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Superior Court of Massachusetts,
Suffolk.

Joanne MINICH,[1] et al.[2]
v.
Luis S. SPENCER, et al.[3]

No. SUCV201500278.
|
May 17, 2016.

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION TO DISMISS

PAUL D. WILSON, Justice.

***1** The plaintiffs, severely mentally ill individuals, allege that they were secluded and restrained unnecessarily and for prolonged periods at Bridgewater State Hospital ("Bridgewater") where they were involuntarily civilly committed. Claiming that the seclusion and restraint violated their state and federal rights, they commenced this lawsuit against the Commonwealth, the Department of Correction ("DOC"), former DOC Commissioner Luis S. Spencer ("Spencer"), and former Bridgewater Superintendent Robert Murphy ("Murphy") (collectively, "defendants")[4] seeking damages for violations of 42 U.S.C. § 1983 (Count I), G.L.c. 123, § 21 (Count II), and the Americans with Disabilities Act ("ADA") and the Rehabilitation Act (Count IV); and seeking declaratory judgments for violations of G.L.c. 123, § 21, and the Massachusetts Declaration of Rights (Count III), and for violations of the ADA and the Rehabilitation Act (Count V). Before me is the defendants' motion to dismiss. For the following reasons, the defendants' motion is *ALLOWED* in part and *DENIED* in part.

PROCEDURAL HISTORY

In March 2014, the plaintiffs[5] filed a prior lawsuit in Norfolk County[6] against the current defendants, as well as the Massachusetts Partnership for Correctional Healthcare, LLC, and Marcia Fowler in her capacity as commissioner of the Massachusetts Department of Mental Health ("DMH") ("Norfolk Action"). See Amended Complaint, pars. 53–59 (discussing Norfolk Action). In the Norfolk Action, the plaintiffs alleged that the illegal restraint and seclusion at Bridgewater violated G.L.c. 123, § 21; violated Article 10 of the Massachusetts Declaration of Rights; violated G.L.c. 12, § 11I; violated 42 U.S.C. § 1983; and breached the 1987 settlement agreement concerning seclusion and restraint at Bridgewater between two Bridgewater patients and the Secretary of Health and Human Services, the Commissioner of Correction, and the Superintendent of Bridgewater. See Amended Complaint, pars. 22–24 (discussing 1987 agreement).

The parties sealed the Norfolk Action in December 2014 pursuant to a Settlement Agreement. See Amended Complaint, par. 59 (discussing Settlement Agreement). The Settlement Agreement "represent[ed] a full and fair resolution of the claims for relief alleged in" the plaintiffs' amended complaint, Settlement Agreement, par. 103; and "address[ed] issues concerning the use of Seclusion and Restraint at [Bridgewater], including Plaintiffs' allegations about the purported prolonged, inappropriate, and/or non-emergency placement of Patients in Seclusion and/or Restraint in violation of G.L.c. 123, § 21, and Plaintiffs' inadequate medical and mental health care claims under the state and federal constitutions related solely to the use of Seclusion and Restraint." Settlement Agreement, par. 38. The parties agreed that certain matters were outside the scope of the Settlement Agreement and therefore not settled but are still open:

> ***2** The Parties disagree as to whether the following practices at [Bridgewater] constitute Restraint under G.L.c. 123 but agree not to attempt to resolve their differences in this Action or Agreement. Therefore, for the purposes of this Agreement solely, Restraint shall not refer to: (a) the temporary use of mechanical devices with a Patient for safety or security purposes when the Patient is being transported within

> [Bridgewater]; or (b) the temporary use of mechanical devices with a Patient for safety or security purposes to prevent injury to Patients as a result of any medical or physical impairment.
>
> The Parties disagree as to whether the following practices at [Bridgewater] constitute Seclusion under G.L.c. 123 but agree not to attempt to resolve their differences in this Action or Agreement. Therefore, for the purposes of this Agreement solely, Seclusion shall not refer to: (a) placement of a Patient in his room on a housing unit for the night at the regular hour of sleep or after 6:30 p.m. upon the Patient's request; (b) temporary placement of a Patient alone in a room for not longer than ninety (90) minutes to await medical assessment and/or treatment; (c) voluntary, temporary placement of a Patient in a room designated by the Superintendent as a Quiet Room; or (d) temporary placement of a Patient in a room for patient and inmate counts and movement. Likewise, the Parties disagree as to whether Seclusion or Restraint orders can be renewed only upon personal examination by a physician or psychiatrist after a Patient has been in Seclusion or Restraint for more than six (6) hours.

