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

ALEJO FAUSTINO, as Parent and Natural Guardian and Administrator of the Estate of IRA FAUSTINO, a Minor, Deceased, and ALEJO FAUSTINO and ERNESTINA FAUSTINO, individually, and in their own right,	:	
Plaintiffs,	:	
	:	
v.	:	**CIVIL ACTION NO. 05-3002**
	:	
THE A.I. DUPONT HOSPITAL FOR THE CHILDREN OF THE NEMOURS FOUNDATION, THE NEMOURS FOUNDATION, WILLIAM I. NORWOOD, M.D., PH.D., CHRISTIAN PIZARRO, M.D., JOHN MURPHY, M.D., ELLEN SPURRIER, M.D., DEBORAH DAVIS, M.D., and PAUL KERINS,	:	
Defendants.	:	

MEMORANDUM AND ORDER

Tucker, J. **October 27, 2006**

Presently before this Court is Defendants' Motion for Partial Summary Judgment (Docs. 21 & 22). For the reasons set forth below, upon consideration of Defendants' Motion and Plaintiffs' Response (Doc. 23), this Court will grant Defendants' Motion for Partial Summary Judgment.[1]

[1] Defendants' Motion for Summary Judgment pertains only to Count VII of Plaintiffs' Complaint. Accordingly Counts I-VI, and VII-XI of Plaintiffs Complaint are not subject to Defendants' Motion

I. BACKGROUND

From the evidence of record, taken in the light most favorable to the Plaintiffs, the pertinent facts are as follows. Plaintiffs Alejo and Ernestina Faustino bring this action seeking relief pursuant the Rehabilitation Act of 1973. Ira Faustino, son of Alejo and Ernestina Faustino, was diagnosed with congenital heart defects prior to his birth on June 5, 2001. Ira was transferred to the Nemours Cardiac Center located inside the A.I. DuPont Hospital for Children for further treatment. On June 11, 2001, Dr. William Norwood performed surgery on Ira. On June 20, 2001, Ira was discharged from the Cardiac Center. Ira was re-admitted to the Cardiac Center for a second surgery on December 5, 2001. On December 6, 2001, he underwent a second surgery, which was also performed by Dr. Norwood. Throughout his procedures, Ira was treated with anesthesia and perfusion procedures. Ira Faustino died on January 23, 2002.

A. Defendants' Position

The Defendants challenge the Plaintiffs' Count VII claim based on the Rehabilitation Act alleging that it fails on three fronts. First, the Defendants assert that the claim should fail because the Plaintiffs have not proffered any evidence showing that Ira was denied access to the hospital and its services. Defendants claim that this conclusion is undisputed because Plaintiffs acknowledge that Ira underwent two surgical procedures at DuPont Hospital in their original Complaint. Defendants further assert that Ira did not satisfy the Act's second requirement that an individual be excluded from a program for which he was "otherwise qualified." Defendants claim that no department other than the Cardiac Center could treat Ira's congenital heart condition, and that they were under no obligation to alter the nature of the hospitals' services. Finally, Defendants assert that while the Act is applicable to administrative decisions, it was

never intended to extend to decisions concerning medical treatment of a patient. Based on the above-mentioned reasons, the Defendants conclude that the Plaintiffs' claim based on the Rehabilitation Act should fail.

B. Plaintiffs' Position

The parties stipulate to dismissal of all individual Defendants, except Dr. Norwood. The Plaintiffs continue to pursue its Rehabilitation Act claim with respect to Dr. Norwood and the institutional Defendants A.I. DuPont Hospital and Nemours Foundation. The Plaintiffs claim A.I. DuPont Hospital deferred too much control to Dr. Norwood over the Nemours Cardiac Center ("Cardiac Center"), which resulted in sub-standard policies and safeguards when it came to the overall health and safety of its patients.

