IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JENNIE D. NEWKIRK	:	CIVIL ACTION
	:	NO. 05-719
v.	:	
THE A.I. DUPONT HOSPITAL FOR CHILDREN, *et al.*	:	

O'Neill, J. June 5, 2006

MEMORANDUM

Plaintiffs Jennie D. Newkirk, Administrator Pendente Lite of the Estate of Chase Mountain, a minor, and Michele Mountain, individually and as the Parent and Natural Guardian of Chase Mountain, a minor, brought this suit against the A.I. DuPont Hospital for Children; The Nemours Foundation; William I. Norwood, M.D., Ph.D.; Christian Pizarro, M.D.; John Murphy, M.D.; A. Majeed Bhat, M.D.; Russell Raphaely, M.D.; Deborah Davis, M.D.; and Daniel Duncan. The complaint includes numerous claims, including fraud, conspiracy, wrongful death, negligence and a claim under the Rehabilitation Act, 29 U.S.C. § 794 (2005). Now before me is defendants' motion for partial summary judgment on the Rehabilitation Act claim, plaintiffs' response, and defendants' reply thereto.

BACKGROUND

Chase Mountain was born on August 11, 2003. He was diagnosed prenatally with Transposition of the Great Arteries (TGA), with an A-V- Canal type Ventricular Septal Defect (VSD) and aortic and right ventricle hypopolasia. He was treated at the Nemours Cardiac

Center, a department operated by and located within DuPont Hospital that specializes in pediatric heart surgery. Dr. Norwood performed surgery twice on Chase, on August 19, 2003 and Feburary 3, 2004. The other individual defendants assisted in the surgery or cared for Chase in the cardiac intensive care unit after surgery. Chase died on February 3, 2004.

On February 16, 2005, plaintiffs filed suit against defendants alleging that their conduct resulted in Chase's death. Plaintiffs argue that DuPont Hospital, the Nemours Foundation, and Dr. Norwood[1] violated the Rehabilitation Act by excluding Chase, based solely on his handicap, from the appropriate services which he and his mother sought. Further, plaintiffs allege that the children admitted to the cardiac center were "segregated and subjected to lesser standards of care than children being treated in all other areas of the hospital."

STANDARD OF REVIEW

Rule 56(c) of the Federal Rules of Civil Procedure provides, in relevant part, that summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c) (2005). Rule 56(e) provides that when a properly supported motion for summary judgment is made, "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."

[1]In their complaint, Plaintiffs originally brought their Rehabilitation Act claims against DuPont Hospital, the Nemours Foundation, Dr. Norwood., Dr. Davis, Dr. Murphy, Dr. Bhat, Dr. Raphaely, and Dr. Pizarro. In plaintiffs' response to defendants' motion for partial summary judgment, plaintiffs stipulate to dismissing the Rehabilitation Act claims against all individual defendants except Dr. Norwood.

Summary judgment will be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The party moving for summary judgment has the burden of demonstrating that there are no genuine issues of material fact. Id. at 322-323. If the moving party sustains the burden, the nonmoving party must set forth facts demonstrating the existence of a genuine issue for trial. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). An issue of material fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. at 255. In addition, the "existence of disputed issues of material fact should be ascertained by resolving 'all inferences, doubts and issues of credibility against'" the moving party. Ely v. Hall's Motor Transit Co., 590 F.2d 62, 66 (3d Cir. 1978) (quoting Smith v. Pittsburgh Gage & Supply Co., 464 F.2d 870, 878 (3d Cir. 1972)).

DISCUSSION

Section 504 of the Rehabilitation Act provides, "No otherwise qualified handicapped individual in the United States. as defined in section 706(7) of this title shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794 (2006). For purposes of the Rehabilitation Act, a "handicapped individual" is defined as "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment." Id. § 706(7)(B). To establish a violation of the Rehabilitation Act, "a plaintiff must prove (1) that he is a 'handicapped individual' under the Act, (2) that he is

'otherwise qualified' for the position sought, (3) that he was excluded from the position sought 'solely by reason of his handicap,' and (4) that the program or activity in question receives federal assistance." Wagner v. Fair Acres Geriatric Center, 49 F.3d 1002, 1009 (3d Cir. 1995).

Both sides agree that Chase qualifies as a handicapped individual and that DuPont Hospital and the Nemours Foundation receive federal assistance. Thus, the only issues in this case are whether Chase was "otherwise qualified" for the position sought and was excluded "solely by reason of his handicap." Defendants argue that plaintiffs' Rehabilitation Act claim fails because Chase was not denied access to any treatment solely by reason of his disability; he was not excluded from any program for which he was "otherwise qualified," and the Rehabilitation Act does not apply to medical treatment decisions.

Plaintiffs argue that the Hospital and Foundation discriminated against Chase because it subjected him to the administration of the Cardiac Center, which suffered from a lack of oversight, control, and patient safety rules and regulations. As plaintiffs note, "Only children with heart defects were treated in such a manner."

I will grant summary judgment to defendants on the Rehabilitation Act claim. Plaintiffs have not offered any evidence that Chase was excluded from a position sought, denied the benefits of, or subjected to discrimination solely because of the disability. Chase was kept in the care of qualified medical providers at all times. As Judge Schiller discussed in a related case, "Plaintiffs have not put forth any alternative place of treatment and offer no possible explanation why treating children with serious heart issues at a cardiac center constitutes any type of denial, exclusion, or discrimination." Farrell v. The A.I. DuPont Hospital For Children of the Nemours Foundation, 2006 U.S. Dist. LEXIS 27042, *19 (E.D. Pa. May 5, 2006). There is no evidence

that Chase was discriminated against based on his heart conditions–instead, he was treated at the Cardiac Center because he needed specialized care.

An appropriate order follows.

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ORDER

AND NOW, this 5th day of June 2006, after considering defendants' motion for partial summary judgment, plaintiffs' response, and defendants' reply thereto, it is ORDERED that defendants' motion for partial summary judgment is GRANTED. The Rehabilitation Act claims against all defendants are DISMISSED.

s/Thomas N. O'Neill, Jr.
THOMAS N. O'NEILL, JR., J.