IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Case No. 14-1082

ROSEMARY SCIARRILLO, by and through her guardians, Joanne St. Amand and Anthony Sciarrillo, et al,

Appellants – Plaintiffs,

v.

CHRISTOPHER CHRISTIE, as Governor of the State of New Jersey, et al,

Appellees – Defendants.

On Appeal from the United States District Court
for the District of New Jersey
D.C. Civil Action No. 2:13-cv-03478 (SRC-CLW)
Stanley R. Chesler, U.S.D.J.)

APPELLANTS' BRIEF & JOINT APPENDIX
VOL. I (JA1-JA22)

Joint Appendix, Volume II (JA 23-JA 89) filed separately

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the APPELLANTS' BRIEF, has been filed electronically with the Clerk of Court for the United States Court of Appeals for the Third Circuit using the appellant CM/ECF system. Participants who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: March 18, 2014

/s/ Thomas B. York
Thomas B. York

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Third Circuit L.A.R. 26.1, Plaintiffs – Appellants make the following disclosure:

1. Rosemary Sciarrillo et al., have no parent corporations.
2. Rosemary Sciarrillo et al., have no publically held companies that hold 10% or more of the party's stock.

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SUBJECT MATTER AND APPELLATE JURISDICTION

The Complaint raises federal questions and equal rights issues under the Civil Rights Act, 42 U.S.C. §1983; the Americans with Disabilities Act, 42 U.S.C. §12132 ("ADA"); Section 504 of the Rehabilitation Act, 29 U.S.C. §794 ("Rehab Act" or "§504"), the Medical Assistance Program under 42 U.S.C. Section 1396, et seq. ("Medicaid"); the waiver of state sovereign immunity under 42 U.S.C. §2000d-7(a)(1); and the United States Constitution. The District Court has subject matter jurisdiction pursuant to 28 U.S.C. §§1331 and 1343. The Third Circuit has appellate jurisdiction of the final order pursuant to 28 U.S.C. § 1291. On December 13, 2013, the District Court issued a final order that disposed of all the parties' claims by dismissing the Complaint with prejudice. Joint Appendix ("JA") at 6. On January 10, 2014, the Plaintiffs timely filed a Notice of Appeal. J.A. 3-4.

STATEMENT OF THE ISSUES

I. WHETHER THE COURT ERRED IN FINDING THAT THE PLAINTIFFS WERE MERELY SEEKING THEIR PREFERENCE FOR A PARTICULAR "INSTITUTION," AND IN THEREBY FAILING TO FULLY CONSIDER THE FEDERAL RIGHTS BEING ASSERTED?

II. WHETHER THE COURT ERRED IN FAILING TO RECOGNIZE THAT AN "INSTITUTION" CAN BE THE LEAST RESTRICTIVE ENVIRONMENT APPROPRIATE TO THE NEEDS OF THE PLAINTIFFS, AND IN THEREBY NOT RECOGNIZING THE RIGHTS OF THE PLAINTIFFS UNDER THE ADA AND OLMSTEAD?

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IV. WHETHER THE COURT ERRED IN FINDING THAT THE PLAINTIFFS ARE VOLUNTARILY RECEIVING SERVICES IN AN "INSTITUTION" AND THEREFORE HAVE NO RIGHT TO SAFE CONDITIONS AND FREEDOM FROM BODILY RESTRAINT?

V. WHETHER THE PLAINTIFFS HAVE PROVIDED ADEQUATE NOTICE PLEADING AS REQUIRED BY FED.R.CIV.P. 8 AND HAVE THEREBY STATED A CLAIM THAT IS PLAUSIBLE ON ITS FACE?

STATEMENT OF THE CASE

The Plaintiffs/Appellants are being forced or will be forced against their will into less appropriate and more restrictive environments without proper consideration by treating professionals of their needs, and will suffer injuries and even possible death. These actions are improperly discriminatory under the ADA and the Rehabilitation Act, are a denial of their right to an ICF/IDD-level of care under Medicaid, and are a violation of Due Process. Without any discovery and without any argument, the District Court dismissed the Complaint with prejudice based only on the briefs and on the arguments raised by the District Court *sua sponte*.

STATEMENT OF THE FACTS

The Plaintiffs/Appellants are residents of Woodbridge Developmental Center (“WDC") and North Jersey Developmental Center (“NJDC"). These are Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICF's/IID) (formerly ICF's/MR). Prior to 2012, all WDC and NJDC residents were consistently evaluated by their treating professionals to be in need of ICF/IID services.

The Defendants/Appellees are officials of the State of New Jersey, who either decided to close WDC and NJDC or who are carrying out the closure of those facilities, without consideration to the rights of the Plaintiffs/Appellants.

On August 1, 2012, the "Task Force on the Closure of State Developmental Centers" issued a "Final Report As Submitted to Governor Chris Christie and the New Jersey Legislature." ("Final Report"). The allegedly binding Final Report did not consider the rights and needs of the residents of Woodbridge and North Jersey, but instead focused only on the politically-dictated goal of closing developmental centers. Since that time, the Plaintiffs/Appellants have been denied independent and reliable evaluations of their needs by treating professionals, have been harassed and intimidated to accept inadequate and dangerous placements despite their lack

of consent, and have been deprived of or threatened with the loss of an ICF/IID-level of care.

The Plaintiffs/Appellants seek declaratory or injunctive relief requiring the Defendants to allow treating professionals to make independent and reliable judgments as to the least restrictive environment that can meet their needs, which could be a developmental center; to allow proper weight to be given to the consent or refusal of residents to any proposed transfers from their long time homes at WDC and NJDC; and to recognize their right to an ICF/IID-level of care.

STATEMENT OF RELATED CASES AND PROCEEDINGS

There are no related cases and proceedings.

STANDARD OF REVIEW

On appeal, the Court's review of the District Court's Rule 12(b)(6) dismissal of Plaintiffs' Complaint is plenary. Fleischer v. Standard Ins. Co., 679 F.3d 116, 120 (3d Cir. 2012).

SUMMARY OF ARGUMENT

The District Court misstated the position of the Plaintiffs by claiming that they are merely seeking a right to their particular developmental centers and that they are requesting an absolute right to stop the closure of their developmental centers. To the contrary, the Plaintiffs are seeking

enforcement of their rights under the ADA and the Rehab Act to receive professional evaluations as to the least restrictive setting appropriate to meet their needs and to receive proper consideration of their consent, or lack thereof, in making a transfer decision. The ADA and Olmstead require proper consideration of professional judgments and of consent in deciding the least restrictive environment that is available to meet the needs of residents. Contrary to the assumption of the District Court, the least restrictive environment that meets the needs of residents can be an "institutional" setting like the developmental centers.

The District Court improperly denied the Plaintiffs any fair opportunity to brief, argue, or seek amendment of the Complaint when it *sua sponte* raised for the first time in its Opinion dismissing the Complaint the issue of whether the Medicaid Act can form the basis of a private action. If given a proper opportunity to address this issue, as demonstrated by arguments below, the Plaintiffs would have shown a strong basis for asserting private rights under the Medicaid Act and regulations.

The Plaintiffs are *de facto* involuntarily committed residents who are entitled to substantive Due Process and, therefore, are entitled to adequate food, shelter, clothing, training, and medical care, along with safe conditions

and freedom from undue restraint. The claim that they are voluntary residents who can choose to leave is incorrect.

For the foregoing reasons, the Complaint was more than adequate notice pleading and stated plausible facts that adequately support a claim for relief. The dismissal of the Complaint was improper.

ARGUMENT

I. THE COURT ERRED IN FINDING THAT THE PLAINTIFFS WERE MERELY SEEKING THEIR PREFERENCE FOR A PARTICULAR "INSTITUTION," AND IN THEREBY FAILING TO FULLY CONSIDER THE ASSERTED FEDERAL RIGHTS.

The District Court repeatedly misstates the position of the Plaintiffs which then tainted any fair consideration of their rights. This appeal, and following argument sections, should be considered in the proper light of the actual position taken by the Plaintiffs.