First, the Plaintiffs challenge the Defendants' assertion that Ira was never denied access to A.I. DuPont Hospital. The Plaintiffs contend that Ira was denied access to the other divisions of A.I. DuPont Hospital and placed in the Cardiac Center, where he was exposed to the sub-standard care. Plaintiffs also maintain that Ira satisfies "otherwise qualified" requirement of the Rehabilitation Act because other children admitted as patients to divisions of AI DuPont Hospital other than the Cardiac Center were given better overall care and not subjected to the anesthetic, surgical, and cooling procedures Dr. Norwood prescribed. Finally, the Plaintiffs contend that Defendants' aforementioned decisions were administrative not medical treatment decisions. The Plaintiffs ground their argument in the claim that Dr. Norwood had express control over the policies of admitting children to the Cardiac Center and employed sub-standard care. The Plaintiffs also believe that A.I. DuPont Hospital should have questioned Dr. Norwood's credibility and safety record. Plaintiffs' argument is based on Dr. Norwood's alleged medical

malpractice history and tendency to employ experimental treatments.

II. LEGAL STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answer to interrogatories, and admissions on file, together with 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. R. 56(c). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. Id.

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis of its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant's initial Celotex burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." Id. at 325. After the moving party has met its initial burden, "the adverse party's response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. R. 56(e). That is, summary judgment is appropriate if the non-moving party fails to rebut by making a factual 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, 477 U.S. at 322. " [I]f the opponent [of summary judgment] has exceeded the 'mere scintilla' [of evidence] threshold and has offered a genuine issue of material

fact, then the court cannot credit the movant's version of events against opponent even if the quality of the movant's evidence far outweighs that of its opponent." Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992). Under Rule 56, the Court must view the evidence presented on the motion in the light most favorable to the opposing party. Anderson, 477 U.S. at 225.

III. DISCUSSION

In its Motion for Partial Summary Judgment, the Defendants request this Court grant summary judgment on Count VII of the Plaintiffs' Complaint regarding the Rehabilitation Act. The Rehabilitation Act states "no otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the 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(a) (2005). To establish a claim under the Rehabilitation Act, a plaintiff must show that: (1) he or she is a "handicapped individual" under the Act; (2) he or she is "otherwise qualified" for the program sought; (3) he or she was excluded from the position sought, denied the benefits of, or subjected to discrimination under the program or activity "solely by reason of his handicap," and the program received federal financial assistance. Wagner v. Fair Acres Geriatric Ctr., 49 F.3d 1002, 1009 (3d Cir. 1995).

The Defendants' Motion for Partial Summary Judgment with respect to the Rehabilitation Act claim should be granted on two particular grounds. First, the Defendants' decisions regarding Ira's admission to the Cardiac Center qualify as medical treatment decisions. Based on legislative history and the complexity of the decisions involved, medical treatment decisions have traditionally been immune from scrutiny under the Rehabilitation Act. Second, Ira did not

satisfy the "otherwise qualified" requirement of the Rehabilitation Act because the other divisions of A.I. DuPont Hospital lacked the resources to effectively treat him. To accommodate Ira in these other divisions would have been an onerous burden on the hospital. The Cardiac Center was the only division, which could have appropriately cared for Ira's congenital heart defects. Thus, the Defendants' Motion for Partial Summary Judgment should be granted.

A. Medical Treatment Decision

Generally, medical treatment decisions have been immune from scrutiny under the Rehabilitation Act, especially with respect to birth defects in newborn infants. The legislative history underlying the Rehabilitation Act indicates that the Act's aim was to focus on discrimination against adults and older children. United States v. Univ. Hosp., State Univ. of N.Y. at Stony Brook, 729 F.2d 144, 158 (2d Cir. 1984). Congress "never contemplated [the Rehabilitation Act] would apply to decisions involving defective newborn infants when the statute was enacted in 1973, when it was amended in 1974, or at any subsequent time." Id. at 161. No congressional committee nor any individual congressional representative recommended that the Rehabilitation Act should apply to defective newborn infants. Id. at 158, citing Am. Academy of Pediatrics v. Heckler, 561 F. Supp. 395, 401 (D.C. Cir. 1983).

The Third Circuit further elaborated on this legislative intent by distinguishing medical treatment decisions from administrative decisions. Wagner by Wagner v. Fair Acres Geriatric Ctr., 49 F.3d 1002 (3d Cir. 1995). In Wagner, a plaintiff suffering from Alzheimer's disease sought relief under the Rehabilitation Act for being refused admission to a nursing home for what the nursing home referred to as behavioral problems. Wagner, 49 F.3d at 1004. In granting the plaintiff's relief, the Third Circuit reasoned that this was a purely administrative decision, which

considered whether the nursing home could "provide the requisite staff (i.e. nurses and nurses aids to feed, bathe, and occupy the Mrs. Wagner) as well as reasonable accommodations without incurring excessive cost." Id. at 1012.

