

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

D.M., et al.	:	
	:	
Appellants,	:	Case No.: 08-4687
	:	
v.	:	
	:	
Butler County Board of Mental	:	On Appeal from the United States
Retardation and Developmental	:	District Court, Southern District of Ohio,
Disabilities, et al.	:	Eastern Division, Case No. 08-00399
	:	
Appellees.	:	

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INTRODUCTION

The Butler County Board (the "Board") and EPI seek to avoid their independent obligations under Title II of the ADA and Section 504 of the Rehabilitation Act by arguing that the Plaintiffs' claims are precluded by a Consent Order that concluded litigation in which no claims against the Board or EPI were brought, and that in no way obligated or bound them.

Contrary to the Board's assertion, Plaintiffs do not concede that the claims raised against the state defendants in *Martin* were the same claims as are now being raised against the Board; nor do Plaintiffs concede that their present claim against the Board should have been raised in the prior *Martin* litigation.

The Board takes a revisionist view of what was or should have been raised in *Martin* for purposes of *res judicata*. The Board's claim that the *Martin* "trial unit" included complaints against the county boards is not supported by the record. At no time before or after they intervened in *Martin* were claims brought against the county boards. That the boards hardly perceived themselves as a target of the *Martin* plaintiffs' allegations is evidenced by the fact that they waited until four years after the *Martin* Complaint was filed to seek intervention, and then they did

so to protect their own interests vis-à-vis the state agency defendants, not because the *Martin* litigation was directed at the boards.¹

The Board diminishes its independent responsibility for the community integration of Butler County residents by portraying itself as the virtual puppet of ODMRDD and ODJFS, the state agencies which administer Medicaid for people with intellectual disabilities. The Board's claim that Medicaid funding has "substantially reduced" the county boards' role in providing home and community based services for people who wish to leave institutional settings is simply not true.

Federal Medicaid dollars for those services are not available unless and until matching funds are provided. And the matching funds must come from either the state, as they did in *Martin*, or from the local county boards. What the boards asserted in *Martin*, that they had an extensive role in providing home and community based services to county residents, is equally true today.

Ohio's county boards of MR/DD have provided an ever-increasing share of local matching funds for home and community based waiver services, a share that has reached hundreds of millions of dollars. Like other county boards, the Board has the power under state law to grant Plaintiffs the relief they seek by providing local dollars for the community integration of the Fairfield Center Plaintiffs

¹ As the boards put it, "[t]here is no reason to believe that ODMR/DD can, or even should, protect the interests of the local MR/DD Boards in representing its own interests." (Record Entry No. 15-3, Def. Exh. B, County Boards' Brief in Support of Motion to Intervene in *Martin*, p.11.)

without impairing or impeding the interests of ODMRDD or ODJFS in any way. Indeed, it is how the system of Medicaid funding for community based services works in Ohio.

EPI's brief contends that Plaintiffs are currently seeking the same relief under the same laws as in *Martin* precluding their claim under Section 504 of the Rehabilitation Act of 1973. Although Plaintiffs concede that they were members of the plaintiff class in *Martin* and that the *Martin* Consent Order dated March 5, 2007 is a final decision on the merits, the remaining elements of *res judicata* are absent.

EPI also attempts to demonstrate that Plaintiffs failed to state a claim for relief under Section 504. However, Plaintiffs' Amended Complaint sufficiently alleges that Plaintiffs wish to live in more integrated, community settings and that such an environment would be appropriate to their needs. Their continued institutional isolation, despite EPI's authority to provide them the relief they seek, is the basis for their cause of action under Section 504.

I. RES JUDICATA: THE CLAIMS IN *MARTIN* AND IN THIS CASE ARE NOT IDENTICAL AND DO NOT PRECLUDE PLAINTIFFS' CLAIMS HERE.

A. Plaintiffs do not concede that their claims in this case were raised in *Martin*.

The claims raised in this case are not identical to the claims raised in *Martin*. The legal analysis is not as simple as saying that the claims are the same because

they both involve community integration. Rather, the extent of preclusion in *res judicata* is determined by the underlying facts that define each claim, and while the same legal theory—community integration—gave rise to both *Martin* and the instant action, there is no identity of claims because the two actions are based on different facts and circumstances. Comparing the complaints reveals the different factual groupings or transactions around which the cases were built.

The Board attempts to portray the *Martin* complaint as including claims against the county boards by relying on Section VI of the *Martin* complaint, "Description of Discrimination and Segregation." This Section contained meticulous background information alleging how the state defendants and their predecessors perpetuated the segregation of people with disabilities in institutions by concentrating state funding on institutional settings and by failing to budget and seek sufficient state funds to meet the demand for community based services.