Settlement Agreement, pars. 40–41. The parties also agreed that:

> Nothing in this Agreement shall constitute a waiver by any Plaintiff ... of any individual claim against any Defendant in a court of competent jurisdiction for monetary damages or concerning matters outside the scope of this Agreements ... Defendants agree that plaintiffs John Doe, Peter Minich, and Felipe Zomosa shall be able to file any claim for monetary damages in any court of competent jurisdiction after execution of this Agreement, subject to any applicable notice requirements. In any such action by these three Plaintiffs, Defendants shall not raise as a defense the failure of these three Plaintiffs to seek monetary damages in this [Norfolk] Action and Defendants shall waive the defenses of res judicata, issue preclusion, and collateral estoppel with regard to this [Norfolk] Action.

Settlement Agreement, par. 119.

This court (Wilson, J.) approved the Settlement Agreement on March 3, 2015.

BACKGROUND

For purposes of a motion to dismiss under Rule 12(b)(6), the court must "accept as true the allegations in the complaint and draw every reasonable inference in favor of the plaintiff." *Curtis v. Herb Chambers I–95, Inc.*, 458 Mass. 674, 676 (2011).[7]

Pursuant to G.L.c. 123, § 21 (the "Restraint Law"), Bridgewater patients can only be secluded or restrained "in cases of emergency, such as the occurrence of, or serious threat of, extreme violence, personal injury, or attempted suicide[,]" G.L.c. 123, § 21, third par.; only physicians can authorize restraint lasting more than six hours, G.L.c. 123, § 21, seventh par.; and "no adult shall be restrained for more than six hours beyond which time an order may be renewed only upon personal examination by a physician." *Id.;* Amended Complaint, par. 29. Bridgewater has also adopted regulations governing seclusion and restraint, 103 BSH § 651.00 et seq., which provide, among other things, that seclusion and restraint cannot "be used for punishment, convenience, discipline, or failure to take non-court-ordered medication[,]" 103 BSH § 651.02(2); and set forth certain preliminary interventions for staff to take before secluding or restraining a patient. 103 BSH § 651.03; Amended Complaint, par. 28.

***3** The "Intensive Treatment Unit" ("ITU") is the separate unit where Bridgewater places secluded and restrained patients. Amended Complaint, par. 33. The thirteen cells have solid steel doors, a window for observation, and a slot for meal delivery. *Id.* While inside, patients are denied exercise, adequate clean clothes, adequate showers, and sensory stimulation including reading materials, and access to visitors and telephone calls is restricted. Amended Complaint, pars. 2, 7, 33.

Patients at Bridgewater fall into four categories: mentally ill prisoners; individuals who have been found not guilty by reason of insanity; individuals undergoing criminal competency or responsibility evaluations; and individuals who have been found to be incompetent to stand trial or not criminally responsible and are civilly committed to Bridgewater for "care and treatment." Amended Complaint, pars. 183–84; see G.L.c. 123, § 15(b), § 16(b). Bridgewater makes no distinction among these categories. Amended Complaint, par. 186. The plaintiffs fall into the fourth category, which comprises the majority of Bridgewater patients. Amended Complaint, pars. 184–85.

Plaintiff Peter Minich ("Minich") has been diagnosed with schizophrenia. After being criminally charged, he was confined to Bridgewater from January 14, 2013, through June 26, 2014, first for a competency evaluation pursuant to G.L.c. 123, § 15(b), then, upon being deemed incompetent to stand trial, he was committed pursuant to G.L.c. 123, § 16(b). Amended Complaint, par. 60. While at Bridgewater, he spent over 6,600 hours in seclusion[8] and over 800 hours in restraint,[9] rates that are more than 1,000 times the 2013 national average for psychiatric facilities. Amended Complaint, pars. 2, 68; see Amended Complaint, par. 102 (detailing Massachusetts Disabled Persons Protection Commission investigation concluding that Minich "was placed in seclusion and restraint on occasion when he was not presenting threatening behavior").

