UNITED STATES DISTRICT COURT

NORTHEN DISTRICT OF NEW YORK

NAVELLA CONSTANCE AND
VERNAL CONSTANCE,

Plaintiffs,

-against-

98-CV-1440
(FJS)(GJD)

STATE UNIVERSITY OF NEW YORK
HEALTH SCIENCE CENTER,

Defendant.

UNITED STATES' RESPONSE AS *AMICUS CURIAE* TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

DANIEL J. FRENCH
United States Attorney
Northern District of
New York

WILLIAM H. PEASE
Assistant U.S. Attorney
Chief, Civil Division
Bar Roll No. 102338
100 South Clinton Street
Syracuse, NY 13261-7198

BILL LANN LEE
Assistant Attorney General
Civil Rights Division

JOHN L. WODATCH
Chief

RENEE M. WOHLENHAUS
Deputy Chief

PHILIP L. BREEN
Special Legal Counsel

ROBERT J. MATHER
Trial Attorney
Bar Roll # 502617
Civil Rights Division
U.S. Department of Justice
P.O. Box 66738
Washington, D.C. 20035-6738
(202) 307-2236

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Preliminary Statement

The United States, as *amicus curiae*, respectfully submit this brief, in support of plaintiffs Navella and Vernal Constance's memorandum of law in opposition to defendant State University of New York Health Science Center's motion for summary judgment.

Defendant filed a motion for judgment on the pleadings on January 13, 1999. In support of this motion, Defendant argued, *inter alia*, that the Constances lacked standing for injunctive relief because they could not show an "injury in fact"; and Plaintiffs failed to sufficiently plead discriminatory intent to justify an award of damages. The court denied Defendant's motion to dismiss. (Judge's Decision and Order, dated 6/28/99).

The court also dismissed Plaintiffs' claim for injunctive relief, but granted Plaintiffs' leave to amend their complaint. (Judge's Decision and Order, dated 6/28/99). Plaintiffs filed an amended complaint on July 9, 1999. The amended complaint contains several new allegations, including that 1) SUNY is one of the few hospitals located within a reasonable driving distance of the Constance's home; 2) SUNY is the only Level One Trauma Center in the region; 3) Navella Constance had developed a serious medical condition (cervical cancer) since 1996 that required hospitalization and ongoing care; 4) given its proximity, it is reasonably possible that Navella will seek services from SUNY; and 5) it is reasonably possible that Vernal will accompany Navella if she uses SUNY's services. (Amended Complaint).

Defendant filed its motion for summary judgment[1] on October 25, 2000, based solely upon arguments made in its earlier motion for judgment on the pleadings. Defendant alleged that: 1) the Constances lack standing because they cannot prove an "injury in fact;" and 2) plaintiffs fail to prove discriminatory intent. The only new information or argument in support

[1]On October 25, 2000, the Attorney General of the State of New York filed a memorandum in support of a motion for summary judgment. (This memorandum is cited herein as "Def. Mem. __.")

of the motion is a recent federal district court decision in *Freydel v. New York Hospital*, 2000 WL 10264 (S.D.N.Y.).

As explained below, reliance upon *Freydel* is misplaced because the facts are plainly distinguishable from the present facts, and because the district court decision, which is currently on appeal to the Second Circuit, is not controlling on this Court.[2] There are genuine issues of material fact on Plaintiffs' standing to seek injunctive relief and on Defendant's discriminatory intent, so as to deny Defendant's motion for summary judgment.

Background[3]

Regulations implementing Title II of the Americans with Disabilities Act ("Title II"),[4] and Section 504 of the Rehabilitation Act ("Section 504")[5] require public entities and recipients of federal financial assistance to ensure "effective communication" with persons who are deaf or hard of hearing by providing appropriate auxiliary aids and services, 28 C.F.R. § 35.160; 45 C.F.R. § 84.52(c)-(d), including qualified interpreters, 28 C.F.R. § 35.104; 45 C.F.R. § 84.52(d)(3).[6]

"Effective communication" is critical in virtually all medical contexts. Without it, a care giver cannot obtain complete medical histories; assess symptoms; provide for patient rights,

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[2]At most, the Court should consider staying this action until the Second Circuit rules in *Freydel* rather than rely upon the case to decide summary judgment in the face of contested facts.

[3]For a summary statement of the case, the United States respectfully refers the Court to plaintiffs' statement of the case contained in plaintiffs' memorandum of law in opposition to defendant's motion for summary judgment, which are adopted herein by reference. (This memorandum is cited herein as "Pls.' Mem. ___.")

[4]42 U.S.C. §§ 12131-34.

[5]29 U.S.C. § 794.