In this section, county boards were mentioned as one among the many agencies, public and private, that provided services to Ohioans with intellectual disabilities. (Record Entry Nos. 15-15, Def. Exh. L, Parts 2 and 3, *Martin* Complaint, ¶¶312 - 485.) This section discussed the history of funding for community programs (¶¶ 315 - 327); ICF/MR funding (¶¶328 - 342); nursing home funding (¶¶343 - 350); Medicaid waivers (¶¶351 - 431); the county boards' day-to-

day administration of Medicaid waivers (¶¶412 - 427); and ways in which the state defendants had limited the growth of Medicaid waivers (¶¶380 - 385).

This section also referred to a cost cap rule enacted by the defendant Director of ODMRDD (a rule that no longer exists) that prevented county boards from serving people with more severe disabilities in the community (¶427) and noted that many county boards served only people with less significant disabilities in their "supported living" programs (¶326). These passing references to the county boards do not fairly support the Board's revisionist view that *Martin's* "trial unit" actually included claims against the county boards.

Rather, the claims pleaded in *Martin's* complaint arose from the actions and inactions of the named state defendants:

¶263: "In spite of his awareness of the residential needs of the plaintiff class and budget recommendations from Defendant Ritchey and his predecessor, Defendant Taft submitted Executive Budget which failed to provide for appropriate living environments for the plaintiff class."

¶265: "Defendant Taft has delayed the expansion of home and community based services waivers that could serve the plaintiff class."

¶273: "Defendant Ritchey operates twelve segregated institutions for individuals with mental retardation and developmental disabilities."

¶314: "Defendants Ritchey and Taft and their predecessors have created and maintained a centralized system of segregated institutions directed by the State."

¶344: "Defendants Taft, Ritchey and Romer-Sensky and their predecessors have authorized the placement of individuals with mental

retardation into nursing facilities because other residential options were unavailable or too limited in number to meet the need."

¶385: "As a result of the *state's* failure to budget for *state* match during the initial implementation of the Individual Options waiver, a significant portion of the slots approved were not available to individuals in institutional settings (emphasis added)."

¶477: "Defendants Taft, Ritchey and Romer-Sensky have neither developed nor encouraged the development of adequate numbers of residential alternatives in spite of the known need for such services."

¶479: "[D]efendants have continued to spend the majority of their resources for residential services on settings which are segregated from individuals who do not have handicaps."

The *Martin* prayers for relief were likewise directed at obtaining relief from the state defendants. Plaintiffs asked the court to enjoin the state defendants to create community placements for them. They also asked the court to enjoin the state defendants to ensure that the host of public and private agencies with whom the state defendants did business met non-discrimination guidelines. This request did not "essentially ask for relief against the MR/DD boards," as the Board argues. (Board Brief at 30). Rather, this was yet another request to hold the state defendants accountable to their legal duty not to perpetuate discrimination in business relationships as required by the ADA Title II and Section 504 regulations. 28 C.F.R. §35.130(b)(1); 45 C.F.R. §84.4(b)(1).

These factual allegations and requests for relief do not support the Board's assertion that the *Martin* plaintiffs were "taking aim at the whole system, including

the county MR/DD boards." (Board Brief at 34.) *Martin* was based on the state defendants' operation of segregated state institutions and the state defendants' failures to provide state matching funds sufficient to address the statewide demand for home and community based services.

By contrast, the Plaintiffs' factual allegations in this case are specifically directed at and based on actions or inactions by the Board. As the complaint in this case states:

The Butler County Board owns the facility where Plaintiffs live. (Record Entry No. 7, Amended Complaint ¶¶ 2, 22.)

The Butler County Board receives a stream of income from that facility. (*Id.* at ¶¶ 2, 23, 25.)

Plaintiffs are Butler County residents with MR/DD who qualify for services from the county board, want to leave Fairfield Center, and would be appropriately placed in smaller community settings. (*Id.* at ¶¶ 10, 11, 13, 14, 16, 17, 39, 40, 41, 45, 46, 47.)

The Butler County Board has failed to place Plaintiffs in more integrated community settings appropriate to their need. (*Id.* at ¶¶ 41, 48.)

The causes of action in this case do not arise out of the same transaction or connected transactions as in *Martin*. This case involves one county board that has failed to use local revenue sources for the community integration of residents who live in an institution owned by the Board. Because this factual grouping is distinct from the facts and circumstances giving rise to the Plaintiffs' claims against the state defendants in *Martin*, there is no identity of claims to sustain *res judicata*.

B. Plaintiffs do not concede that their claims against the Board in the present case should have been raised in *Martin*.

Not only did Plaintiffs not bring any claims against the Board in *Martin*, they should not have brought their present claims against the Board in that prior litigation. While it is possible to argue that almost any claim could have been brought in a former action, such speculation is not a legitimate basis to bar a subsequent claim:

When we come to the second part of the rule, dealing with what might have been litigated in the former action . . . we leave the workaday world and enter into a wondrous realm of words, where results are obtained not by grubbing out facts but by the application of incantations which change pumpkins into coaches

E. Cleary, Res Judicata Reexamined, 57 Yale L. J. 339, 343 (1948). Some practical limits are necessary to contain conjuring up reasons for why a claim should have been raised in a prior action.