Plaintiff Felipe Zomosa ("Zomosa") has been diagnosed with schizophrenia and bipolar disorder. Amended Complaint, par. 103. Zomosa was committed to Bridgewater pursuant to G.L.c. 123, § 15, following his alleged assault of a psychiatrist at another psychiatric hospital; after six months, his civil commitment was extended because of paranoid delusions. Amended Complaint, par. 103. Zomosa was at Bridgewater from April 24, 2013, to May 29, 2014. Amended Complaint, pars. 110, 131. Immediately upon his arrival in April 2013, Zomosa was placed in seclusion despite the lack of emergency situation. Amended Complaint, par. 110. During his first year at Bridgewater, Zomosa spent over 4,400 hours in seclusion[10]—more than half of his time at Bridgewater—and over 337 hours[11] in mechanical restraints, with some periods of seclusion and restraint lasting for months. Amended Complaint, par. 106; see Amended Complaint, par. 135 (detailing Massachusetts Disabled Persons Protection Commission investigation concluding that Zomosa "was placed in seclusion and restraint on occasions when he was not presenting threatening behavior"). These rates are more than 500 times the 2013 national average. Amended Complaint, par. 2.

***4** Plaintiff Jeffrey Doe ("Doe") has been diagnosed with autism, intellectual disability, and schizophrenia. Amended Complaint, par. 137. After being charged with misdemeanor assault and battery on a public employee on November 21, 2013, Doe was sent to Bridgewater for a competency evaluation; he was deemed incompetent to stand trial and was civilly committed to Bridgewater for care and treatment. Amended Complaint, par. 141. Doe spent ten months at Bridgewater, from November 28, 2013, through September 2014. Amended Complaint, par. 142, 171. On his first day at Bridgewater, Doe was immediately placed in seclusion even though there was no indication that he was acting in an assaultive manner. Amended Complaint, par. 151. During his first six months, he spent approximately 1,532 hours—almost half of his time at Bridgewater—in seclusion.[12] Amended Complaint, par. 143. He was not placed in seclusion because of emergency situations but rather because he gave "latent responses," was difficult to understand, and placed his hands down his pants. Amended Complaint, par. 153; see Amended Complaint, pars. 155–56, 161–62; see also Amended Complaint, par. 181 (detailing Massachusetts Disabled Persons Protection Commission investigation concluding that Doe "was placed in seclusion and restraint on occasions when he was not presenting threatening behavior"). He was also secluded as a means of punishment. Amended Complaint, par. 163.

All three plaintiffs were subjected to seclusion and restraint for punitive and disciplinary purposes, not under emergency situations. Amended Complaint, par. 30. As a matter of custom and practice, DOC staff did not attempt to de-escalate situations or treat the plaintiffs to avoid seclusion and restraint. Amended Complaint, par. 74, 84 (Minich); Amended Complaint, pars. 117, 119 (Zomosa). Correctional officers made the decisions to seclude and restrain the plaintiffs, and often used excessive force.[13] Amended Complaint, pars. 32, 186. Nurses, rather than licensed physicians, would often renew the plaintiffs' seclusions and restraints after six hours, and renewals would occur when they were calm, compliant, or sleeping. Amended Complaint, pars. 93–94 (Minich); Amended Complaint, pars. 125–26 (Zomosa); Amended Complaint, pars. 157–60, 173–74(Doe). The plaintiffs allege that this seclusion and restraint constituted undue restraint and unsafe treatment in violation of their constitutional liberty interest, and caused them severe physical and psychological injuries. Amended Complaint,

pars. 32, 38, 207; pars. 82, 100 (Minich); Amended Complaint, pars. 133, 134 (Zomosa); Amended Complaint, pars. 133, 134, 167–70, 172, 179–80(Doe); see Amended Complaint, par. 102 (Minich), par. 135 (Zomosa), par. 181(Doe). Seclusion and restraint rates for the plaintiffs decreased after they filed this suit in March 2014. Amended Complaint, par. 8.

