Rule 8 eliminated the archaic system of fact pleading found in state codes of pleading applied by the federal courts under the 1872 Conformity Act. For the past forty years, "[t]he only function left to be performed by the pleadings alone is that of notice." 5 Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 1202, at 89 (3d ed.2004); *See also* Erickson v. Pardus, 551U.S. 89, 127 S.Ct. 2197, 2200, 167 L.Ed.2d 1081 (2007). Further, Rule 8 contains a concluding admonishment that "[p]leadings must be construed so as to do justice[,]" conveying the liberality by which this Court should judge Plaintiffs' Amended Complaint. Fed. R. Civ. P. 8(f).

The existence of standing turns on the facts as they existed at the time a plaintiff files the complaint. Lujan v. Defenders of Wildlife, 504 U.S. 555, 569 n. 4 (1992). In this matter, none of the allegations have been averted by the passage of time. Plaintiffs do allege facts regarding Defendants' Task Force in the Amended Complaint to show the context of Defendants' unlawful

actions, however, Plaintiffs' claims clearly do not rely on the Task Force recommendations or the resulting Task Force report, and Plaintiffs' claims are not dependent on any contingent future event. In fact, Plaintiffs specifically allege in their Amended Complaint at paragraph 81 that:

> Plaintiffs' causes of action are not based upon, reliant upon, or adversely impacted by any recommendation or finding of the Task Force. The allegedly binding recommendations of the Task Force are merely further evidence of an overall plan to downsize and eventually close all developmental centers in the State of New Jersey.

[Dkt. 30, ¶ 81]. Likewise, none of Plaintiffs' claims are contingent on Defendants' announced decisions to close or continue operating any of their Developmental Centers. As shown above, Plaintiffs' claims emerge from Defendants precluding Plaintiffs' treating professionals from rendering independent judgments about where Plaintiffs should receive services and Defendants precluding Plaintiffs from being able to give informed consent to any proposed discharge from VDC. As noted in Plaintiffs' Amended Complaint, Defendants motivation for depriving Plaintiffs of those rights seems manifold, but Defendants' questionable motivations are immaterial to Plaintiffs' standing or the ripeness of their claims. It is clear that the Plaintiffs have alleged facts that meet the pleading standard required by the Third Circuit and provide Defendants and this Court with sufficient facts that describe a ripe controversy.

Although the party invoking the jurisdiction of the Court bears the burden of establishing standing, "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice." Id. at 561. Nothing in Plaintiffs' claims is abstract, and only this Court can remedy the deprivation of Plaintiffs' rights. Doe v. County of Centre, PA, 242 F.3d 437, 453 (3d. Cir. 2001) ("allegation, while disputed by the County, does not constitute an 'abstract disagreement[]' incapable of judicial resolution") (citing Abbott Laboratories v. Gardner, 387 U.S. 136, 148 (1967); U. S. ex rel. Ricketts v. Lightcap, 567 F.2d 1226, 1233 (3d.

Cir. 1977) ("Since this allegation indicates that an action taken by the prison has had a practical impact on Ricketts' rights, a ripe constitutional injury is stated.") (citing Hardwick v. Ault, 517 F.2d 295 (5th Cir. 1975). Independent of any Task Force recommendation, or announcements and retractions from the Defendants that they will close VDC, Defendants have violated, and continue to violate, Plaintiffs' rights provided for by the Olmstead decision, the ADA, the Rehab Act, the Medicaid Act, and the United States Constitution. Defendants do not dispute that they are recipients of federal financial assistance and therefore subject to the requirements of the Medicaid Act, the Rehabilitation Act, and the Americans with Disabilities Act. Juvelis by Juvelis v. Snider, et al., 68 F.3d 648, 652 (3d. Cir. 1995); *See also* Helen L. v. DiDario, et al., 46 F.3d 325, 331 (3d. Cir. 1995); 42 U.S.C. § 1396a et seq.; Rehabilitation Act of 1973 § 504(a), 29 U.S.C.A. § 794(a), 29 U.S.C.A. § 794; Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132; 28 C.F.R. §§ 35.130(d), 41.51(d).[1] As discussed more fully below, the Plaintiffs are entitled to recommendations from their treating professionals as to where Plaintiffs should receive services. Olmstead v. Zimring, et al., 527 U.S. 581, 587 (1999). Plaintiffs are also entitled to decide whether to consent to discharge from VDC based, in part, on the recommendations of those treating professionals. Id. As alleged in Plaintiffs' Amended Complaint, Defendants have usurped treating professionals' ability to make such recommendations and compelled treating professionals to conclude that Plaintiffs can be served in settings that are not appropriate. [Dkt. # 30, ¶ 46]. Defendants further violate Plaintiffs' rights by ignoring, and failing to allow for, Plaintiffs' rights, as recognized by Olmstead, to oppose