Trial convenience is one of those practical limits: "What factual grouping constitutes a 'transaction', and what groupings constitute a 'series', are to be determined pragmatically, giving weight to such considerations as . . . whether they form a convenient trial unit" Restatement (Second) of Judgments §24 (2) (1982).

Trial convenience also underlies the long-standing reluctance of courts to allow intervenors to enlarge the issues raised by the original parties. *See, e.g., Vinson v. Washington Gas Light Co.*, 321 U.S. 489, 498 (1944) ("[O]ne of the most

usual procedural rules is that an intervenor is admitted to the proceeding as it stands, and in respect of the pending issues, but is not permitted to enlarge those issues or compel an alteration of the nature of the proceeding"). The Board asserts that the county boards' intervention in *Martin* gave the *Martin* plaintiffs "a clear opportunity to assert a duty for the County Boards that was distinct from the role of the state agencies." (Board Brief at 22.) This is an attempt to change a pumpkin into a coach, and contravenes the longstanding policy against allowing an intervenor to shape the litigation.

Courts also consider whether additional claims would prolong pre-trial practice and complicate the trial in determining whether different issues should be tried together. *Beard v. Netco Tile, Inc.*, 2005 U.S. Dist. LEXIS 21277 at *5 - *6 (E.D. Mich. 2006). Consider then, the exponential growth in complexity, difficulty and expense in both pre-trial and trial practice if the *Martin* plaintiffs had been compelled to conduct discovery of and prove or disprove all possible claims of discrimination against the 88 Ohio county MR/DD boards in addition to the litigation they undertook against the state defendants. The *Martin* Plaintiffs would have had to depose representatives of all 88 boards and investigate each county board's system of local funding for home and community based services, this in addition to the already large-scale and complex litigation they were conducting against the state defendants.

In addition to these pragmatic limits, *res judicata* must be carefully applied to class actions seeking institutional reform to avoid sweeping within its scope claims invoking similar rights but arising from different facts. *See Hiser v. Franklin*, 94 F. 3d 1287 (9th Cir. 1996) (refusing to bar subsequent claim of "access to courts" based on a different factual issue).

Hiser involved a previous class action on behalf of prisoners in Alaska that, like *Martin*, was settled by Consent Decree. *Id.* at 1290. The previous 88-page long Consent Decree included "access to court" issues. *Id.* Three years later, however, *Hiser* brought another class action suit claiming denial of access to the courts because prison policy denied photocopies of legal papers. *Id.* at 1289. The state prison officials invoked *res judicata*, claiming that *Hiser's* suit could have been raised as part of the access to courts issues brought in the prior litigation. *Id.* The court disagreed: "Although *Hiser's* photocopying challenge implicates the same right of "access to the courts" as was addressed in the (prior) litigation, it is based on a different series of operative facts and is not merely an alternative theory of recovery" *Id.* at 1292. As in *Hiser*, the plaintiffs' claims in this case may implicate the same right—community integration—as in *Martin* but the current claim arises under facts specific to Butler County's failure to provide local funding for community integration rather than the State's funding failures.

The *Hiser* court also warned that a such a sweeping application of *res judicata* had the potential to unfairly stifle prison reform litigation because "[a]rguably, everything related to prison life could conceivably be deemed part of 'a series of transactions' when a broad-based class action is brought, but if this is how claim preclusion is defined in the class action context, it would essentially make class actions obsolete". *Hiser*, 94 F. 3d at 1293; *see also*, Wright, Miller, & Cooper, Federal Practice and Procedure: Jurisdiction 2d, §4408 at 205 (2nd Ed. 2002) ("Institutional reform litigation presents many examples of the need to confine claim preclusion short of every matter that might have been advanced in the prior litigation.")

Similarly, the Board in this case is seeking to unfairly stifle community integration litigation by arguing that everything related to community integration must be deemed to have been part of *Martin* and should have been raised in *Martin*. This reasoning ignores the distinct factual circumstances, actions and duties of the *Martin* state defendants compared to the Board here. It also ignores the impracticality of trying to bring claims against all 88 county boards in an already complex case.

C. Neither the Settlement Agreement with the county boards in *Martin* nor the Consent Order with the state defendants in *Martin* precludes the relief Plaintiffs seek in this case.

The Board argues that it agreed to "be bound by the outcome of the litigation between Plaintiffs and the state agencies" in the *Martin* settlement agreement and that signing the settlement agreement also entitled the Board to benefit from the "conclusive nature" of the *Martin* Consent Order even though it was not a party to that Order. (Board Brief at 33.) This argument does not withstand the scrutiny of either document.