The seclusion and restraint that the plaintiffs experienced were common practice at Bridgewater. Amended Complaint, par. 31. Between 2004 and 2013, total hours of seclusion and restraint at Bridgewater rose sixteen percent, from 1,215 hours per 1,000 patient days in 2004, to 1,410 hours per 1,000 patient days in 2013. *Id.;* see G.L.c. 123, § 21, twelfth par. (requiring that Bridgewater keep "statistical records" of restraints). Further, Bridgewater patients were secluded and restrained at a rate of more than 100 times the patients at DMH facilities and the patients at other psychiatric hospitals in the United States. Amended Complaint, par. 31.[14]

***5** After they left Bridgewater, the plaintiffs went to DMH facilities; while there, they were provided with more extensive treatment services than they received at Bridgewater; at the DMH facilities, the plaintiffs were barely secluded or restrained at all. Amended Complaint, par. 209. As contrasted with patients at DMH facilities, Bridgewater patients have boilerplate treatment plans, are denied exercise programs and other activities, and do not receive regular therapy with licensed mental health professionals; there are insufficient mental-health-worker-to-patient ratios and restrictive visitation procedures; and it is an inadequate facility to treat mentally ill individuals. Amended Complaint, pars. 189–98. Additionally, DMH has adopted regulations to minimize and protect patients from the use of seclusion and restraint. Amended Complaint, pars. 199–204, citing 104 Code.Mass.Regs. §§ 27.12, 27.14.

In their positions as commissioner and superintendent, respectively, Spencer and Murphy[15] were aware of the undue seclusion and restraint at Bridgewater, but they failed to take any corrective action. See Amended Complaint, par. 35 (allegations concerning Murphy's knowledge); Amended Complaint, pars. 39–49 (allegations concerning Spencer's knowledge); see also Amended Complaint, par. 9 (noting that Spencer and Murphy received "formal reprimands ... for misconduct relating to investigations into the 2009 death of a Bridgewater patient in restraints" and that there have been "[t]hree restraint related deaths since 2009"). The Restraint Law required Spencer, as commissioner, to receive "[c]opies of all restraint forms ... [and] review and sign them within thirty days ..." G.L.c. 123, § 21, twelfth par. Spencer refused to comply with this statutory obligation, thereby delaying the discovery that the plaintiffs were subjected to undue restraint and unsafe treatment in violation of their constitutional liberty interest. Amended Complaint, pars. 4, 46; see Amended Complaint, pars. 48, 98, 129, 177. The Restraint Law obligated Murphy, as superintendent of Bridgewater, to authorize "[t]he maintenance of any adult in restraint for more than eight hours in any twenty-four hour period ..." G.L.c. 123, § 21, ninth par. The Restraint Law also imposed on Murphy "[r]esponsibility and liability for the implementation of the provisions of the Restraint Law. G.L.c. 123, § 21, thirteenth par. Murphy did not comply with his statutory obligations, causing the plaintiffs to be placed in prolonged seclusion and restraint. Amended Complaint, par. 5; see Amended Complaint, pars. 35, 97, 128, 176.

Spencer's and Murphy's failures to comply with their statutory obligations under the Restraint Law resulted in seclusion and restraint occurring at Bridgewater at a rate of more than 100 times the 2013 national average. Amended Complaint, par. 6; see Amended Complaint, par. 41 (alleging that reports of seclusion and restraint at Bridgewater that Spencer received quarterly documented that rate of seclusion and restraint was 100 times higher than national averages). The plaintiffs allege that they have a "constitutional right to ... protections to minimize the harsh affects [sic] of prolonged seclusion and restraint ... [including] the right to reasonable exercise, the right to adequate food, hygiene and clothing, the right to minimally adequate treatment, the right to safe conditions of confinement and the right to reasonable visitation from family members." Amended Complaint, par. 29.

DISCUSSION

I. Standard of Review

***6** A party moving to dismiss pursuant to Mass.R.Civ.P. 12(b)(6) contends that the complaint fails "to state a claim

upon which relief can be granted ...” “While a complaint attacked by a ... motion to dismiss does not need detailed factual allegations ... a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions ...” *Iannacchino v. Ford Motor Co.,* 451 Mass. 623, 636 (2008) (ellipses and alteration in original), quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007). “Factual allegations must be enough to raise a right to relief above the speculative level ... [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact) ...” *Id.* (ellipses and alteration in original), quoting *Bell Atl. Corp.,* 550 U.S. at 555. Therefore, the pleading stage requires “factual ‘allegations plausibly suggesting (not merely consistent with)’ an entitlement to relief, in order to ‘reflect[ ] the threshold requirement of [Fed.R.Civ.P.] 8(a)(2) that the “plain statement” possess enough heft to “sho[w] that the pleader is entitled to relief.” ‘ “ *Id.* (alterations in original), quoting *Bell Atl. Corp.,* 550 U.S. at 557.