[1] Plaintiffs have also alleged that Defendants have violated and continue to violate constitutionally guaranteed rights. Those allegations alone suffice to satisfy standing requirements and make this matter ripe for adjudication. Elrod v. Burns, 427 U.S. 347, 373-74 (1976).

discharge from VDC. [Dkt. # 30, ¶69-70]. Defendants' actions have resulted, and will result, in Plaintiffs' right to receive ICF/IID-level services to be severely diminished or even taken away. [Dkt. # 30, ¶62].

Plaintiffs have properly asserted their claims. Title II of the ADA incorporates the "non-discrimination principles" of section 504 of the Rehabilitation Act and extends them to state and local governments. Easley v. Snider, 36 F.3d 297, 300 (3d Cir.1994) (comparing 42 U.S.C. §§ 12131-12134 and 28 C.F.R. § 35.103); *See also* Helen L. v. DiDario, et al., 46 F.3d 325, 331 (3d. Cir. 1995). Section 202 of Title II provides:

> [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.

In Title II actions, such as this one, the Third Circuit has expressly held "that Congress did not intend to condition the protection of the ADA upon a finding of 'discrimination.'" Helen L., 46 F.3d 325, 334. So, although only intellectually disabled individuals can receive services at VDC, the Defendants cannot claim that they are violating the rights of all VDC residents equally and therefore not "discriminating" against them based on their disability.

The ADA regulations expressly state that: "A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." (emphasis added) 28 C.F.R. § 35.130(d).[2] Plaintiffs' allege that Defendants' deprivation of their rights has caused, and will cause, Plaintiffs to be discharged from VDC to settings that are not appropriate to their needs. [Dkt. #30, ¶ 45, 54, 55, 56, 62].

[2] This regulation is almost identical to the Rehab Act's Section 504 regulation. *See* 28 CFR § 41.51(d).

Other district courts have recognized identical causes of action asserted by residents of state-operated institutions for the intellectually disabled. *See* Ligas v. Maram, et al., 1:05-cv-4331 (N.D. Ill., 2010) 2010 WL 1418583; U.S. v. Virginia, et al., 3:12-cv-59 (E.D. Va. 2012) 2012 WL 1739165. Defendants' motivation for depriving Plaintiffs of their rights appears to be part of an ideological agenda to eliminate all larger congregate settings for individuals with intellectual disabilities, including ICFs/IID, and discharge some of the most medically fragile and vulnerable individuals to settings that are not appropriate and often dangerous. As described more fully below, Plaintiffs recognize that they do not have an absolute right to receive services in a state-operated ICF/IID. However, as long as Defendants continue to operate those services, Plaintiffs do have the right to compel Defendants to administer those services in accordance with well-settled federal law. As such, Plaintiffs have alleged facts indicating how Defendants have refused to comply with the law in failing to provide Plaintiffs with professional judgments with regard to discharge. This continuous failure on the part of Defendants, as described in the facts alleged in Plaintiffs' Amended Complaint show that Plaintiffs have suffered, and continue to suffer, an actual harm. Thus, Plaintiffs' claims are ripe for adjudication.