The District Court incorrectly claims: "In Plaintiffs' view, the State of New Jersey cannot close the NJDC or WDC until every resident at those facilities consents to a transfer and a treatment professional has determined that another facility...is 'the most appropriate place to receive services.'" J.A. 13. It further misstates that the "Plaintiffs [claim] a federal right to the intermediate care facility of their choosing." J.A.17. It implies that the Plaintiffs are seeking some kind of absolute right to not be relocated. J.A.9. It also inaccurately claims that the Plaintiffs believe that Medicaid "prevents

Defendants from moving Plaintiffs to facilities that are "significantly distant" from family members or guardians." J.A.3.[1] There are no such arguments made by the Plaintiffs in their Complaint (J.A.34-87), in Plaintiffs' Response In Opposition To Defendants' Motion To Dismiss (Dkt. No. 1), or anywhere else. Instead, the Plaintiffs, as outlined in the argument sections below, have argued for much more limited relief.

The District Court continues to misunderstand the causes of action by simply stating that the Plaintiffs allege "that the decision to close NJDC and WDC and relocate Plaintiffs from their residences there violates Plaintiffs' substantive due process rights." J.A.17. Not surprisingly, there is no citation to the Complaint to support this claim. The Plaintiffs have never alleged that the decision to close the subject developmental centers is by itself a violation of due process. Rather, it is the failure to provide the Plaintiffs with their rights during the closure process and during their relocation that is a violation of due process.[2]

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[1] The District Court also incorrectly assumes that all the Plaintiffs have been offered a move to a different Developmental Center. J.A. 9. Although a few have received such an offer, no promise has been made to all the Plaintiffs that they will be offered another Developmental Center.

[2] The District Court failed to understand this argument by stating: "This is a distinction without a difference, as a practical result of Plaintiffs successfully enjoining the State from moving residents out of the Centers would obviously force those Centers to remain open." That finding by the District

Only by misunderstanding the Plaintiffs' claims, to make them appear excessive and absolute, can the District Court try to justify the denial of rights to the Plaintiffs. The actual more reasonable and limited position of the Plaintiffs is described in the following argument sections.

II. THE COURT ERRED IN FAILING TO RECOGNIZE THAT AN "INSTITUTION" CAN BE THE LEAST RESTRICTIVE ENVIRONMENT APPROPRIATE TO THE NEEDS OF THE PLAINTIFFS, AND IN THEREBY NOT RECOGNIZING THE RIGHTS OF THE PLAINTIFFS UNDER THE ADA AND OLMSTEAD.

The District Court incorrectly impliedly assumes that the least restrictive setting that is appropriate to the needs of the Plaintiffs can never be an "institution" or a developmental center. Only by this flawed assumption could the District Court find that the Plaintiffs have no rights under the ADA and the Rehab Act. The Court erred in essentially finding that the movement of a disabled person, against their will and without the exercise of professional judgment, to an inappropriate setting that is more restrictive and will injure them, and perhaps result in their death, when a less restrictive setting appropriate to their needs is available at a developmental center, cannot be discriminatory under the ADA or the Rehab Act. The State's failure to adequately plan for moves including not providing

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Court is false. If the Plaintiffs are provided proper rights and protections, the centers could still eventually close.

evaluations by treating professional, not properly weighing the opinions of family and guardians in developing those plans,[3] and not determining the least restrictive setting appropriate to their needs, amounts to discrimination against this highly vulnerable population. All persons not in "institutional" settings receive appropriate evaluation by treating professionals and have the wishes of their guardians properly considered, and have a determination of the least restrictive environment to meet their needs, but the most severely disabled in WDC and NJDC are to be denied such rights by the Court.

Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 119 S. Ct. 2176, 144 L. Ed. 2d 540 (1999) holds that a State is required to place an intellectually or developmentally disabled person in a more integrated setting based upon three factors:

> [1] when the State's treatment professionals have determined that community placement is appropriate, [2] the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and [3] the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.

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[3] The Plaintiffs do not claim an absolute right to veto every placement under any circumstances. We have argued that the consent, or lack thereof, of the guardian must be given significant weight. No appropriate weight is being given to the opinions of Plaintiffs' guardians by the Defendants as the State has announced moves to occur by certain dates without any consultation with the Plaintiffs' guardians. The exact limitations on the rights of guardians to refuse a move must depend on the facts of individual cases and requires further guidance from the courts.

Olmstead, 527 U.S at 582. If one of those three criteria is missing, then, the State would have no duty to transfer the individual and the State would not be discriminating. Those same criteria should be applied if the least restrictive environment appropriate to an individual's needs is the present "institutional" setting. If the treating professionals determine that the "institution" is the appropriate least restrictive environment, that the resident (usually through his or her guardian) consents to continue residing there, and the placement can be reasonably accommodated there or in another developmental center, then Olmstead applies. To not allow care in an 'institutional" setting to persons already residing there, when others receive similar services, is discrimination under the ADA. The residents of NJDC and WDC who are being forced into alternative settings without the benefit of their treating professionals' determinations as to the least restrictive setting appropriate to meet their needs, or against their treating professionals' determination that the current institutional setting is the least restrictive setting appropriate to serve their needs, and who do not desire an alternative setting, but yet are being forced into the setting, are being subjected to discrimination by the State.

> 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) (an implementing regulation of Title II of the ADA). Recipients of federal funds must "administer programs and activities in the most integrated setting appropriate to the needs of qualified individuals." 28 C.F.R. § 41.51(d) (one of the § 504 of the Rehabilitation Act regulations). Such mandates necessarily require determinations of the most integrated setting appropriate to the needs of the individual. Hence, in addition to Olmstead, Title II of the ADA and § 504 of the Rehabilitation Act, as interpreted in the regulations, contemplate determinations of least restrictive setting appropriate to an individual's needs.

Olmstead further explains the regulatory language and statutory intent of the ADA.

> We emphasize that nothing in the ADA or its implementing regulations condones termination of institutional settings for persons unable to handle or benefit from community settings.
>
> * * *
>
> Consistent with these provisions, the State generally may rely on the reasonable assessments of its own professional in determining whether an individual 'meets the essential eligibility requirements' for habilitation in a community based program. Absent such qualification, it would be inappropriate to remove a patient from the more restrictive setting.
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> * * *
>
> Nor is there any federal requirement that community-based treatment be imposed on patients who do not desire it. See 28 CFR § 35.130(e)(1) (1998) ('Nothing in this part shall be construed to require an individual with a disability to accept an accommodation ... which such individual chooses not to accept.'); 28 CFR pt. 35, App. A, p.450 (1998) ('Persons with disabilities must be provided the option of declining to accept a particular accommodation.')."

Olmstead, 527 U.S. at 601, 602 (citations omitted).

The Appellants are not claiming that closure of an ICF/IID, closure of NJDC and WDC, alone amounts to discrimination. What Appellants are claiming, as supported by the language in Olmstead, is that NJDC and WDC residents are being discriminated by the State by being denied determinations by their treatment professionals of the most integrated setting appropriate to their needs, and by being denied proper consideration of their consent to a placement. Plaintiffs are not directly seeking an "institutional" residence, but rather are seeking the least restrictive setting that can meet their needs, which in this case may well be a developmental center.

The District Court states that it will "join the numerous other federal courts [that] have rejected similar 'obverse Olmstead' arguments." Opinion at 7, J.A. 40. Respectfully, the cases interpreting Olmstead on this issue (of professional evaluations as to least restrictive setting appropriate to an individual's needs) are not numerous. There appears to be less than five directly on this issue, and all are district court cases. All of these cases seem to incorrectly assume that an "institution" can never be appropriate and also the least restrictive alternative.[4]

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[4] There are some disabled individuals who are placed in a house in the "community" where they see one caretaker all day and seldom leave the

The Olmstead criteria constitute a three-part test for finding a violation of the integration mandate and not merely when the State has a duty to transfer an individual. "The Third Circuit has synthesized these laws into a three-part test for finding a violation of the integration mandate." Duffy v. Velez, 2010 U.S. Dist. LEXIS 10537 at *6 (Dist. NJ, Feb. 8, 2010) (unpublished decision). As such, the three-part test applies whenever a transfer is being considered, even if the test results in a finding that a disabled person can be most appropriately integrated and cared for in an "institutional" setting.