What the *Martin* settlement agreement actually says is not that the county boards would be "bound by the outcome" of the *Martin* litigation but rather that they would be bound by any legal interpretations made by the court. (Record Entry No. 15-7, Def. Exh. F, Settlement Agreement Between County Boards and plaintiffs in *Martin*.) The settlement agreement also recognized that the county boards were subject to the regulations and rules of the state agencies, which is true in any event, as the Board agrees. (Board Brief at 42-44.) The settlement agreement says nothing about the outcome of the litigation, particularly an outcome negotiated with the state defendants for relief provided by the state only.

The "outcome" of the *Martin* litigation—the Consent Order—contains nothing that binds the county boards in any way. The only "legal interpretation" in the Consent Order is contained in paragraph 5 and states: "The Supreme Court case

of *Olmstead v. L.C.*, 527 U.S. 581 (1999) contains authority which governs and guides this case." (Record Entry No. 15-10, Def. Exh. I, Final Consent Order in *Martin*.) The sole provision that referred to county boards excluded county board-funded waivers (the very issue that plaintiffs are raising in this case) from its terms. (*Id.* at Paragraph 1) (providing that the 1500 *Martin* waivers "shall be in addition to any planned expansion of locally [county] funded slots.") Because no county interests were even dealt with in the Consent Order, the Board's assertion that the state defendants were "representing" its interests is unfounded.

Under these circumstances, it is untenable for the Board to argue that the Plaintiffs in this action are "seeking relief that exceeds the relief in the *Martin* Consent Order." (Board Brief at 33.) The Plaintiffs in this case seek relief from the Board, which was not a party to the Consent Order and against whom no claims were brought in *Martin*. It cannot be said that seeking relief from the Board exceeds the relief in the *Martin* Consent Order, where that Order attached no obligations to county boards and expressly excluded county board-funded waivers from its provisions.

II. ODMRDD AND ODJFS ARE NOT REQUIRED PARTIES IN THIS CASE BECAUSE COMPLETE RELIEF CAN BE GRANTED TO PLAINTIFFS WITHOUT JOINING THEM.

The Board has the ability to provide the relief sought by Plaintiffs and providing such relief will not impair or impede any interests of ODMRDD and ODJFS.

A. The relief that Plaintiffs seek would not impair or impede the interests of the state agencies in "downsizing" Fairfield Center.

The county board claims that ODMRDD and ODJFS are necessary parties because ODMRDD has sole "jurisdiction" over what the Board disingenuously calls the "deinstitutionalization process" at Fairfield Center. (Board Brief at 50.) "Deinstitutionalization" is not the process that is taking place at Fairfield Center. Instead, the main campus of Fairfield Center is being downsized, while the remaining Fairfield Center residents will be moved to ICF/MR facilities operated by the licensee at other locations. (Record Entry No. 20-2, Pl. Exh. 1, RFP Permanent Licensee of Fairfield Center.) The residents of Fairfield Center, including the Plaintiffs, will remain in institutional settings.

Just as inaccurate are the Board's claims that ODMRDD would be prejudiced if the Board were ordered to assess Plaintiffs as part of the relief they seek in this case, and that any relief granted in this case might conflict with the ODMRDD's control of the downsizing of Fairfield Center. The Board is setting up a conflict that does not exist.

Plaintiffs seek the same assessment that all county boards are required to provide to county residents who seek home and community based services under Ohio Rev. Code §5126.055(A)(1) and Ohio Admin. Code §5123:2-9-04(C)(1). It is therefore difficult to understand how these assessments would prejudice the state agencies or the county board in any way.

Nor would the relief sought in this case conflict with ODMRDD's efforts to downsize Fairfield Center. What the RFP states is that the licensee will "work with" ODMRDD, ODJFS, the Board, residents, family members and guardians to develop a downsizing plan "that acknowledges individual preferences." (Record Entry No. 20-2, Pl. Exh. 1, RFP Permanent Licensee of Fairfield Center, p.3.) This indicates a collaborative effort among all parties involved, one that makes room for individual choices. Plaintiffs' desires to move to more integrated community settings do not pose a conflict with ODMRDD or ODJFS, as these state agencies would have no interest in keeping residents at Fairfield Center against their will if there are community placements for them.

B. The county boards have the authority to provide the relief that Plaintiffs seek.

The Board's portrays ODMRDD and ODJFS as having such supremacy over Medicaid funding for home and community based waiver services, licensure and monitoring of ICF's/MR, and assessments of ICF/MR residents that the Board

claims it is powerless to grant Plaintiffs relief in the absence of these state agencies.

This is a one-sided and misleading picture of Ohio's system for delivering home and community based services to people with intellectual disabilities that omits the entire Chapter 5126 of the Ohio Revised Code delineating the co-extensive powers and duties of the county boards of MR/DD.