C. DEFENDANTS ARE REQUIRED TO ADMINISTER SERVICES IN ACCORDANCE WITH THE SUPREME COURT DECISION IN OLMSTEAD, THE AMERICANS WITH DISABILITIES ACT, AND THE REHABILITATION ACT

In arguing that the ADA and Rehab Act do not provide for Plaintiffs' causes of action, the Defendants deliberately misrepresent Plaintiffs' claims and the Olmstead decision to craft an argument that has no basis in fact or law. As described more fully in the section below, Defendants have falsely represented that Plaintiffs seek to "require Defendants to serve Plaintiffs in a particular developmental center." [Dkt. #33-1, at 22]. Plaintiffs seek Defendants' compliance with federal law, which entitles Plaintiffs to

receive independent recommendations from their treating professionals as to the most appropriate setting to receive services and, after receiving those recommendations, the law gives to the Plaintiffs a right to consent to or to oppose any recommended discharge. The Plaintiffs have never claimed to be entitled to services at a particular developmental center.

Defendants' distortion of the Olmstead decision compels Plaintiffs to provide a full discussion of that case. The Olmstead case was an action filed on behalf of two women with mental retardation and co-morbid psychiatric disorders, referred to by their initials, L.C. and E.W. After being admitted voluntarily to the Georgia Regional Hospital in Atlanta in May 1992, L.C.'s schizophrenia was treated and stabilized. By May 1993, L.C. expressed a desire to leave the Georgia Regional Hospital and her treating professionals at the facility agreed that she could have her needs met in a state-supported community treatment program. However, L.C. remained in the Georgia Regional Hospital for nearly three (3) more years. E.W. was voluntarily hospitalized at the Georgia Regional Hospital in February 1995 with a diagnosis of personality disorder. By 1996, E.W. expressed a desire to leave the facility and her therapist concluded that she could be treated in a community-based treatment program. E.W. was not discharged until after litigation was initiated. Both women argued that the state's failure to discharge them to a community-based treatment program violated Title II of the ADA, the Rehab Act, and due process.

Finding that L.C.'s and E.W.'s continued treatment at the Georgia Regional Hospital violated the ADA, Olmstead created a three-prong test to determine when the ADA "require[s] placement of persons with mental disabilities in community settings

rather than in institutions." Olmstead, 527 U.S. at 587. The Court instructed that community placement is required when:

> the State's treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.

Id. Interpreting the ADA and the Department of Justice's regulations issued under it, Olmstead emphasized that there is no "federal requirement that community-based treatment be imposed on patients who do not desire it." Id. at 602. The Defendants argument in the instant matter is diametrically opposed to this proposition. Olmstead expressly stated that "nothing in the ADA or its implementing regulations condones termination of institutional settings for persons unable to handle or benefit from community settings." Id. at 601-02. "[T]he ADA is not reasonably read to impel States to phase out institutions, placing patients in need of close care at risk." Id. at 605. In fact, the Court recognized that "for [some] individuals, no placement outside the institution may ever be appropriate." Id. (citing and quoting Brief for American Psychiatric Association et al. as *Amici Curiae* at 22-23) ("Some individuals, whether mentally retarded or mentally ill, are not prepared at particular times—perhaps in the short run, perhaps in the long run—for the risks and exposure of the less protective environment of community settings"); Brief for Voice of the Retarded et al. as *Amici Curiae* 11 ("Each disabled person is entitled to treatment in the most integrated setting possible for that person—recognizing that, on a case-by-case basis, that setting may be in an institution") (emphasis added); Youngberg v. Romeo, 457 U.S. 307, 327 (1982) (Blackmun, J., concurring) ("For many mentally retarded people, the difference between the capacity to

do things for themselves within an institution and total dependence on the institution for all of their needs is as much liberty as they ever will know") (emphasis added)).

In the instant matter, Defendants would have this Court conclude that Plaintiffs are not entitled to protect the rights that were expressly recognized by Olmstead. Because Olmstead provides no support for Defendants' argument, Defendants have fabricated their own standard without regard to Olmstead. In their Brief in Support of their Motion to Dismiss, Defendants state:

> In Olmstead, supra, 527 U.S. at 587, the Supreme Court, in a plurality opinion, found that under Title II of the ADA, specifically, 42 U.S.C. § 12132, and 28 C.F.R. 35.130(d), if a State's treating professionals have determined that a person can be served in the community and the person does not oppose community placement, then the State is responsible to make such placement or show justification for why it need not under the ADA "fundamental alterations" provisions.