As recognized by the District Court, the Third Circuit granted intervention to a group of individuals who opposed community placement and were seeking an enforceable right to remain at the institution. Benjamin ex rel. Yock v. Dep't of Pub. Welfare of Pa., 701 F. 3d 938 (3d Cir. 2012). While the granting of intervention does not constitute the acknowledgement of discrimination, it does acknowledge that the residents and guardians may have ADA or other rights. "Olmstead and the regulations make clear that 'community based treatment [cannot] be imposed on patients who do not desire it'." Id. at 942. The Third Circuit explained that it refused to express

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house, which is clearly not more integrated than a more stimulating "institutional" setting where there are many activities and many persons throughout the day.

an opinion as to whether the residents have a legally enforceable right to remain in their current ICF/MR, but, stated that the Court 'assume[s], without deciding that they do'. Id. at 944, 945. While this is dicta, it is illustrative that the Third Circuit may consider ICF/IID residents and their guardians to have ADA rights. The Third Circuit granted intervention at the remedy stage to those who were not part of the defined class and who wished to remain in their current ICFs/MR because the settlement agreement affected or impaired "protectable interests of Appellants and other ICF/MR residents, guardians, and involved family members". Id. at 957. While the Third Circuit did not define those rights, the Court recognized some protectable interest. In making its determination, the Court made reference to the Olmstead criteria, emphasizing that residents be discharged into the community when eligible and desirous of such placement. While the Court did not hold per se that discrimination occurs when a resident wishes to remain at the institution and the three Olmstead criteria have not been met, it certainly does not infer that using the criteria to determine protectable interests would be "obverse" to Olmstead. J.A.14.

Other federal district courts have recognized the importance of professional judgments with respect to least restrictive settings appropriate to the individual's needs under the ADA and the Rehab Act. The District

Court of Connecticut stated that medical professionals should not be absolved from the "responsibility to exercise professional judgment about recommending placement in all cases except those in which a class member, parent, or a guardian has explicitly asked for community placement" and that that would be "inconsistent with the integration mandate of the ADA and §504." Messier v. Southbury Training School, 562 F. Supp. 2d 294, 329 (D. Conn. 2008). The Court found that professional judgments should be made as to the appropriateness of placements even if the residents were not seeking to move. Messier stated that there is "a constitutional right to have professionals exercise their judgment as they must in any decision regarding treatment, programming or in the use of restraints at a state institution." Messier, 562 F. Supp. 2d at 335, 336 citing the Second Circuit, Society for Good Will to Retarded Children v. Cuomo, 737 F. 2d 1239, 1249 (2d Cir. 1984). "The court sees no reason why STS professionals should not be required to consider appropriateness of community placement in every case." Messier, 562 F. Supp. 2d at 342 citing the Fourth Circuit, Thomas S. v. Flaherty, 902 F. 2d 250, 254 (4th Cir. 1989). Considering the appropriateness of community placement is not in a vacuum, it by necessity also would need to consider the appropriateness of the current "institutional" placement.

The Defendants are avoiding the integration mandate by failing to require professionals to make recommendations regarding the required services. Without professional assessments before transfer, NJDC and WDC residents risk serious harm and even death, including possibly being placed in a more restrictive setting or a setting inappropriate to meet their needs.

As recognized by the Supreme Court: "We emphasize that nothing in the ADA or its implementing regulations condones termination of institutional settings for persons unable to handle or benefit from community settings." Olmstead. at 601, 602. This language clearly implies the truth that an "institution" might be the most appropriate integrated setting available. If a resident wanted to move to a community placement, but his or her treatment team found such placement to inappropriate, the State would not be discriminating against the individual by not moving them. But, if a resident does not want to move to a community placement, and his treatment team found such placement to be inappropriate or made no determination at all, under the limited interpretation advanced by the District Court, a State nonetheless would not be discriminating against the individual if it forced the individual to move. The Supreme 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)). This supports a possible finding that an "institution" can be the least restrictive setting appropriate to the needs of the Plaintiffs and that Olmstead applies when individuals want to remain in an "institution."

As stated in the Complaint, the State has denied NJDC and WDC residents any meaningful evaluations by treating professionals as to the least restrictive settings appropriate to meet their needs. [For example, Complaint at ¶¶ 70, 71, 72, 93, 94, 95, 104, 113, 114, 116, 124, 128, 129, 136, 137, 141, 149, 150, 151, 159, 160.] J.A. 58-59, 64-65, 67-69, 71-72, 74, 76, 78-

81. As stated in the Complaint, the State has failed to properly consider NJDC and WDC residents/guardians' consent to alternative placement, and instead has used tactics of fear and coercion. [For example, Complaint at ¶¶ 74, 102, 117, 118, 128, 129, 140, 141, 142, 150, 151, 160.] J.A. 59-60, 66, 69-71, 72, 76-77, 78-79, 82-83. The Plaintiffs have alleged that all the named Plaintiffs and proposed members of the class have experienced this denial of rights. The plaintiffs have clearly stated a claim for relief that is plausible on its face.

III. THE COURT ERRED IN *SUA SPONTE* RAISING THE ISSUE OF WHETHER THE MEDICAID ACT CAN BE ENFORCED BY PRIVATE INDIVIDUALS WITHOUT ANY OPPORTUNITY OF THE PLAINTIFFS TO ADDRESS THIS ARGUMENT, AND IN THEN FINDING NO PRIVATE CAUSE OF ACTION.

The Defendants never raised the issue of whether the Medicaid Act can be enforced by private individuals. That issue was raised for the first time in the Opinion dismissing the Complaint. As a result, the Plaintiffs were never given an opportunity to brief this issue or to timely amend their Complaint. [5] Not only should the Plaintiffs have had an opportunity to brief

[5] Surprisingly, the District Court states: Plaintiffs' Opposition brief makes no argument whatsoever as to whether the litany of Medicaid Statutes and regulations cited in the Complaint individually pass a Gonzaga Univ. v. Doe analysis and can therefore be enforced privately pursuant to § 1983." J.A. 16. Understandably, since no issue had been raised as to a Medicaid private cause of action before Plaintiffs brief was due, Plaintiffs' Opposition did not address that issue.

or argue this issue, but the finding of no private cause of action was an error.[6]

"A district court has authority to dismiss all or part of a complaint *sua sponte* (i.e., on the judge's own motion), provided that the procedure employed to raise the issues is a fair one." Bowman v. U.S.A., No. 95-5863, 1995 U.S. Dist. LEXIS 16286, *4 (E.D. Pa, Nov. 1, 1995), citing Hermann v. Meriden Mortgage Corp., 901 F. Supp. 915, 923, 924 (E.D. Pa. 1995) and 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357 at 301 (2d ed. 1990). Accordingly, Bowman allowed the parties an opportunity to submit memoranda of law subject to the Rule 12(b)(6) dismissal. Id.

> Courts must move cautiously when dismissing a complaint sua sponte … Although it is occasionally appropriate for a district court to 'note the inadequacy of the complaint and, on its own initiative, dismiss the complaint[,] a court may not do so without at least giving plaintiffs

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Similarly, the District Court *sua sponte* raised the issue of whether the Medicaid cause of action was brought under § 1983. Although the Complaint refers to § 1983 in multiple places, it may have not been woven directly into Third Cause of Action that covered the Medicaid Act. *See* J.A. 39, 48-49. However, the Third Cause of Action clearly incorporated all the preceding paragraphs that included references to §1983. J.A. 80. If Plaintiffs had been given the opportunity to brief, argue, or amend as to this issue, it would have been clearly addressed.

[6] Unfortunately, the issue of a private action under Medicaid is complicated and could use up thirty pages itself. The Plaintiffs have attempted to adequately address this issue in the limited pages remaining after addressing other important issues. This would have been more appropriately briefed, or addressed by amendment, in the Court below without such page limitations.

> notice of the proposed action and affording them an opportunity to address the issue.'

The Clorox Co. of Puerto Rico v. The Proctor & Gamble Commercial Co., 228 F. 3d 24, 30 (1st Cir. 2000) (citations omitted). No fair opportunity was provided by the District Court to address this issue. In any case, as discussed below, the finding that there was no private claim was in error.