The Third Circuit concluded that decisions concerning the numbers and standard activities of nursing staff are typically levied by administrators and fall within the "essential nature" of a nursing home and are therefore adminstrative. Id. at 1012. However, the Third Circuit expressly stated that these administrative decisions are "unlike . . . medical treatment cases involving handicapped infants which necessitate complex assessments of the medical needs, benefits and risks of providing invasive medical care," which would rely upon the learned medical judgment of a medical professional. Id. Thus, in the instant matter, Plaintiffs' claim regarding their handicapped infant under the care of A.I. Dupont and Dr. Norwood, subject to complex assessment of medical care by the Defendants, falls outside the purview of Congress's intention for the application of Section 504 of the Rehabilitation Act.

Furthermore, while the Faustinos contend that this case involves an administrative decision based on Ira's admission to the Cardiac Center as opposed to another division of the hospital, the facts do not align with Plaintiffs' contention. Plaintiffs allege that A.I. DuPont exposed Ira to sub-standard policies and safeguards by its decision to place him in the Cardiac Center, which the Faustinos contend would qualify as an administrative decision. This contention, however, does not withstand scrutiny since the Cardiac Center was the only hospital division qualified to treat Ira's heart condition. Thus, A.I. DuPont's admission of Ira to the Cardiac Center more readily reveals a medical treatment decision predicated on a specific location where Ira could receive the most specialized care and less like an administrative

decision based on pure availability of other divisions. Where one facility does not provide certain treatment, the patient may be directed to the appropriate facility.

Ira's admission to the Cardiac Center coupled with the medical procedures taken by the doctors in the Cardiac Center qualify as medical treatment decisions. In addition, the decisions to perform two invasive surgical procedures and the use of cooling strategies to preserve brain and organ function require medical expertise and consultation, and as Congress intended, are outside the purview of Section 504.

B. "Otherwise Qualified" Requirement

Ira did not satisfy the "otherwise qualified" requirement under the Rehabilitation Act. An "otherwise qualified" individual is one who can meet all of the eligibility requirements of a program in spite of the handicap. See Southeastern Community College v. Davis, 442 U.S. 397 (1979). When making such a determination, courts must focus on why a particular individual was denied access to a program, as opposed to why the individual sought admission. Wagner, 49 F.3d at 1010. A Rehabilitation Act claim is defeated if "accommodating that individual would require either a modification of the essential nature of the program, or impose an undue burden on the recipient of the federal funds." Strathie v. Dept. of Transp., 716 F.2d 227, 231 (3d Cir. 1993). Thus, the question is whether Ira would be "otherwise qualified" if A.I. DuPont had made reasonable accommodations for his handicap.

The Faustinos ground their argument on the fact that Ira was denied access to the other divisions of the DuPont Hospital solely based on his congenital heart defect, and was thus subjected to the sub-standard anesthesia, perfusion, and cooling procedures performed by Dr. Norwood. The Faustinos contend that children in the other divisions of the hospital did not

experience such procedures.

A.I. DuPont, however, could not have made any accommodations for Ira to remain in the other divisions of the hospital. The Cardiac Center was the most appropriate facility with the necessary resources to treat Ira's congenital heart condition. It is a well-established principle that health care providers are not required to change the essential nature of their services to accommodate specific patients. 45 C.F.R. 84, Appendix A, ¶ 36 ("A [medical] center need not provide medical services to handicapped persons unless it provides such medical services to non-handicapped persons."). The resources needed to treat Ira's congenital heart defect were neither available in the other divisions of the hospital nor employed on children admitted to locations other than the Cardiac Center. Thus, Ira does not satisfy the "otherwise qualified" requirement under the Rehabilitation Act; such an accommodation by A.I. DuPont would have been an unreasonable change to the essential nature of its other divisions, which was not offered to its other non-handicapped patients.

IV. CONCLUSION

Ira's admission to the Cardiac Center coupled with the medical procedures taken by the doctors in the Cardiac Center qualify as medical treatment decisions. Additionally, Ira does not satisfy the "otherwise qualified" requirement under the Rehabilitation Act. For the foregoing reasons, Defendants' Motion for Partial Summary Judgment is granted. An appropriate order follows.