[Dkt. # 33-1, at 25]. Conspicuously, the Defendants do not quote the Olmstead decision, but rather cite to the decision and then make unfounded implications that treating professionals' determinations are optional, and only if such determinations are made, is the state "responsible to make such placement...." Id. Defendants' fabricated standard fails to accurately represent the clear language used by the Supreme Court in Olmstead. The actual language from Olmstead is as follows:

> [W]e confront the question whether the proscription of discrimination may require placement of persons with mental disabilities in community settings rather than in institutions. The answer, we hold, is a qualified yes. Such action is in order when the State's treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated,

> taking into account the resources available to the State and the needs of others with mental disabilities.

Id. Defendants' surreptitious substitution of the word "if" for "when" is an attempt to nullify the substance of the Olmstead standard, and would render that decision largely meaningless. In the instant matter, Defendants illogical position is clear. VDC is licensed by the Centers for Medicaid and Medicare Services, and is required to comply with ICF/IID regulations. Among other things, the ICF/IID regulations require Plaintiffs' treating professionals to annually assess the appropriateness of their continued residency at VDC. *See* 42 CFR § 483.440(a) et seq.; CMS State Operations Manual Appendix J Guidelines for 42 CFR § 483.440(a) et seq.[3] Those regulations do not give treating professionals the option of determining where Plaintiffs should receive services. Those regulations require treating professionals to at least annually determine whether Plaintiffs continued residence at VDC is appropriate. There is no option for "if" Plaintiffs' treating professionals make such determinations.

Consistent with Olmstead, CMS has promulgated regulations and guidelines describing when transfer or discharge of a resident of an ICF/IID can occur:

> Transfer or discharge occurs only when the facility cannot meet the individual's needs, the individual no longer requires an active treatment program in an ICF/MR setting, the individual/guardian chooses to reside elsewhere, or when a determination is made that another level of service or living situation, either internal or external, would be more beneficial, or for any other "good cause," as defined below.
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> ...
>
> Moving an individual for "good cause" means for any reason that is in the best interest of the individual.

[3] *See generally* 42 CFR § 440.150 and 42 CFR §§ 483.400-483.480 for the definition of and regulations pertaining to intermediate care facilities for the mentally retarded.

CMS Guideline 42 CFR §483.440(b)(4)(i). If any VDC resident has been, or is to be, discharged, his or her treating professionals must comply with these guidelines. Defendants' rendition of the Olmstead standard not only contradicts the language used by the Court, but Defendants' version is also simply untenable in the context of the ICF/IID regulations.

Defendants' current practice of usurping treating professionals' independent judgments, and directing treating professionals to conclude that VDC residents should be discharged without regard for the treating professionals' independent determination, violates the holding in Olmstead and the ICF/IID regulations. Defendants' failure to allow for Plaintiffs' consent prior to discharge independently violates those same laws.

Just as Defendants misrepresented the language of the Olmstead decision, they similarly distort the Findings and Purpose section of the ADA by inappropriately piecing together various phrases from different subsections of Congress' findings. The net result is a false premise from which Defendants argue to deprive Plaintiffs of the very rights provided for in the ADA. Defendants' willingness to strain so far to deprive Plaintiffs of basic rights to safety is the same type of aberrant conduct Congress warned against in the same Findings section cited by Defendants:

> [I]ndividuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

42 U.S.C. § 12101(a)(5) (emphasis added).

Plaintiffs have a federally-protected right to receive recommendations from treating professionals as to whether alternative placement is appropriate and to consent to any such discharge. Olmstead dictates that VDC residents and their guardians have the benefit of treating professionals' judgments regarding the most appropriate place to receive services. Only after they have the benefit of that information are residents and guardians required to oppose or consent to continued residence at a Training Center, or to discharge to an alternative setting. *See* U.S. v. Arkansas, 794 F. Supp. 2d 935, 982 (E.D. Ark. 2011) (In a CRIPA case brought by the Department of Justice the district court concluded that the Department of Justice failed to meet its burden pursuant to Olmstead because: "No person determined by the State's treatment professionals to be appropriate for community placement has been denied community placement."); *See also* School Bd. of Nassau Cty. v. Arline, 480 U.S. 273, 288 (1987) ("courts normally should defer to the reasonable medical judgments of public health officials"); Hanson By and Through Hanson v. Clarke County, Iowa, 867 F.2d 1115 (8th Cir. 1989).