The Plaintiffs cite to a number of sections of the Medicaid Act including 42 U.S.C. §§ 1396n, 1396a(a)(10), and 1396(a)(15) and 42 CFR §§ 483.440(b)(3) and 483.440(a)(1). J.A. 80. If allowed, the Plaintiffs would have supported the private causes of action under each of these sections.

For example, under the Medicaid "HCBS waiver program," Congress authorizes funding for "states to give individuals who would otherwise be eligible to receive Medicaid benefits in a more traditional, long-term institution the option of receiving care in their home or in community-based residences." Ball v. Rodgers, 492 F.3d 1094, 1098 (9th Cir. 2007). To qualify for the waiver program, states must provide "certain 'assurances' to the Secretary of Health and Human Services." Id. (citing §§ 1396n(c)(2), (d)(2)). Section 1396n(c)(2)(C), known as the free choice provision, requires one such assurance:

> [S]uch individuals who are determined to be likely to require the level of care provided in a hospital, nursing facility, or intermediate care facility for the mentally retarded are informed of the feasible alternatives, if available under the waiver, at the choice of such individuals, to the provision of inpatient hospital services, nursing facility services, or services in an intermediate care facility for the mentally retarded.

42 U.S.C. § 1396n(c)(2)(C). The named Plaintiffs and the proposed class members qualify for and are currently receiving services covered by this provision. As such, where options for treatment are available in New Jersey under the HCBS waiver program, Plaintiffs and their wards are entitled to be "informed of the feasible alternatives" and to choose the type of facility where they receive services. 42 U.S.C. § 1396n(c)(2)(C). This subsection may not mandate that Defendants offer a particular option or operate a particular facility but "just requires the provision of information about options that *are* available." *See* Bertrand ex rel. Bertrand v. Maram, 495 F.3d 452, 459 (7th Cir. 2007). The Medicaid Act itself does not authorize individual actions under § 1396n(c)(2)(C). However, § 1983 arms Plaintiffs with an implied enforcement mechanism. Two Supreme Court decisions guide the analysis of this question: Gonzaga University v. Doe, 536 U.S. 273 (2002) and Blessing v. Freestone, 520 U.S. 329 (1997). Blessing sets out three factors to consider when evaluating "whether a particular statutory provision gives rise to a federal right." 520 U.S. at 340. A plaintiff must

show that: (1) "Congress . . . intended that the provision in question benefit the plaintiff;" (2) "the right assertedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence;" and (3) the statute "unambiguously impose[s] a binding obligation on the States." Id. at 340–41. In Gonzaga, the Supreme Court clarified the first element of the Blessing test, holding that "it is *rights*, not the broader or vaguer 'benefits' or 'interests,' that may be enforced" under § 1983. 536 U.S. at 283. A post-Gonzaga authority holds that § 1396n(c)(2)(C) is enforceable via § 1983. In Ball v. Rodgers, the Ninth Circuit addressed this precise issue in detail. The opinion includes a careful, extensive analysis and application of the Blessing and Gonzaga tests. 492 F.3d at 1103–17. The Ninth Circuit ultimately concluded that "Medicaid beneficiaries enjoy 'unambiguously conferred' individual rights under §§ 1396n(c)(2)(C) and (d)(2)(C) and that those rights can be properly enforced through a § 1983 cause of action." Id. at 1117.[7]

The Defendants have not informed Plaintiffs of feasible alternatives, as necessarily must be determined by judgments made by treating professionals, that remain available in New Jersey under the waiver. For

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[7] A large portion of the argument in this paragraph is adopted, sometimes verbatim, with some modifications, from the unreported Memorandum Opinion and Order in Illinois League Of Advocates v. Quinn, Case No. 13 C 1300 (N.D. Ill. 2013) at pp. 18-20.

example, the Defendants have simply told Plaintiffs that their loved ones will be moved by the projected closure dates. The Defendants also have not provided information based upon professional determinations as to any placement alternatives. The Defendants have deprived them of information based upon professional judgments and of choice despite § 1396n(c)(2)(C)'s mandate. The Third Cause of Action thus adequately sets forth a claim for violations of Medicaid's free choice provision.

Similar arguments supporting a private cause of action can be made for the following sections:

§1396a(a)(10) States must make medical assistance available
§1396a(a)(31) States must provide a written plan of care, and review by independent professionals (including medical evaluations)
§ 1396d(a)(15) developmentally disabled are entitled to medical assistance
§ 1396d(d) definition of ICF/MR
§ 1396n(i)(D) assessments needed for waiver

The Court claims that 1396a(a)(10) and 1396d(a)(15) are not applicable to this case, even though case law has recognized a private cause of action with respect to those sections, because they involve the making of medical assistance available. J.A. 16-17. The Court says that we are not arguing that medical assistance is not being made available, but rather we are arguing about the type of medical assistance available in other facilities. To the contrary, if the services being offered are so inadequate as to cause harm or death to the residents, then medical assistance is not truly available.

Providing medical assistance cannot be satisfied simply by the State paying for inappropriate services. Further, 1396a(a)(31) and 1396n seem appropriate as well to support a private cause of action. At ICF's/IID, habilitation plans are required, which would include assessments by treating professionals. 1396a(a)(31). For consideration of community waiver services, assessments by treating professionals are required. 1396n(c)(2)(C) and 1396n(i)(D). Congress intended these provisions to benefit the residents, these rights are not vague and amorphous, and these sections unambiguously impose binding obligations. A private right under Medicaid is supported by these relevant sections and more.

IV. THE COURT ERRED IN FINDING THAT THE PLAINTIFFS ARE VOLUNTARILY RECEIVING SERVICES IN AN "INSTITUTION" AND THEREFORE HAVE NO RIGHT TO SAFE CONDITIONS AND FREEDOM FROM BODILY RESTRAINT.

The District Court finds that the Plaintiffs are all voluntarily living at the subject Developmental Centers and that they therefore deserve no protections under substantive due process. J.A. 20-22.[8] The reality is that the Plaintiffs are *de facto* involuntarily confined to the care of the State, as the State has assumed full control over them for many years which has made them fully dependent upon the State, and they do not enjoy any reasonable

[8] Even if the District Court was correct, the causes of action under the ADA, the Rehab Act, and the Medicaid Act still are viable.

freedom of movement, as evidenced even by the planned transfers against their will. The reality is that the Plaintiffs have no real options that would allow them to voluntarily choose to forego any placements dictated by the State. The District Court seeks to deprive the Plaintiffs of Due Process rights by promoting the illusion that the Plaintiffs are voluntarily placing themselves in the care of the developmental centers and can voluntarily leave state care if they do not wish to be forced to move to an inappropriate setting. However, the reality is that, especially after years of services in the developmental centers on which they have learned to depend, no real options exist for the Plaintiffs to leave their services at the developmental centers. The Complaint has alleged that the Plaintiffs are very significantly, and often profoundly, developmentally or intellectually disabled, and medically disabled. J.A. 39-45, 49, 52-57. Almost all the Plaintiffs have been diagnosed with additional disabilities, including seizure disorders, severe autism, cerebral palsy, hearing impairments, and hearing impairments. J.A. 52-57. Most lack the capacity to consent for themselves. J.A. 49. They have resided at NJDC or WDC for many years, with some over 40 or even over 50 years. J.A. 39-45, 50. All of the Plaintiffs are diagnosed as in need of state-run ICF/IID institutional care and have been appropriately designated as eligible for state-operated ICF/IID-level of care. J.A. 52. They receive

and require the services provided by the State. Thus, while not formally committed to institutional care provided by the State, they most certainly could not maintain their needs without the current level of care the State has been providing. While the residents may be free theoretically to leave NJDC or WDC, they could not do so without the proper care and supports elsewhere, that do not presently exist. Further, as long as the State requests and accepts federal funding for the care of New Jersey and Woodbridge residents in its centers, the State has an obligation to provide such care. Also, once the State has assumed the care of these individuals for so many years, they should not be able to deny them due process rights based upon an illusory claim that they are capable of walking away from those services if they are dissatisfied with coerced transfers. Developmentally or intellectually disabled individuals whose care was assumed by state developmental center without any full knowing and informed consent of the individuals themselves, should be entitled to rights of safe conditions and freedom from restraint at least as great as those involuntarily committed to state institutions.

