



MR-CA-004-012

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 7

8 UNITED STATES DISTRICT COURT

9 FOR THE CENTRAL DISTRICT OF CALIFORNIA

10

11	RICHARD S., CYNTHIA R., VALDINA)	Case No. SACV97-219 GLT
	R., and ROES 1 through 800,)	(EX)
12	individually and on behalf of all)	
	those similarly situated by)	STATE DEFENDANT
13	WILLIAM CABLE, M.D. as Guardian)	DEPARTMENT OF
	Ad Litem,)	DEVELOPMENTAL SERVICES
14)	AND FAIRVIEW
	Plaintiffs,)	DEVELOPMENTAL CENTER'S
15)	OPPOSITION TO PLAINTIFFS'
	vs.)	APPLICATION FOR
16)	PRELIMINARY INJUNCTION
	DEPARTMENT OF DEVELOPMENTAL)	AND DECLARATIONS OF
17	SERVICES OF THE STATE OF)	MICHAEL B. MOUNT, DAWN
	CALIFORNIA, FAIRVIEW)	LEMONDS, LOIS A. CISELL,
18	DEVELOPMENTAL CENTER, SOUTH COAST)	JEFFREY HELFER, AND
	REGIONAL PROJECT, HARBOR REGIONAL)	ROBERTA A. MARLOWE
19	CENTER, SAN DIEGO REGIONAL)	
	CENTER, SOUTH CENTRAL LOS ANGELES)	Date: March 31, 1997
20	REGIONAL CENTER, WESTSIDE)	Time: 3:30 p.m.
	REGIONAL CENTER, DENNIS G.)	Courtroom: 2
21	AMUNDSON, as Director of the)	
	DEPARTMENT OF DEVELOPMENTAL)	
22	SERVICES STATE OF CALIFORNIA,)	
	HUGH KOHLER, as Executive)	
23	Director of FAIRVIEW)	
	DEVELOPMENTAL CENTER, LILIA TAN-)	
24	FIGUEROA, M. D., as Medical)	
	Director of FAIRVIEW)	
25	DEVELOPMENTAL CENTER, DAWN)	
	LEMONDS as Director of SOUTH)	
26	COAST REGIONAL PROJECT, and DOES)	
	1 through 500, inclusive,)	
27)	
	Defendants.)	
28)	

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

This action was filed by Richard S., Cynthia R., and Valdina R. (developmentally disabled consumers) individually and on behalf of all those similarly situated by William Cable, M.D. as guardian ad litem. The action is against the California Department of Developmental Services (DDS), Fairview Developmental Center (Fairview), South Coast Regional Project and several regional centers located in Southern California. The Complaint and Ex Parte Application For Temporary Restraining Order were filed on March 20, 1997. The Temporary Restraining Order was denied by Judge Gary L. Taylor on March 20, 1997 and this hearing on the request for Preliminary Injunction was set for March 31, 1997.

PRELIMINARY STATEMENT

DDS, a department in the Health and Welfare Agency of the State of California, provides services and support to persons with developmental disabilities. DDS operates six developmental centers in California, including defendant Fairview Developmental Center (Fairview) in Costa Mesa. DDS also contracts with twenty-one regional centers to provide services to people with developmental disabilities in the community. The five named defendant regional centers (all private non-profit corporations) provide such services pursuant to contracts with DDS. Defendant South Coast Regional Project facilitates the identification of people who might appropriately reside in a community setting, and seeks to locate placements for these individuals in cooperation

1 with regional centers. (See attached Declarations of Michael B.
2 Mount and Dawn Lemonds.)¹
3 People with developmental disabilities residing in
4 California are entitled to receive services pursuant to the
5 Landerman Act (Welfare and Institutions Code section 4500, et
6 seq.) and Association for Retarded Citizens v. Department of
7 Developmental Services (1985) 38 Cal. 3d 384. The statutory
8 entitlement to services includes the right of an individual with
9 developmental disabilities to exercise personal choice to the
10 extent possible in receiving services and support. Individual
11 program plans (IPPs) tailored to each person's needs and
12 preferences are designed in a team effort involving
13 representatives of the developmental center and regional center,
14 the person with developmental disabilities, and his or her
15 parents, legal guardian or conservator, where appropriate. For
16 persons residing at a developmental center, this process takes
17 place in the developmental center.