While ODJFS is indeed the "single state agency" for purposes of administering the federal Medicaid dollars that flow into Ohio, the Board ignores the fact that Ohio law grants county boards "medicaid local administrative authority" under which each county board must provide a wide variety of services for county residents who seek or receive home and community based waivers. Ohio Rev. Code §5126.055(A); Ohio Admin. Code §5123:2-9-04(A). These services include:

- Paying the nonfederal share of home and community based waiver expenditures, Ohio Admin. Code §5123:2-9-04(C)(21);
- Performing assessments and evaluations of the person seeking or receiving waiver services, Ohio Rev. Code §5126.055(A)(1), Ohio Admin. Code §5123:2-9-04(C)(1);
- Recommending whether an application for community services should be approved, Ohio Rev. Code §5126.055(A)(1)(a); and
- Monitoring the community services provided to ensure the person's health and safety, Ohio Rev. Code §5126.055(A)(4), Ohio Admin. Code §5123:2-9-04(A)(8).

Consequently, with their Medicaid local administrative authority, Ohio's county boards, including Butler County, are heavily involved in almost every aspect of the daily administration of home and community based waiver services, including local funding for waiver slots.

Nevertheless, the Board asserts that the development of Medicaid funding for home and community based services "has substantially reduced the role of MR/DD Boards in the development and management of residential services." (Board Brief at 42.) Like the Board's other attempts to portray county boards as minor leaguers in Ohio's system for delivering community-based services, this assertion is demonstrably inaccurate.

The role of county boards in funding home and community based waiver services has increased and continues to increase, as documented by the Ohio Legislative Service Commission (LSC) in Ohio's Executive Budget process. LSC prepares an analysis of every Executive Budget Proposal from the Governor in the LSC "Redbook," a public document that contains analysis of each executive agency's budget.² (See, attached, <http://www.lbo.state.oh.us/fiscal/budget/redbooks128/dmr.pdf>) As the 2009 LSC Redbook for ODMRDD explains, "County MR/DD boards are responsible for providing the nonfederal share of the

² Courts may take judicial notice of such reliable and verifiable materials. *See, e.g. City of Monroe Retirement System v. Bridgestone Corp.*, 399 F. 3d 651, 655 n.1(6th Cir. 2005).

home and community-based Medicaid waiver costs, which can be paid for using subsidy dollars or local resources, such as levy dollars." (LSC Redbook, page 5.)

Notably, the local funding for the nonfederal share has seen substantial increases. According to line item #322624 for county funding available for waiver match, this local funding has grown from nearly \$92 million in 2006 to over \$122 million in 2008, and is estimated to grow as high as nearly \$170 million by the end of the executive budget biennium. (Redbook, Catalog of Budget Line Items, COBLI: 15 of 16.) The hundreds of millions of dollars that county boards have provided and will continue to provide as the match for home and community based waiver services hardly represent a "substantially reduced" role for MR/DD boards. Despite the Board's attempt to change its tune now, the Board had it right the first time in *Martin* when it sought to intervene and argued that "county boards of mental retardation and developmental disabilities play an integral role in the development, funding and monitoring of residential services in Ohio." (Record Entry #15-3, Def. Exh. B., Brief in Support of Motion to Intervene p. 1.)

In sum, the Board has the power under Ohio law; the duty under Ohio law; the Medicaid local administrative authority under Ohio law; and the demonstrated ability to provide local matching funds needed for waiver services. The Board can provide the relief that Plaintiffs seek in this case without impairing or impeding the

interests of ODMRDD and ODJFS. As such, they are not parties required to be joined.

III. PLAINTIFFS' CLAIM AGAINST EPI UNDER SECTION 504 OF THE REHABILITATION ACT OF 1973 IS NOT BARRED BY THE DOCTRINE OF *RES JUDICATA*.

A. EPI was not in privity with any of the defendants in *Martin*.

EPI acknowledges that it was not a party in *Martin* but maintains that its interests as an ICF/MR were "closely enough aligned" with the defendants in *Martin* to establish privity and bar Plaintiffs' claim against it in this case. (*Id.* at 17.) EPI attempts to provide several justifications for this argument, none of which are persuasive.

First, EPI argues that it is licensed by ODMRDD, receives Medicaid funding through ODJFS, and must follow the agencies' rules, regulations and conditions of participation. (*Id.* at 17.) This is true, but a private entity such as EPI cannot be presumed to be in privity with a government agency merely because it is subject to its regulations and licensing requirements and receives funding. This would expand the concept of privity and *res judicata* in unfathomable ways.

Second, EPI asserts that it is "bound by the *Martin* Consent Order for purposes of the placement of residents in community settings . . . because that Consent Order helped shape how waivers will be offered to residents of ICFs/MR in Ohio." (*Id.* at 17-18.) Similarly, EPI maintains that, according to the Consent

Order in *Martin*, ODJFS "agreed to work with the state's ICFs/MR to conduct a survey of residents to determine which preferred different placements," and ICFs/MR were "bound by the [Consent Order] to cooperate, and [they] did in early 2007." (*Id.* at 18.)