Other Courts have held that voluntary residents of state schools for the developmentally disabled were entitled to certain due process rights (that is, certain Youngberg rights: the rights to adequate food, shelter, clothing,

training and medical care, and the right to safe conditions and freedom from undue restraint. Youngberg v. Romeo, 457 U.S. 307 (1982)). Society for Good Will to Retarded Children, Inc., v. Cuomo, 737 F.2d 1239, 1245 (2d Cir. 1984). Society for Good Will reasoned that the Youngberg case relied on Supreme Court precedent that suggested that anyone in a state institution has a right to safe conditions protected by the Due Process Clause. Id. *(See also* Rubacha v. Coler, 607 F.Supp. 477, 479 (N.D. Ill. 1985), Society for Good Will "extended *Youngberg"* to *any* person in state custody and held the State was required to exercise accepted 'professional judgment' in safeguarding the security of children in its custody.") *(See also* Kolpak v. Bell, 619 F. Supp. 359 (N.D. Ill. 1985), finding that a resident with mental and intellectual disabilities had trouble communicating and had virtually no power to leave the institution or otherwise protect himself, "he may have had only a *de jure,* and not a *de facto,* right to leave.") The Court stated:

> [F]or all practical purposes, many of the residents of state-run mental institutions are effectively admitted involuntarily: they may have been admitted upon unilateral application of their parents or guardians; they may be incapable of expressing a desire to enter or to leave; they may be involuntarily committed when they apply for discharge; or their financial circumstances may be such that admission, voluntary or involuntary, is a foregone conclusion. A decision that a 'voluntary' admittee, whatever the definition of voluntary, has no constitutional rights would have to be made with these factors in mind.

Id. at 378,379 (Court construed resident's admission as "involuntary" for purposes of Youngberg).

The Third Circuit has recognized that residents who have been formally recognized as being voluntarily committed may find themselves in a "*de facto*" involuntary status and the facts and circumstances of whether an individual has been deprived liberty to trigger the Youngberg protections must be examined beyond the label of involuntary or voluntary custody. Torisky v. Schweiker, 446 F.3d 438, 447-448 (3d Cir. 2006). In addition, citing Brooks v. Guiliani, 84 F.3d 1454, 1467-68 (2nd Cir. 1996), it explained:

> [E]ven though the plaintiffs' commitment to out-of-state residential treatment facilities did not give rise to *Youngberg* rights, an 'involuntary transfer' to in-state facilities would restrict plaintiffs' liberty' and thereby 'implicate the Due Process Clause.'

Torisky, 446 F.3d at 447. Torisky concluded:

> [P]laintiffs may be able to prove facts consistent with these allegations that would establish a deprivation of liberty and a violation of Youngberg's duty of care and protection.
> * * *
> [A]ssuming none were [court-ordered committed], it is far from clear that any of the plaintiffs were in a position to extricate themselves from state custody at the time of the transfer that allegedly inflicted their injuries.

Id. at 448. "[R]esidents of state institutions whose circumstances do not qualify them for protection under *Youngberg* nevertheless possess other

substantive due process rights to be free of certain state interference in their lives." Torisky, 446 at 443.]

The Plaintiffs cannot freely leave NJDC or WDC on their own accord at any time. The Plaintiffs are totally dependant on the medical and habilitative care provided by the State, and they cannot decline services at any time without jeopardizing their health, safety, and well-being, and even their lives. Nor can they do so without the recommendation of a treating professional, and the consent of their guardian or family member. While in the State's custody and care, NJDC and WDC residents are entitled to adequate food, shelter, clothing, training and medical care, and safe conditions and freedom from undue restraint. The failure of the treating professionals to make unbiased, independent determinations as to least restrictive settings appropriate to meet an individuals' needs, which is alleged throughout the Complaint, is a substantial departure from accepted professional practice and is a violation of Due Process. Thus, Plaintiffs' substantive Due Process claims should not be dismissed.

V. THE PLAINTIFFS HAVE PROVIDED ADEQUATE NOTICE PLEADING AS REQUIRED BY FED.R.CIV.P. 8 AND HAVE THEREBY STATED A CLAIM THAT IS PLAUSIBLE ON ITS FACE.

The District Court erred in finding that the Plaintiffs did not meet the pleading standards. The Federal Rules of Civil Procedure Rule 8(a)(2) only

requires a short and plain statement of relief. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 n.3, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). In their Complaint, Plaintiffs provided more than a mere recitation of the elements of their causes of action, they provided facts and information to support their claims. As such, a "well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable." Id. at 556. If a complaint contains sufficient facts, accepted as true, to state a claim to relief that is plausible on its face, then the complaint should survive a Fed. R. Civ. P. 12(b)(6) motion to dismiss. Factual plausibility exists when a court can draw a reasonable inference that the defendants are liable for the allegations made. Aschcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). The Plaintiffs, as described in the foregoing arguments, have adequately presented the facts and the plausibility of their claim for relief.

CONCLUSION

The Plaintiffs-Appellants request that this Court reverse the dismissal of the Complaint.

Respectfully Submitted,

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Lemoyne, Pennsylvania 17043
(717) 236-9675
Attorney for Appellants

By: /s/ Thomas B. York
Thomas B. York

Dated: March 18, 2014

COMBINED CERTIFICATIONS

I, Thomas B. York, hereby certify:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,617 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word Office Professional 2003 in font 14, Times New Roman.

3. Pursuant to Local Rule 46.1, that Thomas B. York is a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

4. The text of the electronic brief is identical t the text in the paper copies.

5. That a virus detection program Microsoft Security Essentials has been run on the electronic file and no viruses were detected.

Dated: March 18, 2014

/s/Thomas B. York
Thomas B. York

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the APPELLANTS' BRIEF, has been filed electronically with the Clerk of Court for the United States Court of Appeals for the Third Circuit using the appellant CM/ECF system. Participants who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: March 18, 2014

/s/ Thomas B. York
Thomas B. York

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Case No. 14-1082

ROSEMARY SCIARRILLO, by and through her guardians, Joanne St. Amand and Anthony Sciarrillo, et al,

Appellants – Plaintiffs,

v.

CHRISTOPHER CHRISTIE, as Governor of the State of New Jersey, et al,

Appellees – Defendants.

On Appeal from the United States District Court
for the District of New Jersey
D.C. Civil Action No. 2:13-cv-03478 (SRC-CLW)
Stanley R. Chesler, U.S.D.J.)

JOINT APPENDIX
VOL. I (JA1-JA22)

Joint Appendix, Volume II (JA 23-JA 89) filed separately

ON THE BRIEF:

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
VICINAGE OF NEWARK

ROSEMARY SCIARRILLO, by and through her guardians, Joanne St. Amand and Anthony Sciarrillo,

JOYCE BANOS, by and through her guardian, Peter Banos,

CHARLES DAVID CHRISTENSEN, by and through his guardian, Daniel Christensen,

ARLEEN BRAUSE, by and through her guardians, Joseph Fass and Harriet Fass,

KENNETH COOPER, by and through his guardian, Minnie Cooper,

VINCENT GALLUCCIO, by and through his guardian, Domenica Galluccio,

RODNEY HAMMOND, by and through his guardian and his brother, Carrie Hammond and Walter Hammond,

SHARON KNAPP, by and through her guardians, Barry Knapp and Maria Knapp,

RICHARD SARAO, by and through his guardian, Mary Tritt,

CHERYL GORDON, by and through her brother, Joseph Gordon,

PETER CANALE, by and through his guardians, Steven Canale and Maria Canale,

LINDA GRAVES, by and through her

parents, Shirley and Billie Graves, :

DIANE O'BRIEN, by and through her :
guardian, Fred O'Brien, :

THOMAS MARINELLO, :
by and through his guardians, :
Jean Marinello and Jody Sorge, :

KERR MITCHELL, by and through :
his guardian, Juana Mitchell, :

EUGENE CARR, by and through :
his guardian Marylyn Carr, :

LEAH WRIGHT, by and through :
her guardian, Elizabeth Wright, :

JACQUELINE FRIEDMAN, by and :
through her guardians, Sam Friedman :
and Gail Friedman, :

PAUL DITTAMO, by and through his :
mother, Wendy Dittamo, :