18 Dr. William Cable (Cable) is a state employee of
19 Fairview who is the moving force in the filing of this lawsuit in
20 which the plaintiffs are ill-informed as to the facts and law²
21 surrounding the placement and protection of themselves and other
22
23
24

25 ¹Original signatures of all declarants will be filed with the
26 Court at the time of the hearing.

27 ²These State Defendants join in the Regional Center of Orange
County's Objections to the Declarations.

1 | similarly situated developmentally disabled consumers.²

2 | Plaintiffs are apparently laboring under the
3 | misimpression that the defendants have the goal of moving hundreds
4 | of developmentally disabled consumers out of Fairview to make room
5 | for consumers from Camarillo needing placements by the end of June
6 | due to Camarillo's closure. Plaintiffs further mistakenly assume
7 | that any actions of defendants are to save money and would place
8 | plaintiffs in jeopardy. As will be shown herein and in the
9 | attached declarations, nothing could be further from the truth.
10 | The following is a brief summary of the protections afforded
11 | developmentally disabled consumers at Fairview.

12 | In the Association for Retarded Citizens v. Dept. of
13 | Developmental Services, supra, the California Supreme Court
14 | construed the Lanterman Developmental Disabilities Services Act
15 | (Welf. & Inst. Code, §§ 4500 - 4846)⁴ (Lanterman Act) to grant a
16 | right to developmentally disabled persons to be provided with
17 | services that enable them to live in the least restrictive
18 | environment, and imposes an obligation on the Department to
19 | provide such services. (*Id.* at p. 392.) Developmentally disabled

to treatment/
behaviors in
most restrictive
environment
§ 4502(a)

20 |
21 | 3. Although irrelevant, Cable alleges that he has been
22 | retaliated against for opposing client discharges. The
23 | disciplinary action was not in retaliation for opposing client
24 | discharges. Rather, his discipline was due to his hostile and
25 | offensive manner (among other Government Code violations) in the
26 | course of his performance of duties at Fairview. Dr. Cable did
27 | not appeal either his letter of reprimand or his 10 day
suspension. Those decisions are now final. Miller v. County of
Santa Cruz (1994) 39 F.3d 1030. A copy of both adverse actions
are attached hereto as Exhibit A to the Declaration of Michael B.
Mount.

27 | 4. All references are to the Welfare and Institutions Code
unless stated otherwise.

required
of their
and
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lls/process
4502.1

1 persons or consumers have an entitlement to those services
2 established in their IPPs. (Id. at p. 390.) Thus, California law
3 requires that developmentally disabled individuals must be placed
4 in the least restrictive environment as determined by
5 interdisciplinary teams preparing a client's IPP. (See also
6 Senate Bill (SB) 1383, enacted September 28, 1992 which amended §
7 4502(a) (Stats. 1992, C.1011.)

8 The California Supreme Court has construed the Lanterman
9 Act as an entitlement, and specifically stated the State's
10 obligations in implementing the entitlement:

11 "The purpose of the statutory scheme is twofold: to prevent
12 or minimize the institutionalization of developmentally
13 disabled persons and their dislocation from family and
14 community, and to enable them to approximate the pattern of
15 everyday living of nondisabled persons of the same age and to
16 lead more independent and productive lives in the
17 community.... It is through the IPP process that the right
18 the Act grants to each developmentally disabled person and
19 the obligation it imposes on the state are implemented;
20 through it, the developmentally disabled person on an
21 individual basis receives, as an entitlement, services that
22 enable him to live a more independent and productive life in
23 the community." (Association of Retarded Citizens v.
24 Department of Developmental Services, supra, at pp. 388, &
25 392.)

26 In 1981, in In re Hop (1981) 29 Cal.3d 82, to further
27 protect developmentally disabled consumers, the California Supreme
Court decided every person who was not a true voluntary admission
to a Developmental Center, be entitled to a judicial hearing as to
whether, because of a developmental disability, being gravely
disabled, or a danger to self or others, placement in a state
developmental center was warranted.