Likewise, Defendants' argument ignores the right of VDC residents and guardians, as recognized by Olmstead, to oppose discharge from a facility. Interpreting Olmstead, the district court in U.S. v. Arkansas concluded that the Department of Justice failed to meet its burden because "[n]o resident of [the facility] has been denied community placement when a parent or guardian has requested such a placement." Arkansas, 794 F. Supp. 2d at 982; *See also* Ligas v. Maram, et al., 1:05-cv-4331 (N.D. Ill., 2010) 2010 WL 1418583; U.S. v. Virginia, et al., 3:12-cv-59 (E.D. Va. 2012) 2012 WL 1739165. In their Motion to Dismiss, the Defendants have not even challenged this independent basis for Plaintiffs' claims.

The Olmstead decision cannot be twisted, as Defendants attempt, to require deinstitutionalization of individuals who need the services at the facility. *See* Olmstead at 605. In Conner v. Branstad, a district court soundly reasoned that "if Congress had actually intended to require states to provide community-based programs for mentally disabled individuals currently residing in institutional settings, it surely would have found a less oblique way of doing so." Conner v. Branstad, 839 F. Supp. 1346, 1357 (S.D. Iowa 1993); *See also* U.S. v. Oregon, 782 F. Supp. 502, 514 (D. Or. 1991) ("[P]remature or inappropriate community placements would result in a much higher risk of potential harm than residents are exposed to at [the facility].").

Defendants have attempted to argue that Plaintiffs have not requested community placement, therefore, they have not been considered for community placement at this time. [Dkt. #33-1 at 29]. However, whether or not Defendants believe that community placement is requested by any of the named Plaintiffs is irrelevant to this analysis. The fact still remains that Plaintiffs have properly alleged that Defendants have failed to provide Plaintiffs with independent professional judgments regarding the least restrictive environments that are appropriate to meet their needs. Plaintiffs have a federally-protected right to receive recommendations from treating professionals as to whether alternative placement is appropriate and to consent to any such discharge. Further, the Olmstead decision dictates that VDC residents and their guardians have the benefit of treating professionals' judgments regarding the most appropriate place to receive services. Therefore, since Plaintiffs have alleged sufficient facts that independent professional judgments are not being made regarding the least restrictive setting appropriate to their needs in accordance with the ADA and Rehab Act, Plaintiffs have properly alleged their claims. Therefore, these claims should not be dismissed.

D. PLAINTIFFS HAVE NOT ALLEGED THAT DEFENDANTS ARE REQUIRED TO SERVE INDIVIDUALS IN A PARTICULAR INSTITUTION

Defendants have baldly misrepresented Plaintiffs' Medicaid Act claim in an attempt to create a strawman that they can knock down. Contrary to Defendants' assertions, Plaintiffs have not alleged that they are entitled to receive services in a particular setting. Plaintiffs have alleged that the Medicaid Act, among other things, imposes a duty on the Defendants to provide Plaintiffs with "choice of an ICF/IID institutional placement, subject to a hearing, under 42 U.S.C. § 1396n and 42 CFR § 441.302(d)." [Dkt. # 30, ¶107] (emphasis added). The prior ninety-four (106) paragraphs of Plaintiffs' Amended Complaint describe the means by which Defendants have failed to give Plaintiffs that choice. Defendants have submitted their frivolous argument to the Court, but they do not cite any portion of Plaintiffs' Amended Complaint to support their false representation of Plaintiffs' allegations. See [Dkt. # 33-1 at 30-33].