CLAYTON DAVIS, by and through his :
guardians, Rose Seyler and :
Dorothy Davis, :

STEPHEN SCOTT DYER, by and :
through his guardian, Peter Dyer, :

SUSAN GRIFFIN, by and through her :
guardian, Barbara Columbo, :

EUGENE KESSLER, by and through his :
guardian, Frances Finkelstein, :

PHILIP CONKLING, by and through :
his guardian, Caroline Conkling, :

RALPH GRZYMKOWSKI, by and :
through his guardians, Dana and :
Mirek Grzymkowski, :

MARY ELLEN SCESA, by and through :

her guardians, Kathleen and Louis Scesa,

ALICE TUCKER, by and through her guardian Bertha Westbrock,

STEPHANIE ROOTS, by and through her guardian, Marie Reid,

KESHA SMITH, by and through her guardian, Deborah Smith,

ANDREW SEKELA, by and through his guardian, Winifred Sekela,

PAUL VACCA, by and through his guardians, Donald and Theresa Vacca,

RALPH VERLEUR, by and through his guardian, Else Verleur,

Plaintiffs,

v. **CIV. NO.: 2:13-cv-03478-Stanley R. Chesler**

CHRISTOPHER CHRISTIE, as Governor of the State of New Jersey; NEW JERSEY DEPARTMENT OF HUMAN SERVICES; JENNIFER VELEZ, as Commissioner of the New Jersey Department of Human Services; NEW JERSEY DEPARTMENT OF HUMAN SERVICES DIVISION OF DEVELOPMENTAL DISABILITIES; DAWN APGAR, as Deputy Commissioner/Acting Assistant Commissioner of New Jersey Department of Human Services Division of Developmental Disabilities; NORTH JERSEY DEVELOPMENTAL CENTER; WOODBRIDGE DEVELOPMENTAL CENTER,

Defendants. **January 10, 2014**

NOTICE OF APPEAL

Notice is hereby given that all Plaintiffs in the above-named case, hereby appeal to the United States Court of Appeals for the Third Circuit from the December 13, 2013, Order (Dkt. No. 18) of the United States District Court for the District of New Jersey, Vicinage of Newark, entering final judgment in favor of the Defendants and against the Plaintiffs, and dismissing Plaintiffs' Complaint with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of January 2014, 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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/s/ Thomas A. Archer

CLOSED

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ROSEMARY SCIARRILLO, by and through her guardians, Joanne St. Amand and Anthony Sciarrillo, et al., Plaintiffs, v. CHRISTOPHER CHRISTIE, Governor of the State of New Jersey, et al., Defendants.	**Civil Action No. 13-03478 (SRC)** **ORDER**

CHESLER, District Judge

This matter having come before the Court on Defendants' motion to dismiss the Complaint, pursuant to Federal Rule of Civil Procedure 12(b)(6) [Docket Entry 4.]; and Plaintiffs having opposed the motion [Docket Entry 13]; and the Court having opted to rule on the papers submitted, and without oral argument, pursuant to Federal Rule of Civil Procedure 78; and for the reasons expressed in the Opinion filed herewith; and good cause shown,

IT IS on this 13th day of December, 2013,

ORDERED that Defendants' motion to dismiss [Docket Entry 4] be and hereby is **GRANTED**; and it is further

ORDERED that the Complaint be and hereby is **DISMISSED WITH PREJUDICE**; and it is further

ORDERED that this case be and hereby is **CLOSED**.

s/ Stanley R. Chesler
STANLEY R. CHESLER
United States District Judge

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ROSEMARY SCIARRILLO, by and through her guardians, Joanne St. Amand and Anthony Sciarrillo, et al.,

Plaintiffs,

v.

CHRISTOPHER CHRISTIE, Governor of the State of New Jersey, et al.,

Defendants.

Civil Action No. 13-03478 (SRC)

OPINION

CHESLER, District Judge

This putative class action, filed by thirty-five developmentally disabled individuals ("Plaintiffs") who currently receive services at two state-run developmental centers, seeks to prevent the State from closing those centers and moving Plaintiffs to other treatment facilities. The Complaint asserts causes of action under three federal statutes – the Americans with Disabilities Act ("ADA"), the Rehabilitation Act ("RA"), and the Social Security Act – as well as a § 1983 constitutional due process claim. Defendants[1] have filed a motion to dismiss these claims, pursuant to Federal Rule of Civil Procedure 12(b)(6). [Docket Entry 4.] Plaintiffs oppose. [Docket Entry 13.] In addition, the United States of America has filed a Statement of Interest, pursuant to 28 U.S.C. § 517, which argues that Plaintiffs have failed to state ADA and

[1] The Complaint names seven Defendants: Christopher Christie; the New Jersey Department of Human Services ("NJ DHS"); Jennifer Velez, Commissioner of the NJ DHS; the New Jersey Department of Human Services Department of Developmental Disabilities ("NJ DDD"); Dawn Apgar, Deputy Commission of the NJ DHS; North Jersey Developmental Center ("NJDC"); and Woodbridge Developmental Center ("WDC"). This Opinion uses the terms "Defendants" and "State" interchangeably.

RA causes of action. [Docket Entry 7.] The Court has considered these submissions, and will rule on the motion without oral argument, pursuant to Federal Rule of Civil Procedure 78. For the reasons that follow, Defendants' motion will be granted, and the Complaint will be dismissed with prejudice.

I. Background

This lawsuit arises out of the State of New Jersey's decision to close two state-run residential care facilities for the developmentally disabled, Woodbridge Developmental Center ("WDC") in Middlesex County and North Jersey Developmental Center ("NJDC") in Passaic County. (See Compl. at ¶¶ 121-22.) In broad terms, the Complaint alleges that Defendants are "downsize[ing] or depopulate[ing]" the NJDC and the WDC "without regard to the needs of the individual Plaintiffs," who are all profoundly disabled adults residing at one of the two Centers. (See id. at ¶ 119.) According to the Complaint, Defendants plan to move Plaintiffs out of WDC and NJDC; to this end, Defendants have offered Plaintiffs the choice between a "community placement" – *i.e.*, "small group homes, nursing homes, and other settings with smaller populations" – and a move to a different Developmental Center located "over one hundred miles away." (Id. at ¶¶ 110, 118(d).) Being moved out of the NJDC and WDC will result in the denial to Plaintiffs of "access to their current high level of treatment and services," (id. at ¶ 130), and the decision to close the two Centers has exposed or will expose Plaintiffs to a "significant risk of harm." (Id. at ¶ 90.)

By this lawsuit, Plaintiffs' ask the Court to prevent their relocation, as well as the relocation of a class of similarly situated individuals who have been residents of NJDC or WDC since August 1, 2012. Applying language from the Supreme Court's decision in Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581 (1999), Plaintiffs argue that an involuntary transfer out of

NJDC or WDC constitutes discrimination in violation of Title II of the ADA, 42 U.S.C. § 12131, as well as § 504 of the RA, 29 U.S.C. § 794(a). According to Plaintiffs, Olmstead provides them a right to oppose the State of New Jersey's decision to move them from institutional care to a more integrated community setting. (See Compl. ¶ 132-35 ("there is no 'federal requirement that community-based treatment be imposed on patients who do not desire it'" (quoting Olmstead, 527 U.S. at 602).)

Plaintiffs also seek relief pursuant to (1) the Medicaid portions of the Social Security Act and related regulations, and (2) the Due Process Clause of the Fourteenth Amendment. As to the former, the Complaint alleges that Medicaid provides Plaintiffs with a host of rights – including the right to oppose a "discharge or transfer" from NJDC or WDC – and also prevents Defendants from moving Plaintiffs to facilities that are "significantly distant" from family members or guardians. (See id. at 47-50.) As to the latter, the Complaint alleges what amounts to two separate theories of liability. First, Defendants will violate Plaintiffs' substantive due process rights by moving Plaintiffs to non-institutionalized residences that will "substantially increase [Plaintiffs'] likelihood of injury and death from abuse, neglect, error, lack of appropriate services, and other causes." (See id. ¶¶ 168-71.) Second, Defendants have violated Plaintiffs' substantive due process rights by providing inferior care for Plaintiffs' safety and well-being during the downsizing of NJDC and WDC. (See id. ¶¶ 172-74.)