Each county where a developmental center was located
decided how to implement this decision. Concurrently with and

1 independent of other processes and protections, the Orange County
2 Superior Court requires any new admission to Fairview
3 Developmental Center be placed only after a court review, under In
4 Re Hop (HOP) (1981) 29 Cal.3d 82 (unless a \$ 6500 commitment,
5 danger to self or others, is needed).

6 As set forth in the attached Declarations of Michael B.
7 Mount, Dawn Lemonds, Lois A. Cissell and Jeffrey Helfer, the
8 following is a sequential order of events to help understand the
9 HOP proceedings:

- 10 1. Regional center case worker identifies resident to
11 the attorney. (Each regional center hires an attorney to
12 file HOP petitions.)
- 13 2. Regional center reviews the resident's file, gathers
14 information, and provides this information to attorney.
- 15 3. The attorney prepares the declaration for case
16 worker to sign.
- 17 4. Declaration becomes part of the petition for HOP.
- 18 5. A HOP HOLD order is obtained, allowing Fairview to
19 retain the resident until the hearing.
- 20 6. A delegation form is prepared by the attorney, and
21 given to the regional center.
- 22 7. Regional center forwards this delegation to the
23 parent or conservator for signature.
- 24 8. Parent or conservator must sign this delegation and
25 return it to the regional center, which in turn forwards it
26 to the attorney prior to the hearing.
- 27 9. Parents or conservators are not required to attend

1 the hearing, but if they wish to attend, can contact either
2 the regional center or Fairview for the hearing date and
3 time.

4 10. Public Defender investigators interview the
5 resident, review the file, and make recommendations to the
6 Public Defender.

7 11. The hearing is held on the specified date.

8 12. The judge reads all materials prior to the hearing
9 and makes his decision. Judge signs the HOP order which is
10 good for one year.

11 Placements of persons out of developmental centers,
12 including Fairview, have increased since 1994. This pattern
13 follows DDS' settlement of the Coffelt, et al. v. The Department
14 of Developmental Services, et al., San Francisco Superior Case No.
15 91641 lawsuit that same year. Pursuant to the settlement
16 agreement reached in San Francisco Superior Court, DDS was
17 required, within five years, to reduce the population of persons
18 residing in developmental centers by one third, or by about 2,000
19 people. DDS has complied with that mandate. Included in the
20 settlement agreement were provisions for placement, assessment,
21 case management, increased availability of flexible living
22 options, emergency and crisis intervention services, quality
23 assurance, and monitoring. (See Declaration of Michael B. Mount.)

24 Fairview, using the IPP process, has been involved in
25 evaluating placement options for its residents. The paramount
26 objective in making placement decisions has been determining the
27 most appropriate, least restrictive living option for the person.

1 This decision-making process has been carried out in compliance
2 with the Lanterman Act, and no decision to place an individual in
3 the community is made over a family's objections. (See Declaration
4 of Lois A. Cissell)

5 Further, placement decisions are subject to the fair
6 hearing provisions at the Welfare and Institutions Code 4700 et
7 seq. This provides an additional administrative protection
8 against an improper decision to place a person in the community.

9 ARGUMENT

10 I

11 PLAINTIFFS' APPLICATION FOR A PRELIMINARY
12 INJUNCTION MUST BE DENIED

13 A. Plaintiffs Demonstrate No Risk
14 of Irreparable Harm

15 Despite rushing to this Court for a temporary
16 restraining order without understanding the inadequacies of their
17 prima facie case, the plaintiffs fail to establish the requisite
18 irreparable harm to support the issuance of the broad restraining
19 order which they seek, that is, the Defendants being restrained
20 from "Discharging or transferring from Fairview Developmental
21 Center to other California developmental centers or to non-
22 institutional placement any adult client who has no conservator of
23 the person, during the pendency of this action".²

24 Based upon the few but incorrect facts alleged by the
25 plaintiffs and their complete lack of knowledge and comprehension
26 of the laws and requirements under the Lanterman Developmental

27 5. Plaintiffs' Proposed Order (p. 2)

proposed TT
Order

1 Disability Services Act (Welf. & Inst. Code, §§ 4500-4846)
2 (Lanterman Act), the Court must deny plaintiffs' application for a
3 preliminary injunction.