As Defendants concede, they do have an obligation to continue to provide ICF/IID care for Plaintiffs as long as they accept federal funding pursuant to the Medical Act. *See* [Dkt. # 33-1 at 32 (citing 42 U.S.C. §§ 1396d(a)(15) and 1396n(c)(2)(C)]. By accepting those federal funds and operating their Developmental Centers, the Defendants have voluntarily assumed certain obligations. Those obligations specifically include providing ICF/IID-level of services, 42 U.S.C. §§ 1396a(a)(10) and 1396d(a)(l5); giving qualified individuals the choice of receiving services in an ICF/IID placement, 42 U.S.C. § 1396n and 42 CFR § 441.302(d); and discharging Plaintiffs only pursuant to 42 CFR § 483.440(b)(4)(i) and in accordance with the ADA and Olmstead, 527 U.S. 581, 607.

Under 42 U.S.C. § 1396a(a)(8), "[a] State plan for medical assistance must … provide that all individuals wishing for medical assistance under the plan shall have opportunity to do so, and that such assistance shall be furnished with reasonable promptness to all eligible individuals." The responsible state agency must "furnish Medicaid promptly to recipients without any delay caused by the agency's administrative procedures," and "continue to furnish Medicaid regularly to all eligible individuals until they are found to be ineligible." 42 C.F.R. § 435.930(a)-(b) (1996). All Plaintiffs receive assistance under the Medical Assistance Program and are owed these and other duties by the Defendants. Defendants ignore those clear requirements to frivolously argue to this Court that the Medicaid Act imposes no duty on them to provide services to Plaintiffs.

Plaintiffs have not sued Defendants to keep VDC from closing. Plaintiffs have sued Defendants to stop Defendants' unlawful discrimination against Plaintiffs. Among other things alleged in Plaintiffs' Amended Complaint, the Defendants have instructed Plaintiffs' treating professionals to disregard their independent judgment and instead conclude that Plaintiffs can be served in alternative settings. [Dkt. # 30 at 11-12]. Defendants' actions are prohibited by the ADA, the Rehab Act, the Olmstead decision, and the U.S. Constitution. As noted in Plaintiffs' Amended Complaint, the Defendants are prohibited from using criteria or methods of administration that have the effect of subjecting Plaintiffs to discrimination on the basis of handicap or that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to handicapped persons. [Dkt. # 30 at 23]; See also 45 CFR § 84.4(b)(4); 28 CFR § 41.51(b)(3)(I). Earlier this year, the Eastern District of Virginia assessed a motion to intervene filed by residents of state-operated institutions for

the intellectually disabled, where those residents asserted the same rights as those asserted by Plaintiffs in this matter. *See* U.S. v. Virginia, et al., 3:12-cv-59 (E.D. Va. 2012) 2012 WL 1739165. That Court granted intervention and held that "the Petitioners have a significant, protectable interest in receiving the appropriate care of their choice and protecting their rights under the ADA." U.S. v. Virginia, et al., 3:12-cv-59 [Dkt. # 65 at 3 (citing Olmstead, 527 U.S. 581, 602 ("Nor is there any federal requirement that community-based treatment be imposed on patients who do not desire it."))].

Plaintiffs have a right to receive the services they are currently provided at VDC. VDC offers extensive services that simply cannot be replicated in alternative settings, such as specialized clinical and professional staff trained to provide services to specific VDC residents, onsite health care, and systems operated in accordance with the ICF/IID regulations. The services currently offered at VDC are not available in alternative settings. The provision of those services at VDC, and the lack of availability of those services elsewhere, is a matter of life and death for Plaintiffs. Plaintiffs have alleged facts to support their claims that Defendants have not properly complied with the Medicaid Act by failing to provide Plaintiffs with appropriate professional judgments to allow for competent evaluation for placement in an institutional facility, and have thus properly alleged a violation of the Medicaid Act. Therefore, Count III of Plaintiffs' Amended Complaint should not be dismissed.