[6]For information on the practical necessity of providing interpreters in health care settings, *see* Elizabeth Ellen Chilton, Note, *Ensuring Effective Communication: The Duty of Health Care Providers to Supply Sign Language Interpreters for Deaf Patients*, 47 Hastings L.J. 871, 873 & n.12 (1996)(citing studies).

including informed consent; develop accurate diagnoses and prognoses; develop, explain and administer procedures, medication and treatment generally; provide counseling; or otherwise ensure that patients' needs are appropriately met. Failure to ensure that deaf and hard of hearing patients can effectively communicate threatens the quality of care and, even when treatment ultimately is successful, violates legally protected rights. Moreover, depriving patients and companions such as Navella and Vernal Constance of the means to communicate can cause needless panic, fear and worry.

I. *FREYDEL V. NEW YORK HOSPITAL* IS DISTINGUISHABLE FROM THIS CASE

Defendant heavily relies on *Freydel v. New York Hospital*, 2000 WL 10264 (S.D.N.Y. 2000), to argue that plaintiffs lack standing.[7] Such reliance is misplaced as the case is plainly distinguishable from the present facts.

The *Freydel* court ruled that a patient who was denied a Russian sign language interpreter during the first week of her stay at the hospital was not entitled to injunctive relief, after noting the changes in the circumstances which led Mrs. Freydel to be sent to New York Hospital: 1) she was transferred to New York Hospital only because her primary care physician was at that time a member of the hospital's cardiac catheterization laboratory; and 2) subsequently, her primary care physician left New York Hospital, thus severing Mrs. Freydel's previous link with the institution. 2000 WL 10264 at *3. The court also found that the relationship between her community hospital and defendant hospital was “too weak” to form a basis to establish a real or imminent need for her to utilize defendant hospital in the future, and that one visit to a hospital was insufficient to establish that Mrs. Freydel was likely to again find herself seeking treatment

[7]Defendant fails to note that *Freydel* is on appeal to the Second Circuit and was scheduled for argument before the court November 29th. One of the issues argued is whether a deaf patient who was denied interpreter services on a single visit to a hospital and continues to have medical need, which may require her to return to the hospital, have standing for injunctive relief.

at the hospital. Based on these facts, the court concluded that Mrs. Freydel has failed to provide evidence of a likely future encounter between herself and defendant hospital.

The present record shows that Constances have a far stronger link with SUNY. Mrs. Constance's recurring health condition, as well as her cervical cancer, is likely to require future care.[8] She is likely to require that care at SUNY for her conditions.[9] A trier of fact could reasonably conclude that if Mrs. Constance suffers again from the condition for which she was originally sent to SUNY in 1996, she is likely to be sent to SUNY's emergency department. Also, a trier of fact could reasonably conclude that if her current course of treatment fails, she will likely choose to go to SUNY, one of Upstate New York's most advanced cancer treatment centers.[10] Thus, it is extremely likely that Mrs. Constance will require future care for her conditions at SUNY.[11]

II. THE RECORD CONTAINS EVIDENCE THAT SUNY WILL NOT ADEQUATELY PROTECT THE CONSTANCES' RIGHT TO EFFECTIVE COMMUNICATION[12]

Defendant claims that its hospital policies and procedures for interpreting services make recurrence of alleged violations less likely (Def. Memo, p. 17). In the present case, there is, however, evidence that SUNY has not corrected serious programmatic deficiencies in the policy regarding whether or when interpreters should be obtained. The New York State Department of

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[8] *See* Pls.' Mem., p. 2; Depo., Vernal Constance, pp. 24-25; Pls.' Mem., p. 8-9; Dep., Navella Constance, p. 39; Navella Constance Aff., ¶ 11; Pls.' Mem., p. 9, Navella Constance, p. 39; Navella Constance Aff., ¶ 11.

[9] *See* Pls. Mem., p. 9; Navella Constance Aff., ¶ 12.

[10] *See* Pls.' Mem., p. 9; SUNY website, http://www.unversityhospital.org/cancer; Navella Constance Aff.¶ 12.

[11] Because it is likely that Navella will return to SUNY, it is also likely that Vernal will return with her. Therefore, he too has standing for purposes of an injunction against SUNY.

[12] Regarding the correct requirements for establishing standing injunctive relief under Title II and Section 504, the Department respectfully refers this court to the Department of Justice's Memorandum of Law As Intervenor and *Amicus Curiae* in Response to Defendant's Motion for Judgment on the Pleadings, at pp. 12-16.

Health specifically found that SUNY's policy, as it existed in 1996, was deficient,[13] and there is evidence that SUNY has not changed the policy substantively in response to the DOH findings.[14]

Moreover, the record shows that SUNY has continued its failure to provide interpreter services in similar incidents. First, the New York State Department of Health cited deficiencies in SUNY's interpreter services not only in this case, but also in two prior cases in 1994.[15] Second, even after being cited for these deficiencies, SUNY still continued its failure to provide interpreter services *more than two years* after plaintiffs' experiences when SUNY failed to provide interpreters for another deaf patient, Joan Emerick, who repeatedly requested services during her four-day hospitalization in August 1998.[16] As stated above, evidence shows that there was a lack of clarity in the SUNY policy and that SUNY failed to correct the policy after ordered to do so by the State.