4 In order to be entitled to a preliminary injunction, a
5 party must show either a likelihood of prevailing on the merits
6 with the balance of hardships tipping in favor of the moving party
7 or by demonstrating that the balance of hardships tips decidedly
8 to the plaintiffs and "serious questions" on the merits are
9 raised. Both tests also require the Court to weigh the public
10 interest when considering the hardships. (Carribbean Marine
11 Services Company, Inc. v. Baldrige, 844 F.2d 668, 674 (9th Cir.
12 1988) (reversing imposition of preliminary injunction on grounds
13 that no irreparable harm was established)."

14 "Speculative injury does not constitute
15 irreparable injury sufficient to warrant
16 granting a preliminary injunction. [Citation
17 omitted]. A plaintiff must do more than
18 merely allege imminent harm sufficient to
19 establish standing; a plaintiff must
20 demonstrate immediate threatened injury as a
21 prerequisite to preliminary injunctive
22 relief." (Emphasis in original) (Baldrige,
23 844 F.3d at 674.)

24 See also, Goldie's Bookstore, Inc. v. Superior Court of the State
25 of California, 739 F.2d 466, 474 (9th Cir. 1984) (reversing
26 injunction because of, inter alia, plaintiff's failure to prove
27 irreparable harm).

24 6. In view of the fact that plaintiffs have not addressed
25 (let alone established) that the public interests involved favor
26 the plaintiffs, this issue is not separately dealt with in this
27 opposition. However it will be shown that public interest is
actually best served by denying plaintiffs' application in that
there is already in place appropriate protections and safeguards
for the consumers.

1 Injunctive relief is unavailable, however, unless a
2 plaintiff can demonstrate both irreparable injury and lack of an
3 adequate remedy at law. International Assoc. of Firefighters v.
4 City of Sylacauga, 436 F.Supp. 482, 492 (N.D. Ala. E.D. 1977),
5 citing Beason Theatres Inc. v. Westover, 359 U.S. 500, 79 S.Ct.
6 948, 3 L.Ed.2d 988 (1959); see also Baldwin Metals Co., Inc. v.
7 Donovan, 642 F.2d 768, 775 n. 17 (5th Cir. 1981), cert. denied,
8 454 U.S. 893, 102 S.Ct. 389, 70 L.Ed.2d 207 (1981).

9 The primary purpose of an injunction is to preserve the
10 status quo pending a determination of the action on the merits and
11 to prevent future violations, not punish for past conduct. Los
12 Angeles Memorial Coliseum Commission v. National Football League,
13 634 F.2d 1197, 1200 (9th Cir. 1980); United States v. W.T. Grant
14 Co., 345 U.S. 629, 633, 73 S.Ct. 894, 898, 97 L.Ed. 1303, 1309
15 (1953); Swift & Co. v. United States, 276 U.S. 311, 314, 72 L.Ed.
16 587, 597 (1928); Loya v. Immigration and Naturalization Service,
17 583 F.2d 1110, 1114 (9th Cir. 1978). It is the moving party's
18 burden to allege and to demonstrate that injunctive relief is
19 necessary to avert some cognizable danger of recurrent violation.
20 United States v. W.T. Grant Co., 345 U.S. at 633; Hill v. Nelson,
21 272 F.Supp. 790, 800-802 (N.D. Cal. 1967).

22 The Ninth Circuit has held:

23 "The moving party may meet its burden by
24 demonstrating either (1) a combination of probable cause
25 success on the merits and the possibility of irreparable
26 injury, or (2) that serious questions are raised and the
27 balance of hardships tips sharply in its favor." Chalk
v. United States District Court, 840 F.2d 701, 704 (9th
Cir. 1988), citing Benda v. Grand Lodge of International
Association of Machinists & Aerospace Workers, 584 F.2d
308, 314-315 (9th Cir. 1978), cert. denied, 441 U.S. 937
(1979).

1 With regard to the first prong of this test, plaintiffs
2 have failed to make even the most minimal showing that there is
3 irreparable injury which will result if the injunction is not
4 granted.