II. Discussion

A. Legal Standard

A complaint will survive a motion under Rule 12(b)(6) only if it states "sufficient factual allegations, accepted as true, to 'state a claim for relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic v. Twombly, 550 U.S. 554, 570 (2007)).

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. (citing Twombly, 550 U.S. at 556). Following Iqbal and Twombly, the Third Circuit has held that, to prevent dismissal of a claim, the complaint must show, through the facts alleged, that the plaintiff is entitled to relief. Fowler v. UPMC Shadyside, 578 F.3d 203, 211 (3d Cir. 2009). While the Court must construe the complaint in the light most favorable to the plaintiff, it need not accept a "legal conclusion couched as factual allegation." Baraka v. McGreevey, 481 F.3d 187, 195 (3d Cir. 2007); Fowler, 578 F.3d at 210-11; see also Iqbal, 556 U.S. at 679 ("While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations."). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, will not suffice." Iqbal, 556 U.S. at 678.

B. The ADA and Rehabilitation Act Claims[2]

The ADA was enacted in 1990 "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b). The ADA recognizes that "historically, society has tended to isolate and segregate individuals with disabilities, and despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." Id. § 12101(a)(2). Consistent with this statement of purpose, Title II of the ADA prohibits discrimination against individuals with disabilities by public entities: "no qualified individual with a disability shall, by reasons of such disability, be excluded from participation in or be

[2] The parties treat the ADA and Rehabilitation Act claims as interchangeable for purposes of this motion. This Court will do the same. See Olmstead, 527 U.S. at 590-92 (noting the similarities between 42 U.S.C. § 12131 and the RA and that the regulations implementing § 12131 are modeled after those implementing § 504 of the RA); Frederick L. v. Dep't of Pub. Welfare of Commonwealth of Pa., 364 F.3d 487, 490 n.2 (3d Cir. 2004) (acknowledging the "congruence" of the ADA and RA "integration mandates").

denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." Id. § 12132. Title II's integration regulation, promulgated by the Attorney General, requires public entities to "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). The "most integrated setting" is defined as one that "enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible . . . ." 28 C.F.R. Pt. 35, App. B at 673.

In Olmstead v. L.C. ex rel. Zimring, the Supreme Court addressed the question of whether the ADA's "proscription of discrimination may require placement of persons with mental disabilities in community settings rather than institutions." 527 U.S. at 587. The Court held that the answer to that question was a qualified yes: under Title II "[u]njustified isolation" in an institution can, in certain circumstances, be "properly regarded as discrimination based on disability." 527 U.S. at 597. The Court provided a three factor analysis to determine when a State must place a mentally disabled individual in a community setting, as opposed to an institution:

> [1] when the State's treatment professionals have determined that community placement is appropriate, [2] the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and [3] the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.

Id.

In support of its holding, the Court noted the shift in congressional policy towards treating disabled individuals in "state-run home and community based care," and away from institutionalized treatment. See id. at 601 (stating that Medicaid provides funding for such programs through a waiver and that the Department of Health and Human Services encourages

states "to take advantage of the waiver program"). But the Court, in dicta, was careful to observe that (1) "nothing in the ADA or its implementing regulations condones" forcing disabled persons into community settings when they are "unable to handle or benefit" from them, and (2) there is no "federal requirement that community-based treatment be imposed on patients who do not desire it." See id. at 601-02; see also id. at 604 ("the ADA is not reasonably read to impel States to phase out institutions, placing patients in need of close care at risk"). To this end, Olmstead instructed States to rely on "the reasonable assessments" of their own treating professionals to determine if disabled individuals are eligible for "habilitation in a community-based program." Id. at 602.

Olmstead thus stands for the proposition that "it is a violation of the [ADA, the RA,] and their implementing regulations to force developmentally disabled patients to reside in institutions when they are able and willing to live" in more integrated community settings. See Benjamin ex rel. Yock v. Dep't of Pub. Welfare of Pa., 701 F.3d 938, 942 (3d Cir. 2012). To substantiate their ADA and RA claims, however, Plaintiffs seize on the above dicta and argue that Olmstead stands for a somewhat related but entirely distinct proposition – that a State cannot move a developmentally disabled person from their current institution to a community setting unless the Supreme Court's three-factor analysis is met. (See Opp. Br. at 15-16). In Plaintiffs' view, the State of New Jersey cannot close the NJDC or WDC until every resident at those facilities consents to a transfer and a treatment professional has determined that another facility – institutional or community-based – is "the most appropriate place to receive services." (See id. at 15.)[3]

[3] Plaintiffs argue that they do not seek to prevent the State of New Jersey from closing the NJDC and WDC, and instead seek enforcement of "rights [that] may prevent the move of some residents from [WDC] and [NJDC] . . . ." (See Opp. Br. at 2.) This is a distinction without a

Plaintiffs' interpretation of Olmstead is untenable. Simply put, "there is no basis [in Olmstead] for saying that a premature discharge into the community is an ADA *discrimination* based on disability." Richard S. v. Dep't of Developmental Servs. of the State of Cal., No. 97-cv-219, 2000 WL 35944246, at *3 (C.D. Cal. Mar. 27, 2000) (emphasis in original). Indeed, "[t]here is no ADA provision that *providing* community placement is a discrimination. It may be a bad medical decision, or poor policy, but it is not discrimination based on disability." Id. (emphasis in original). This Court will therefore join the numerous other federal courts have rejected similar "obverse Olmstead" arguments in circumstances where a State has decided to close treatment facilities for the developmentally disabled or relocate such disabled individuals to community settings. See, e.g., Richard C. ex rel. Kathy B. v. Houstoun, 196 F.R.D. 288, 292 (W.D. Pa. 1999) (rejecting interpretation of Olmstead identical to the one proffered in this case and finding that "it does not logically follow [from Olmstead] that institutionalization is required if any of the three Olmstead criteria is not met"); Ill. League of Advocates for the Developmentally, Disabled v. Quinn, No. 13-cv-1300, 2013 WL 3168758, at *5 (N.D. Ill. June 20, 2013) (noting, in case brought to enjoin the State of Illinois from closing development centers, that "[u]njustified isolation constitutes discrimination under the ADA, but" Olmstead does not mean the converse is true).[4]

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difference, as the practical result of Plaintiffs successfully enjoining the State from moving residents out of the Centers would obviously force those Centers to remain open.

[4] The Third Circuit, in the context of a motion for intervention under Federal Rule of Civil Procedure 24, has "assum[ed], without deciding" that a group of institutionalized mentally disabled individuals who oppose community placement "ha[s] a legally enforceable right to remain in the institution where they currently reside." See Benjamin ex rel. Yock v. Dep't of Pub. Welfare of Pa., 432 F. App'x 94, 98 & n.4 (3d Cir. 2011) (denying Rule 24 intervention). In a later decision in the Benjamin litigation, the Third Circuit granted the Rule 24 intervention of the same group of individuals at the remedy stage, holding that the "protectable interests" of institutionalized individuals "may be affected" by a Settlement Agreement that fosters integration through institutional discharge. See 701 F.3d at 957 (3d Cir. 2012). But a right sufficient to warrant intervention does not a discrimination cause of action make. Absent more

The Court is sensitive to the difficulties faced by institutionalized individuals and their families; for instance, it appears from the Complaint that Plaintiffs and their families have grown accustomed to receiving state-provided care at the two institutions New Jersey has marked for closure. Plaintiffs' concerns, however, are concerns which are appropriately directed to the State agencies involved. The Court's analysis is limited to whether the controlling statutes relied upon by Plaintiffs have been violated, and it does not appear that Plaintiffs' relocation amounts to discrimination on the basis of disability in violation of federal law. As such, the Complaint fails to state a claim for violation of the ADA and RA, and those causes of action must be dismissed.

C. The Medicaid Claim

The Complaint also alleges that relocating residents of NJDC and WDC violates several provisions of the Social Security Act's Medicaid portions and their implementing regulations. The Complaint cites six provisions of the United States Code and the Code of Federal Regulations: 42 U.S.C § 1396n; 42 C.F.R. § 441.302(d); 42 U.S.C. § 1396a(a)(10); 42 U.S.C. § 1396d(a)(15); 42 C.F.R. § 483.440(b)(3); and 42 C.F.R. § 483.440(a)(1). Plaintiffs allege that this laundry list of statutes and regulations hangs upon Defendants various duties, which will all be violated by relocating Plaintiffs from NJDC and WDC.