This characterization of the *Martin* Consent Order is misleading. Although it did create additional opportunities for residents of ICFs/MR in Ohio to reside in community settings, the Consent Order did not address any obligations of an ICF/MR to provide such placements. (Record Entry No. 15-10, Def. Exh. I, Final Consent Order in *Martin*.) Contrary to EPI's assertion, there is no mention in the *Martin* Consent Order that EPI or any ICF/MR was bound to "work with" or "cooperate" with the state agency defendants in *Martin* to survey the residents of ICFs/MR. No ICF/MR, including EPI, had any duties or obligations under the Consent Order, and EPI fails to cite to any provision that required it to do anything at all.

Finally, EPI argues that it is in privity with the *Martin* defendants because its obligations under the RFP oblige it to downsize Fairfield Center and to work with ODMRDD, ODJFS, and the Board to fulfill this requirement. (EPI Brief at 18). This reasoning is flawed. Even assuming EPI, the Board, ODMRDD, and ODJFS are in privity because of the present downsizing of Fairfield Center under the RFP, this exists in a different and unique context outside the *Martin* litigation. There is

absolutely no relationship between the current downsizing process involving Fairfield Center and the *Martin* litigation. EPI's obligations under the RFP arose after *Martin* was ultimately settled and cannot be the basis for establishing privity with the *Martin* defendants for *res judicata*.

B. Plaintiffs' claim against EPI involves issues fundamentally distinct from the issues addressed in *Martin*.

EPI also asserts that Plaintiffs have raised the "exact same issues" as those previously litigated in *Martin*, which also involved community integration claims. (*Id.* at 19.)

However, whether a *private* entity receiving federal funding has an independent obligation under Section 504 and *Olmstead* to provide integrated, community placements to individuals for whom it would be appropriate and who desire to live in such settings was *not* an issue in *Martin*. Nor did *Martin* address the obligation of an ICF/MR operator to implement downsizing of its facility in a manner consistent with Section 504. Contrary to EPI's contention that the decision in *Martin* denying plaintiffs' motion for summary judgment dealt with these issues, that decision merely describes the various institutions in which persons with intellectual disabilities reside, including ICFs/MR, as well as relevant statistics and other information, and does not discuss any of the issues involved in this case. *See Martin v. Taft*, 222 F.Supp.2d 940, 953 (S.D. Ohio 2002).

Furthermore, EPI disregards the crucial fact that the *Martin* Consent Order explicitly envisions that there are other ways in which individuals in institutional settings can obtain community placements. (Record Entry No. 15-10, Def. Exh. I, Final Consent Order in *Martin*.) The new waivers provided by the *Martin* Consent Order were to be "in addition to any planned expansion of locally (county) funded slots." (*Id.*) EPI's characterization of *Martin* as exhaustively involving all possible opportunities by persons with intellectual disabilities living in institutional settings to receive community placements is disingenuous.

C. The present litigation does not share an identity of claims with those brought in *Martin*.

Lastly, EPI argues that Plaintiffs' claim under Section 504 shares identity with the claims brought in *Martin* because both cases "arise from the same common nucleus of facts." (EPI Brief at 20). This is incorrect. This litigation is based on an entirely new and different factual situation than *Martin*. In particular, EPI is required under the RFP to downsize Fairfield Center and to place almost half of the current residents in other settings, and this obligation arose after *Martin* was ultimately settled.

EPI also claims that its recent attainment of the license to operate Fairfield Center does not establish a different set of factual circumstances for purposes of *res judicata*. (EPI Brief at 22). But Plaintiffs have never alleged that the reason why their claim against EPI arises from different and unique facts from those in

Martin is merely because EPI did not begin to operate Fairfield Center until after *Martin* was settled. EPI became the new operator and licensee of Fairfield Center with very specific obligations under the RFP to downsize the facility. As stated repeatedly by Plaintiffs, their claims against EPI and the Board were filed at a time when plans for the downsizing of Fairfield Center were being finalized without assurances that residents would be placed in the most integrated setting appropriate to their needs. These facts demonstrate that a different nucleus of operative facts currently exists and that there is no identity of claims between the two actions.

IV. PLAINTIFFS' SECTION 504 CAUSE OF ACTION AGAINST EPI ADEQUATELY STATES A CLAIM FOR RELIEF.

A. Plaintiffs sufficiently alleged that EPI has discriminated against them under Section 504.

EPI argues that Plaintiffs failed to state a claim for relief under Section 504 because they did not adequately explain how EPI discriminated against them. (EPI Brief at 24). EPI claims that it has never "delayed or hindered Plaintiffs in their efforts, if any, to secure different living arrangements" and that it is incapable of placing them in community settings. (*Id.* at 24-25.) Despite these assertions, Plaintiffs' Amended Complaint contains sufficient allegations of discrimination under Section 504.