III. THE RECORD CONTAINS EVIDENCE OF SUNY'S DELIBERATE INDIFFERENCE TO THE CONSTANCES' FEDERALLY PROTECTED RIGHTS

The Second Circuit concluded in *Bartlett v. New York State Board of Law Examiners* that a plaintiff may obtain monetary damages for intentional violations of Title II and Section 504 by establishing "deliberate indifference to the strong likelihood that a violation of federally protected rights will result from the implementation of the [challenged] policy . . . [or] custom". 156 F.3d at 331 (brackets in original)(citations omitted). In this context, unlawful discrimination "does not require animosity or ill will". *Id.* Indeed, as the district court noted in *Bartlett*, liability can attach even where "defendants may have had the best intentions." *Bartlett v. New York State Board of Law Examiners***,** 970 F. Supp. 1094, 1151 (S.D.N.Y. 1997), *aff'd in relevant*

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[13]*See* Pls.' Mem., p. 4; Ex.1 - DOH Report.

[14]*See* Pls.' Mem., p. 9; Ex. 2 & 5 - HR Policy.

[15]*See* Attachment 1 to Plaintiff's Amended Complaint.

part, vacated in part, 156 F.3d 321 (2d Cir. 1998), *vacated on other grounds and remanded*, __ U.S. __, 119 S. Ct. 2388 (1999). This analysis is consistent with the Supreme Court's conclusion in *Alexander v. Choate*, 469 U.S. 287 (1985), that "much of the conduct Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by discriminatory intent." *Id.* at 296-97.

Defendant argued that Plaintiffs have no cause of action because they cannot prove discriminatory intent. Contrary to the defendant's arguments, the record contains evidence of SUNY's "deliberate indifference" to the Constances' federally protected rights that is sufficient to defeat summary judgment. That evidence includes SUNY's ongoing failure to meet requests for interpreters,[17] its failure to train[18] or supervise its staff regarding hospital policy and the rights of deaf and hard of hearing persons generally,[19] and the complete disregard of the Constances' requirements for effective communication by hospital staff and officials who had both knowledge of those requirements and the ability to address them.[20]

A trier of fact could reasonably conclude that the evidence is sufficient to satisfy the deliberate indifference standard that this Court recently concluded governs the availability of compensatory damages under Title II and Section 504, *see Bartlett v. New York State Board of Law Examiners*, 156 F.3d 321, 331 (2d Cir. 1998), *vacated on other grounds and remanded*, __ U.S. __, 119 S. Ct. 2388 (1999), and to withstand SUNY's summary judgment motion on plaintiffs' damage claim, *cf. Wyant v. Okst*, 101 F.2d 845, 856-57 (2d Cir. 1994) (summary

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[16]*See* Attachment 3 to Plaintiff's Amended Complaint.

[17]*See* Pls. Mem., pp. 1-2; Vernal Constance Depo. p. 5; Pls. Mem., p. 4; Ex. 1- DOH Report.

[18]*See* Pls. Mem., p. 5; Maxine Thompson Depo, p. 38.

[19]*See* Pls. Mem., p. 4; Ex. 2 - Policy H2; D. Pipas Depo, pp. 27-28; Maxine Thompson Aff., p 8.

[20]*See* Pls. Mem., pp. 1-2; Vernal Constance Depo. p. 5.

judgment inappropriate when a reasonable juror could conclude that defendants in § 1983 action were deliberately indifferent to plaintiff's needs).[21]

CONCLUSION

For the foregoing reasons, Defendant's motion for summary judgment should be denied in its entirety.

Dated: Washington, D.C.
December 1, 2000

Respectfully Submitted,

DANIEL J. FRENCH
United States Attorney
Northern District of
New York
WILLIAM H. PEASE
Chief, Civil Division
Assistant U.S. Attorney
Bar Roll No. 102338
100 South Clinton Street
Syracuse, NY 13261-7198
(315) 448-0672

BILL LANN LEE
Assistant Attorney General
Civil Rights Division

By:_____
JOHN L. WODATCH
Chief
PHILIP L. BREEN
Special Legal Counsel
RENEE M. WOHLENHAUS
Deputy Chief
ROBERT J. MATHER
Trial Attorney
Bar Roll # 502617
Disability Rights Section
Civil Rights Division
U.S. Department of Justice
P.O. Box 66738
Washington, D.C. 20035-6738
(202) 307-2236

Attachment

Title II Technical Assistance Manual

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[21]In *Weyant*, the Second Circuit observed that factual questions about the sate of knowledge necessary to establish deliberate indifference are ordinarily determined after trial because, in most cases, there will be genuine issues of material fact that preclude summary judgment. 101 F.3d at 856-57.

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ENCLOSURE TO

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DANIEL J. FRENCH
United States Attorney
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WILLIAM H. PEASE
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Special Legal Counsel

ROBERT J. MATHER
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