E. DEFENDANTS WILL CONTINUE TO VIOLATE PLAINTIFFS' RIGHTS IF THIS COURT ABSTAINS FROM ADJUDICATING PLAINTIFFS' CLAIMS

Plaintiffs' claims cannot be dismissed based on abstention. The doctrine and application of abstention is exceedingly narrow, and cannot be appropriately applied to this case, because federal courts have a "virtually unflagging obligation" to exercise their validly conferred jurisdiction. Zwickler v. Koota, 389 U.S. 241, 248 (1967). There are few "extraordinary and narrow exception[s] to the duty of the District Court to adjudicate a controversy properly before it." Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976). The abstention doctrine evolves from those limited exceptions. Koken v. Viad Corp. 307 F.Supp.2d 650, 653 (E.D.Pa. 2004). In this matter, Defendants improperly assert the Burford abstention doctrine and seek to improperly apply this doctrine to this case. Burford v. Sun Oil Co., 319 U.S. 315 (1943).

Burford addressed abstention in the context of a complex, statewide regulatory regime for gas and oil drilling in Texas. Id. at 320-25. The Burford Court held that where a state creates a complex regulatory scheme, supervised by the state courts and central to state interests, abstention would be appropriate if the federal court was required to evaluate primarily state law issues, which would disrupt a state's efforts "to establish a coherent policy with respect to a matter of substantial public concern." Colorado River, 424 U.S. at 814; *see also* U.S. Automobile Ass'n v. Muir, 792 F.2d 356, 364 (3d Cir.1986) ("Generally, Burford abstention is justified where a complex regulatory scheme is administered by a specialized state tribunal having exclusive jurisdiction."). *See also* Zablocki v. Redhail, 434 U.S. 374, 380 n. 5, 98 S.Ct. 673, 678 n. 5, 54 L.Ed.2d 618

(1978) ("[T]here is, of course, no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of a state policy.").

In stark contrast to Burford, Plaintiffs' claims in this matter specifically invoke their federally-recognized rights. Any state administrative process, which Defendants suggest should take the place of this Court, would not only be inadequate to address Plaintiffs' federal claims, but it would also be tainted with Defendants' ongoing unlawful actions.

This Circuit recently addressed the standard governing Burford abstention:

> Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

Riley v. Simmons, 45 F.3d 764, 771 (3d Cir.1995) (quoting New Orleans Pub. Serv., Inc. v. Council of New Orleans (" NOPSI "), 491 U.S. 350, 360-63 (1989)). See also Feige v. Sechrest, 90 F.3d 846, 847-848 (3d. Cir. 1996).[4]

The present case does not meet the Third Circuit's requirements for abstention. First, there are no difficult questions of state law here, but rather questions of federal law and how the Defendants are violating those laws through their policies and procedures.

[4] The Third Circuit has consistently held that Burford abstention calls for a two-step analysis. The first question is whether "timely and adequate state-court review" is available. Id. Only if a district court determines that such review is available, should it turn to the other issues and determine if the case before it involves difficult questions of state law impacting on the state's public policy or whether the district court's exercise of jurisdiction would have a disruptive effect on the state's efforts to establish a coherent public policy on a matter of important state concern. Riley, 839 F.Supp. at 1127.

There is no adequate state review available for those unlawful activities. Second, there would be no disruption if this Court were to exercise federal review of any state effort to establish a coherent policy. Rather, federal review would make it easier for the Defendants to establish a coherent policy that protects Plaintiffs' rights and complies with federal law. Only through this Court's review will Defendants' policies and procedures be made to comply with the federal law cited in Plaintiffs' Amended Complaint.

Defendants cite New Orleans Public Service Inc. v. Council of New Orleans, 491 U.S. 350 (1989), as support for their argument. However, NOPSI does not support Defendants' contention. In fact, that Court specifically stated that "[w]hile Burford is concerned with protecting complex state administrative processes from undue federal interferences, it does not require abstention whenever there is such a process." NOPSI at 362.

Burford abstention is only appropriate where there are complex state administrative processes that would be disturbed if the federal court interfered. Courts in the Third Circuit have only granted abstention in exceptional circumstances. For example, the Third Circuit has held that abstention is appropriate to avoid federal court interference with Pennsylvania's regulation of insolvent insurance companies. Lac D'Amiante du Quebec, Ltee v. American Home Assurance Co., 864 F.2d 1033 (3d Cir.1988). (Court granted abstention because the state court placed the Company in state liquidation proceedings and a federal case would have disrupted those proceedings and the regulatory scheme). The Third Circuit has also affirmed that if a federal court has exclusive jurisdiction, such as in a case involving a federal question, abstention is improper. Riley at 775. (Third Circuit held that adequate review of federal claims could

not be had in state court.)