As discussed in Plaintiffs' opening brief, "the unjustifiable institutional isolation of persons with disabilities" is a cognizable form of discrimination based

on disability under Title II of the ADA. *Olmstead*, 527 U.S. at 600. The central principles of *Olmstead* apply to entities receiving federal funding under Section 504 to the same extent as states and other public entities. See *Radaszewski v. Maram*, 383 F.3d 599, 607 (7th Cir. 2004). See also *Frederick L. v. Dep't of Public Welfare of Pennsylvania*, 364 F.3d 487, 491 (3d Cir. 2004). In their Amended Complaint, Plaintiffs allege that they wish to leave Fairfield Center and live in more integrated, community settings and that they would be appropriately placed in such settings. Such allegations are sufficient to state a cause of action under Section 504 and *Olmstead*. See *Joseph S. v. Hogan*, 561 F. Supp. 2d 280, 292 (E.D.N.Y. 2008), *adopted by, objection overruled by*, 2008 U.S. Dist. LEXIS 53940 (E.D. N.Y. May 21, 2008).

B. EPI mischaracterizes Plaintiffs' claim for relief against it under Section 504.

EPI also contends that Plaintiffs' claim under Section 504 focuses on its failure to place them in "someone else's program or activity," which EPI claims it cannot do, and that Plaintiffs have failed to allege that it has not fulfilled all of its obligations toward Plaintiffs. (EPI Brief at 26.) Because, EPI asserts, it is absent from the process of community integration which "is largely controlled by government agencies," it cannot grant Plaintiffs the relief they seek. (*Id.* at 30.)

This is not an accurate representation of Plaintiffs' claim against EPI. Plaintiffs do not allege that EPI must place them in "someone else's program or

activity." Rather, Plaintiffs argue that EPI has the opportunity to make community placements available for them by converting some of its beds to providing waiver services under Ohio Revised Code § 5111.875. Therefore, because Plaintiffs remain in institutional settings, despite EPI's ability to provide them the relief they seek, Plaintiffs have sufficiently alleged that EPI has failed to fulfill its obligations under Section 504. Moreover, pursuant to the RFP, both EPI and the Board have shared responsibilities to develop a specific plan to downsize Fairfield Center. Under Section 504, this plan can and should include providing home and community-based services to residents of Fairfield Center who desire them and for whom such services are appropriate.

Plaintiffs are not, as EPI states, "proposing strict liability for any ICF/MR with a resident that claims to be suitable for placement in a different community setting" and are not alleging that EPI is acting discriminatorily if a resident's wishes to reside in the community are not immediately granted, regardless of other factors. (EPI Brief at 27-28). First of all, Plaintiffs are not requesting to be *immediately* placed in community settings. (Record Entry No. 7, Amended Complaint, Prayer for Relief, ¶ 6.) Under *Olmstead*, an individual who wishes to move from an institutional setting to a more integrated, community environment, if appropriate for his or her needs, must be reasonably accommodated. Plaintiffs seek this relief against EPI in their Amended Complaint and thus have stated a

prima facie case of discrimination under Section 504 and *Olmstead*. Considering EPI's future opportunity to argue that it cannot reasonably accommodate them (a defense which is not relevant in a motion to dismiss context), Plaintiffs' allegations do not constitute "strict liability."

C. The recent decision in *Joseph S. v. Hogan* is relevant to Plaintiffs' claim against EPI.

EPI unsuccessfully attempts to distinguish *Joseph S. v. Hogan*, 561 F. Supp. 2d 280 (E.D.N.Y. 2008), a recent decision which involves an *Olmstead* claim brought under Section 504 that Plaintiffs discussed in their opening brief. (EPI Brief at 32). First, EPI claims that this decision is not relevant to Plaintiffs' claims because the defendants were state employees and agencies not a private entity like EPI. (*Id.*) This distinction is inconsequential. Section 504 and its principles of community integration are directly applicable to all entities which receive federal funding, whether public or private.

EPI also claims that the complaint in *Joseph S.* is inapplicable because it contained "factual allegations related to their unnecessary segregation in nursing homes," including allegations that "they were kept on separate floors from other residents without mental illness and were not allowed to leave their floors without special passes; had little access to outdoors; and could not move about without setting off alarms." (*Id.* at 33.) These specific allegations related to additional claims that the plaintiffs in *Joseph S.* were not only inappropriately placed in

nursing homes, but were also unnecessarily segregated within the nursing home because of their mental illness. *Joseph S.*, 561 F. Supp.at 291. Plaintiffs in the present case make no allegations that they have been unnecessarily isolated from other residents of Fairfield Center. Rather, they oppose their continued presence at Fairfield Center, which is indisputably institutional in nature.

Finally, EPI argues that the complaint in *Joseph S.* contained allegations that a mental health professional had evaluated one of the plaintiffs and concluded that his needs could be met in a more integrated setting. (EPI Brief at 33). The court in *Joseph S.*, however, expressly doubted "whether *Olmstead* even requires a specific determination by *any* medical professional that an individual with mental illness may receive services in a less restrictive setting, or whether that just happened to be what occurred in *Olmstead*." (*Joseph S.*, 561 F. Supp.at 291.) (citing *Fisher v. Ok. Health Care Auth.*, 335 F.3d 1175, 1181-82 (10th Cir. 2003)).