5 With regard to the three named plaintiffs, there is no
6 showing that irreparable harm will occur to either Richard S.,
7 Cynthia R. or Valdina R. (See attached Declarations of Jeffrey
8 Helfer and Dawn Lemonds.) Plaintiff Cynthia R. is an unconserved
9 adult living at Fairview with no family involvement. She was the
10 subject of a therapeutic treatment planning meeting initiated by
11 San Diego Regional Center. The regional center was concerned by
12 the extensive use of restrictive intervention for Cynthia R. and
13 wanted to explore two ideas: How could these restrictive
14 interventions be reduced, as well as what type of services and
15 supports would Cynthia R. need if she ever moved to the community.
16 This meeting included a psychologist from the regional center, a
17 provider with known expertise about community services, the
18 regional center service coordinator, SCRP staff, as well as the
19 other interdisciplinary (ID) team members. This meeting was not a
20 placement planning meeting and was not represented as such.
21 Cynthia R. is not a candidate for placement at this time and there
22 are no imminent plans for her to move.

23 As set forth in the attached Declarations of Jeffrey
24 Helfer and Dawn Lemonds, Valdina R. is an adult who moved to the
25 community last year and is successfully residing in a community
26 care home in San Diego. DDS serves as the limited conservator of
27 her person. Valdina R. has very challenging needs which were

1 discussed extensively by her ID team. The home that she initially
2 moved to had a critical staffing change, losing the services of
3 their behavioral specialist. This loss was serious as the SCRP
4 staff felt that Valdina's success was contingent on the
5 involvement of that specific person with whom Valdina had
6 established a relationship. As soon as this change was
7 discovered, the regional center identified a more appropriate
8 home. Valdina was immediately moved to the new home with a higher
9 staffing ratio, as well as the needed behavioral supports. She is
10 currently served by a psychologist who worked with her at Fairview
11 and was chosen as "worker of the month" recently at her day
12 program. This was a profound and positive change for Valdina R.
13 Valdina R. has been seen several times in the past year by SCRP
14 staff and she is healthy and doing well in her transition.

15 Richard S. is an unconserved adult with involved
16 parents. He resides at Fairview. The SCRP has identified Richard
17 as a good candidate for placement for community living. His
18 family is adamantly opposed to such a placement and, accordingly,
19 there is no current plan to move him to the community because of
20 his parents' objection. (See Declarations of Dawn Lemonds and
21 Jeffrey Helfer.)

22 Plaintiffs have also failed to show that, with the many
23 and extensive protections afforded the developmentally disabled
24 consumers at Fairview (as outlined in this pleading, including
25 exhibits and declarations), any other "Roe" is at serious or
26 imminent risk of serious injury by possible placement in the
27 community.

1 Contrary to plaintiffs' assertions, there are adequate
2 and appropriate safeguards for the persons Cable purports to
3 protect. These various safeguards and procedures are described in
4 detail in the attached declarations of Jeffrey Helfer, Dawn
5 Lemonds, Lois A. Cissell and Michael B. Mount. There is simply no
6 need for the injunction Cable seeks.

7 The purported support for plaintiffs' position is the
8 Declaration of David J. Strauss. This declaration purports to
9 contain information showing a statistically significant greater
10 incidence of mortality/morbidity of individuals in the program
11 sought to be enjoined by plaintiffs' application. However, as
12 shown by the attached Declaration of Roberta A. Marlowe, the
13 studies and statistics upon which Strauss' declaration relies are
14 misleading, not supported by the statistical data and, in fact,
15 misstate the statistical data. For example, the studies
16 specifically excluded approximately fifty percent (50%) of the
17 involved patient population, only speculated without supporting
18 data that the lack of quality medical care was a possible reason
19 for the higher community mortality and did not provide any
20 information about the causes of death. These reasons alone would
21 render his studies (and therefore his declaration and conclusions)
22 questionable at best and wholly incorrect at worst.