Not only have Defendants cited law that does not support abstention, but Defendants have also misstated Plaintiffs' causes of action as contained in the Amended Complaint. In their Brief in Support of Motion to Dismiss, Defendants state: "Plaintiffs allege that Defendants' offers of alternate residential placements will be so deficient that they will violate Plaintiffs' due process rights." [Dkt. # 33-1 at 33]. However, this statement misrepresents the claims set forth in Plaintiffs' Amended Complaint. As discussed more fully above, Plaintiffs' allegations, among other things, are that Defendants have deprived Plaintiffs of their rights, so as to taint the underlying facts for any state administrative proceedings. [Dkt. #30]. Plaintiffs have pled allegations that Defendants have, and continue, to violate Plaintiffs' federally-protected rights.[5] [Dkt. #30 at 19].

The Plaintiffs brought this action to address serious and ongoing violations of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101, et seq., the Rehabilitation Act ("Rehab Act"), 29 U.S.C. § 794(a), et seq., the Medicaid Act, 42 U.S.C. § 1396, et seq., and the United States Constitution. This Court cannot rely on the State of New Jersey's administrative process to ensure that Plaintiffs' federal rights are protected. Furthermore, this is a federal question for which this Court has jurisdiction,

[5] For example, Paragraph 54 alleges "None of Plaintiffs have given informed consent for their discharge from Vineland Development Center because, among other things, Defendants have precluded treating professionals at the Vineland Development Center from fully and fairly considering Plaintiffs' rights to receive treatment and services at Vineland Development Center." [Dkt. 30 at 13]; Paragraph 65 alleges "Defendants have instructed Plaintiffs' treating professionals to include language in Plaintiffs' individual habilitation plans indicating that Plaintiffs are capable of being served in settings other than Vineland Developmental Center, regardless of whether Plaintiffs are actually capable of being served in alternative settings." [Dkt. 30 at 15].

making abstention improper. As Plaintiffs' have alleged, and will show at trial, the State's system for assessing and discharging Plaintiffs from VDC specifically fails to comply with federal law.

The allegations of Plaintiffs' Amended Complaint meet the requirements of the Federal Rules of Civil Procedure, the ADA, Rehab Act, the Medicaid Act, and the United States Constitution. Those claims are properly pled with this Court, and they include claims that the policies and procedures employed by Defendants systematically violate the federal rights of Plaintiffs. Plaintiffs' claims are based on federal questions, upon which this Court has subject matter jurisdiction. State administrative reviews of transfers and discharges are being done in violation of federal law. It is preposterous for Defendants to suggest that this Court abstain from adjudicating this matter, in favor of relying on the very system that Plaintiffs allege is part of the violation. At a minimum, that system is insufficient to address systemic violations by the Defendants to provide for Plaintiffs' due process rights and rights provided by the ADA, the Rehab Act, and the Medicaid Act. The state administrative process is limited to whether a particular transfer or discharge decision was in compliance with the state policies. Plaintiffs allege that Defendants' policy of usurping treating professionals' decisions by not allowing independent recommendations to Plaintiffs, and the Defendants' disregard for Plaintiffs' consent or opposition to transfers and discharges, violates federal law. Furthermore, Plaintiffs would have no effective way of asserting their federal rights in Defendants' administrative hearing process. The facts pled support this Court's exclusive jurisdiction.

This Court is the most appropriate jurisdiction to adjudicate whether Defendants' policies and procedures are part of systemic violations of Plaintiffs' federally-protected

rights. This Court should maintain jurisdiction of Plaintiffs' claims because abstention is inappropriate in this matter.

CONCLUSION

For all of the foregoing reason, Defendants' Motion to Dismiss should be denied.

Respectfully submitted,

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Date: March 4, 2013

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of March 2013, I electronically filed the foregoing with the Clerk of Courts, using the CM/ECF system, which will then send notification of such filing (NEF), to the following:

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