Nevertheless, Plaintiffs' Amended Complaint alleges that Plaintiffs would appropriately be placed in more integrated, community settings. This presents a question of fact upon which Plaintiffs have not been permitted to submit evidence (for example, evidence that Plaintiffs are currently on waiting lists for home and community based waiver services). An evidentiary requirement for a determination as to the appropriateness of a placement, even if required by *Olmstead*, is irrelevant at the pleadings stage, and cannot be considered in the

context of a motion to dismiss. *See Neff v. Std. Fed. Bank*, 2007 U.S. Dist. LEXIS 71976 at *9 (S.D. Ohio Sept. 27, 2007) (concluding that, to withstand a motion to dismiss under *Twombly*, factual allegations must be sufficient "to create a reasonable expectation that discovery will reveal evidence to support the claim").

D. Ohio Revised Code § 5111.875 authorizes EPI to provide Plaintiffs the relief they are seeking.

EPI disputes that Ohio Revised Code § 5111.875 provides a way in which it can accommodate Plaintiffs' desire to live in more integrated, community placements by converting some of the beds of Fairfield Center from providing ICF/MR services to providing home and community-based services. (EPI Brief at 34). EPI claims that this statute is not pertinent to Plaintiffs' claim of discrimination, although the reasons for this argument are unconvincing. First, EPI maintains that the statute is purely voluntary and does not require it to convert its beds into providing home and community-based services. (*Id.*) This is true, but EPI obviously must comply with Section 504 and *Olmstead*, which require it to provide reasonable accommodations to its programs and activities to allow Plaintiffs to live in the most integrated setting appropriate to their needs. Ohio Revised Code § 5111.875 provides explicit authority through which EPI can fulfill these obligations under federal law.

EPI also laments that "Plaintiffs' position would compel the shutdown of EPI" because, "[a]ccording to Plaintiffs, to comply with Section 504, if EPI has

any residents who would prefer community placements, EPI must surrender up to 100 ICF/MR beds and convert them into waivers." (EPI Brief at 35). This contention is completely unfounded, particularly in light of EPI's own statements that its agreement with ODMRDD was revised because "more than 48 Fairfield Center residents requested to stay on the campus." (*Id.* at 18.) In their Amended Complaint, Plaintiffs maintained that they wish to leave Fairfield Center and live in smaller, more integrated community settings and that the appropriateness of community placements for other residents of Fairfield Center is dependent upon each resident's needs *and* wishes. (Record Entry No. 7, Amended Complaint, ¶¶ 7-17; *Id.* at ¶ 5 of their Prayer for Relief.) Thus, Plaintiffs are not seeking to compel community placements for those who wish to remain at Fairfield Center.

Finally, EPI contends that, even if it did convert its beds into providing waiver services, Plaintiffs would not necessarily receive them because "they still would be subject to Ohio's rules relating to waiting lists for waiver placement and might not receive a waiver if others had higher priority under those rules." (EPI Brief at 35). EPI claims it would only be required to inform the residents of Fairfield Center of their options if it did convert some of its beds. (*Id.* at 35-36).

The conversion of beds from providing ICF/MR services to providing waiver services pursuant to Ohio Revised Code § 5111.875, however, affords Plaintiffs the relief they are seeking in their Amended Complaint because it would

increase the availability of home and community based services. Indeed, the specific purpose of § 5111.875 is to "increase the number of slots available for home and community-based services" Ohio Revised Code § 5111.875(A). If EPI converts some of its beds, it must inform each resident of his or her choice to continue residing in an institutional setting or to "[b]egin to receive home and community-based services . . . from any provider of home and community-based services that is willing and able to provide the services to the resident if the resident is eligible for the services and a slot for the services is available to the resident." (Ohio Revised Code § 5111.875 (A)(4).)

Therefore, if EPI converted some of its beds, Plaintiffs would have the opportunity to choose more integrated, community settings to receive services. Even in the event of a waiting list for these home and community based services, Plaintiffs should have priority as individuals who are 22 years of age or older, who are not receiving residential services or supported living, and who have intensive needs for waiver services. Ohio Administrative Code 5123:2-1-08(D)(2).

CONCLUSION

For the foregoing reasons and in Plaintiffs' opening Brief, Plaintiffs ask this Court to reverse the District Court's decision and remand this case for further proceedings below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of April, I electronically filed the foregoing Reply Brief of Appellants with the Clerk of the Court using the CM/ECF system. Notice of this filing will be sent to all parties through the Court's electronic filing system. The parties may access this filing through the Court's system.

s/Jane P. Perry
Jane P. Perry (0029698)

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 32(a)(7)(C) and 6th Cir. R. 32(a), the undersigned certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word count provided by Microsoft Word 2003, and in accordance with the provisions of Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), this brief contains 6,966 words.

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