23 The plaintiffs are unable to meet this minimum
24 requirement of irreparable harm.

25 //

26 //

27

1 B. There is Little If No Likelihood That
2 Plaintiffs Will Prevail On The Merits

3 Because the plaintiffs have no likelihood of prevailing
4 on the merits, the preliminary injunction should not issue.

5 Firstly, Cable cannot be appointed guardian ad litem and, thus,
6 has no standing to bring this action in Federal District Court.

7 Federal Rule of Civil Procedure (FRCP) 17(c) provides as
8 follows:

9 "Whenever an infant or incompetent person has a
10 representative, such as general guardian, committee,
11 conservator, or other like fiduciary, the representative
12 may sue or defend on behalf of the infant or incompetent
13 person. An infant or incompetent person who does not
14 have a duly appointed representative may sue by a next
15 friend or by a guardian ad litem. The court shall
16 appoint a guardian ad litem for an infant or incompetent
17 person not otherwise represented in an action or shall
18 make such other order as it deems proper for the
19 protection of the infant or incompetent person."

20 The first sentence of FRCP Rule 17 has been construed as
21 generally prohibiting the court from appointing a guardian ad
22 litem where there is already a "representative" for the party (6
23 Fed. Procedures & Practice § 1570, p. 497). Therefore, with
24 reference to any of the 800 ROES referred to in plaintiffs'
25 action, Cable cannot be appointed the guardian ad litem for those
26 consumers residing at Fairview who have representatives.
27 Furthermore, the fact that an individual appears to fall within
 one of the categories listed in FRCP 17(c) does not automatically
 compel his/her appointment as a guardian ad litem:-- (26 Fed. Proc.
 L.Ed. § 59:68, p. 66.) Rather, his/her capacity to sue is
 determined by applying the law of the forum state. (Ibid.) With
 reference to the remaining developmentally disabled consumers, it

1 is the state defendants' position that Cable cannot be appointed
2 as guardian ad litem because of his conflicts of interest.

3 Cable claims to have a "special relationship" with the
4 three named plaintiffs. However, in the furtherance of Cable's
5 lawsuit, he violates doctor/patient privilege as well as the
6 confidentiality provisions of Welfare & Institutions Code section
7 4514 for state employees. An incompetent party cannot be
8 represented by one who has a personal interest however remote or
9 indirect in the lawsuit in question. (26 Fed. Proc. L.Ed. § 59:69
10 p. 66.) Cable specifically has an interest in this lawsuit
11 because of alleged retaliation by Fairview which is the subject of
12 another Federal District Court action entitled William Cable, etc.
13 v. Department of Developmental Services, et al., Case No. SACV96-
14 1190 GLT (EBx). Therefore, he cannot be appointed the guardian ad
15 litem for all of the above reasons.

16 Even assuming arguendo, that this Court determines Cable
17 can be appointed as guardian ad litem for at least some of the
18 developmentally disabled consumers at Fairview, the Preliminary
19 Injunction cannot be issued because plaintiffs have little or no
20 likelihood of success on the merits.

21 As set forth above, there are adequate and appropriate
22 safeguards for the persons Cable purports to protect. These
23 various safeguards and procedures are described in detail in the
24 attached declarations of Jeffrey Helfer, Dawn Lemonds, Lois A.
25 Cissell and Michael B. Mount. There is simply no need for the
26 injunction Cable seeks.

27 As set forth above, the Declaration of David J. Strauss,

1 upon which plaintiffs principally rely is replete with
2 misstatements of the statistical data, misleading statements and
3 questionable, if not outright incorrect, conclusions (see attached
4 Declaration of Roberta A. Marlowe). Plaintiffs' arguments are
5 made of whole cloth and do not warrant (let alone support) the
6 granting of the requested preliminary injunction.

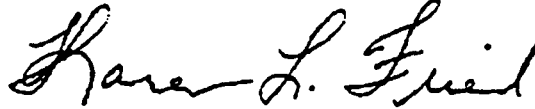
7 CONCLUSION

8 For the foregoing reasons, the plaintiffs' request for
9 Preliminary Injunction must be denied.

10 Dated: March 26, 1997

11 Respectfully submitted,

12 DANIEL E. LUNGREN, Attorney General
of the State of California
13 JOHN H. SANDERS, Supervising
Deputy Attorney General
14 KAREN L. FRIED,
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16 

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