The Medicaid claim must fail. Save for the rights contemplated by 42 U.S.C. §§ 1396a(a)(10) and 1396d(a)(15), Plaintiffs do not cite a provision of Medicaid that they can enforce through a private 42 U.S.C. § 1983 cause of action. See Sabree ex rel. Sabree v. Richman, 367 F.3d 180, 182-83 (3d Cir. 2004) ("[i]n legislation enacted pursuant to the spending power, the typical remedy for state noncompliance with federally imposed conditions is not a

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direct guidance from the Third Circuit, the Court will follow the plain language of the Olmstead decision itself and the other federal courts that have applied Olmstead to reject ADA arguments identical to the one currently before the Court.

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private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State" (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 28 (1981))).[5] It is Plaintiffs' burden to establish that the federal statute cited "gives rise to federal rights enforceable through § 1983." Grammer v. John J. Kane Regional Centers-Glen Hazel, 570 F.3d 520, 525 (3d Cir. 2009). But Plaintiffs' Opposition brief makes no argument whatsoever as to whether the litany of Medicaid statutes and regulations cited in the Complaint individually pass a Gonzaga University v. Doe analysis and can therefore be enforced privately pursuant to § 1983. See Sabree, 367 F.3d at 183 (quoting Gonzaga Univ. v. Doe, 536 U.S. 273 (2002)).

If §§ 1396a(a)(10) and 1396d(a)(15) were applicable to this case the outcome might be different, insofar as the Third Circuit has explicitly held that those subsections are privately enforceable in § 1983 suits. See Sabree, 367 F.3d at 183. But the two provisions are not relevant here. Section 1396a(a)(10) requires "[a] State plan for medical assistance" to provide . . . for making medical assistance . . . available, . . . to all [eligible] individuals . . . ." Nowhere in the Complaint do Plaintiffs allege that the State is not making medical assistance available to them. Instead, the Complaint takes issue with the type of medical assistance allegedly provided at facilities other than NJDC and WDC.

Likewise, § 1396d(a)(15) requires states to provide medical assistance in the form of payment for at least some of the "services [received by individuals] in an intermediate care facility" for the developmentally disabled. Again, the Complaint does not say that Defendants are violating federal law by failing to pay for intermediate care facilities like NJDC and WDC,

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[5] Indeed, Plaintiffs fail to bring their Medicaid claim pursuant to 42 U.S.C. § 1983, the vehicle provided by Congress for private vindication of rights that may be created by statutes such as Medicaid. See Sabree, 367 F.3d at 183. Having found the Medicaid claim is meritless, the Court will proceed as if Plaintiffs have properly brought suit pursuant to § 1983.

only that Plaintiffs have a federal right to the intermediate care facility of their choosing. Indeed, Plaintiffs argue that "Defendants have no right to assume all [intermediate care facilities] are equal or provide necessary services." (Opp. Br. at 20.) But all that § 1396d(a)(15) requires is for the State of New Jersey to pay for some or all of the services provided to disabled individuals at such facilities, not to offer disabled individuals a choice to receive care at the facility that they perceive to be superior.

In sum, Plaintiffs' Medicaid claim relies on federal law that is not enforceable in private lawsuits and statutes that are irrelevant to the complained of conduct. It will therefore be dismissed.

D. The Due Process Claim

Plaintiffs final claim is one for injunctive relief under 42 U.S.C. § 1983; it alleges that the decision to close NJDC and WDC and relocate Plaintiffs from their residences there violates Plaintiffs' substantive due process rights. To state a cause of action under § 1983, a plaintiff must "allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." West v. Atkins, 487 U.S. 42, 48 (1988). The Complaint and both parties' briefs treat the due process claim as one that rests solely on the substantive due process rights to protection and care enunciated in Youngberg v. Romeo, 457 U.S. 307 (1982).

In Youngberg, the Supreme Court addressed "the substantive [due process] rights of involuntarily committed" developmentally disabled individuals. Id. at 314. Youngberg held that "these substantive rights include a qualified right to safe conditions and freedom from bodily restraint." Fialkowski v. Greenwich Home for Children, Inc., 921 F.2d 459, 465 (3d Cir. 1990). Of course, due process "generally confer[s] no affirmative right to governmental aid." See

DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 196 (1989). Youngberg rights, however, "fit within an exception providing that 'when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.'" Torisky v. Schweiker, 466 F.3d 438, 444 (3d Cir. 2006) (quoting DeShaney, 489 U.S. at 199-200). As stated earlier, a fair reading of the Complaint reveals that Plaintiffs in fact bring two separate but related Youngberg claims – for harm that might arise if Plaintiffs are transferred to community-based facilities, and for harm that has already occurred based on inadequate staffing at NJDC and WDC.

The due process claim fails under either theory. Plaintiffs cannot state a plausible Youngberg claim based on speculative future harm that might result if Plaintiffs are placed in community-based settings. (See Compl. ¶¶ 168-71.) Such a result is foreclosed by Fialkowski, in which the Third Circuit held that a developmentally disabled individual did not have his "personal liberty . . . substantially curtailed by the state" in a manner sufficient to implicate Youngberg when the individual was moved from a state institution to a group home and choked to death at that location. See 921 F.2d at 465. In support of its holding, the Fialkowski Court noted that the individual's family "could remove their son from the [group home] if they wished" and that the individual "himself enjoyed considerable freedom of movement." See id. at 465-66. There is no indication from the Complaint or otherwise that identical considerations would not govern here. Thus, any harm that might occur to Plaintiffs in a group home setting would not be harm visited while Plaintiffs were "deprived of freedom 'through . . . institutionalization or other similar restraint of personal liberty,'" and thus would not be actionable under the Due Process Clause. See id. at 466 (quoting DeShaney, 489 U.S at 200); see also Campbell v. State of Wash. Dep't of Soc. and Health Servs., 671 F.3d 837, 843-45 (9th Cir. 2011) (holding that a mentally

disabled adult's residence in a state-run alternative-living facility is not involuntary confinement). In short, the freedom inherent in a community-based residence and the curtailment of personal liberty necessary to state a Youngberg claim are entirely dissimilar. The due process claim, insofar as it seeks liability for harm that might occur while Plaintiffs reside in state-funded community settings, is dismissed.

As to Plaintiffs' second theory, the Complaint fails to plead facts sufficient to make out a plausible Youngberg claim based on the alleged reduction in services at NJDC and WDC. See Iqbal, 556 at 678. Plaintiffs allege that the Defendants "have significantly contributed to and increased the vulnerability of the Plaintiffs [living at NJDC and WDC] and created risks that would not have otherwise existed if Defendants complied with their legal duties." (See Compl. at ¶ 173.) But as Defendants correctly argue, Plaintiffs support their claim with nothing more than "sweeping legal conclusions derived from Youngberg," not specific facts. (Mov. Br. at 20 (noting the allegation that the medical services provided by Defendant have "substantially departed from generally accepted professional standards" (quoting Compl. ¶ 85)).) Such allegations cannot survive a Rule 12(b)(6) motion under contemporary pleading standards.

Plaintiffs' argument to the contrary is baffling. Plaintiffs do not attempt to highlight specific facts to substantiate a plausible claim that the State has failed to confine them under "conditions of reasonable care and safety . . . ." Youngberg, 457 U.S. at 324. Instead, Plaintiffs lift a three-and-a-half page block quote out of their Complaint and insert it into their brief, thereafter noting that "[t]hese allegations are sufficient notice pleading." (Opp. Br. at 23-26.) The Court would overlook this approach, if the block-quoted portion of the Complaint was not rife with the sort of conclusory allegations that cannot serve to state a plausible claim. As just one example, Paragraph 79 states that the "provision of protection from harm mechanisms, since

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the JOINT APPENDIX VOL. I, has been filed electronically with the Clerk of Court for the United States Court of Appeals for the Third Circuit using the appellant CM/ECF system. Participants who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: March 18, 2014

/s/ Thomas B. York
Thomas B. York