II. Claims Under 42 U.S.C. § 1983—Count I

In Count I, the plaintiffs seek damages for violations of their federal constitutional rights under 42 U.S.C. § 1983. Section 1983 of Title 42 of the United States Code provides that “[e]very person who, under color of any statute, ordinance, regulation, custom, or usage of any State ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ...” In Count I, the plaintiffs allege that Murphy and Spencer violated 42 U.S.C. § 1983 by their tolerance of the systemic abuse of restraint and seclusion at Bridgewater. Murphy and Spencer seek the dismissal of this claim on the basis that the plaintiffs cannot state a claim for supervisory liability and that, regardless, Murphy and Spencer are entitled to qualified immunity.[16]

A. Supervisory Liability

The defendants argue that, to hold Murphy and Spencer liable as supervisors, the plaintiffs must allege more than mere negligence, and the plaintiffs must allege a link between the employee’s misconduct and the supervisor’s act or omission. The defendants have correctly stated the law.

> [A]n official cannot be held vicariously liable for the conduct of his subordinates—instead, such official can only be held liable on the basis of his own acts or omissions ... A supervisor may be held liable for a subordinate’s acts where [1] the subordinate’s behavior resulted in a constitutional violation *and* [2] the supervisor’s action or inaction was “affirmatively linked” to the behavior in that [3] it could be characterized as “supervisory encouragement, condonation or acquiescence” or gross negligence amounting to “deliberate indifference.”

***7** *Williams v. Bisceglia,* 115 F.Sup.3d 184, 188 (D.Mass.2015) (internal citation omitted) (emphasis in original); see *Ramirez–Lluveras v. Rivera Merced,* 759 F.3d 10, 19 (1st Cir.2014); *Clancy v. McCabe,* 441 Mass. 311, 317 (2004). Therefore, “proof of mere negligence, without more, is inadequate to ground supervisory liability.” *Maldonado–Denis v. Castillo Rodriguez,* 23 F.3d 576, 582 (1st Cir.1994). The plaintiffs “must allege facts to support [their] supervisory claim[s] ... [and] it is not sufficient for [them] to simply formalistically recite the necessary elements of such a claim.” *Williams,* 115 F.Sup.3d at 188, citing *Iqbal,* 556 U.S. at 681; see *Maldonado–Denis,* 23 F.3d at 582 (“[Supervisor] may be liable for the foreseeable consequences of such conduct if he would have known of it but for his deliberate indifference or willful blindness, and if he had the power and authority to alleviate it”). As explained below, the plaintiffs have met their burden here.

1. Constitutional Violation

The United States Supreme Court has held that involuntarily committed individuals have certain constitutionally protected rights. See *Youngberg v. Romeo,* 457 U.S. 307, 314 (1982). First, "the right to personal security constitutes a 'historic liberty interest' protected substantively by the Due Process Clause." *Id* . at 315. It is therefore "unconstitutional to confine the involuntarily committed ... in unsafe conditions." *Id.* at 316. Second, "[l]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Id.* (alteration in original) (citation omitted). Third, an individual's "liberty interests require the State to provide minimally adequate or reasonable training to ensure safety and freedom from undue restraint." *Id.* at 319; see *Hopper v. Callahan,* 408 Mass. 621, 624–25 (1990) (relying on *Youngberg* for holding that involuntarily committed psychiatric patient had "Federal due process right (a) to essential medical care and (b) not to be physically restrained unduly").

To determine "whether a State adequately has protected the rights of the involuntarily committed[,]" the court must balance the individual's "liberty interests against the relevant state interests." *Youngberg,* 457 U.S. at 321. In making this determination, "the Constitution only requires that the courts make certain that professional judgment in fact was exercised." *Id.* (citation omitted); see *Hopper,* 408 Mass. at 626–27, 630–32 (reciting and applying *Youngberg* standard). "[T]he decision, if made by a professional, is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." *Youngberg,* 457 U.S. at 323 (footnote omitted).

***8** The plaintiffs have alleged facts plausibly suggesting that the seclusion and restraint that the plaintiffs experienced constituted a substantial departure from accepted professional judgment, practice, or standards. For example, Bridgewater staff[17] secluded and/or restrained the plaintiffs when they were not presenting threatening behavior; their seclusion and/or restraint orders were renewed even when they were calm, compliant, or sleeping; and they were secluded and/or restrained in the absence of emergency situations. Moreover, the high rates of seclusion and restraint that the plaintiffs each experienced at Bridgewater as compared not only to DMH facilities but also to the national average support the inference that the seclusion and restraint decisions were a substantial departure from accepted professional judgment, practice, or standards.

The plaintiffs have therefore alleged facts plausibly suggesting that "the subordinate's behavior resulted in a constitutional violation ..." See *Williams,* 115 F.Sup.3d at 188; see also *Ramirez–Lluveras,* 759 F.3d at 19.

2. Deliberate Indifference

Massachusetts federal courts "have typically formulated the deliberate indifference inquiry as a three-part test that requires plaintiffs to show: (1) 'that the officials had knowledge of facts,' from which (2) 'the official [s] can draw the inference' (3) 'that a substantial risk of serious harm exists.' " *Ramirez–Lluveras,* 759 F.3d at 20 (alteration in original) (citations omitted); see *Clancy,* 441 Mass. at 318. "Under this rubric, a supervisor may be held liable for what he does (or fails to do) if his behavior demonstrates deliberate indifference to conduct that is itself violative of a plaintiff's constitutional rights." *Maldonado–Denis,* 23 F.3d at 582. "Therefore, substandard care, malpractice, negligence, inadvertent failure to provide care, and disagreement as to the appropriate course of treatment are all insufficient to prove a constitutional violation." *Ruiz–Rosa v. Rullan,* 485 F.3d 150, 156 (1st Cir.2007).

The plaintiffs allege that, as superintendent and commissioner, Murphy and Spencer had the "responsibility and liability" to ensure that Bridgewater employees complied with constitutional requirements, and the requirements of the Restraint Law and Bridgewater's restraint regulations. See G.L.c. 123, § 21, thirteenth par. "[Section] 1983 liability[, however,] cannot rest solely on a defendant's position of authority." *Ramirez–Lluveras,* 759 F.3d at 19. The plaintiffs also allege that Murphy knew of the prolonged and unconstitutional seclusion and restraint to which the

plaintiffs were subjected, but he failed to stop the practice.

It is a fair inference that facility superintendent Murphy, working every day at a facility housing many mentally ill persons being subjected to the extraordinarily high rates of restraint and seclusion alleged in the amended complains must have been aware of these rates. In addition, in 2009, Murphy received a formal reprimand for misconduct with respect to the death of a restrained Bridgewater patient. Knowledge of this misconduct could also have led Murphy to infer that a substantial risk of serious harm existed, i.e., the unconstitutional restraint of patients at Bridgewater.[18] See *Ramirez–Lluveras,* 759 F.3d at 20. Against the backdrop of this inference, then, the allegations that Murphy knew of the unconstitutional seclusion and restraint plausibly suggest that Murphy's conduct amounted to deliberate indifference. See *Ramirez–Lluveras,* 759 F.3d at 19; *Williams,* 115 F.Sup.3d at 188.

***9** Spencer received quarterly reports that documented seclusion and restraint practices at Bridgewater. These reports revealed that the occurrence of these practices was 100 times the national seclusion and restraint averages. Knowledge of these facts could have led Spencer to draw the inference that Bridgewater unconstitutionally secluded and restrained its patients and that, therefore, a substantial risk of serious harm existed. See *Ramirez–Lluveras,* 759 F.3d at 20. Accordingly, these facts plausibly suggest that Spencer's conduct also amounted to deliberate indifference. See *id .; Williams,* 115 F.Sup.3d at 188.

3. Affirmatively Linked

"To succeed on a supervisory liability claim, a plaintiff not only must show deliberate indifference or its equivalent, but also must affirmatively connect the supervisor's conduct to the subordinate's violative act or omission." *Maldonado–Denis,* 23 F.3d at 582. This "showing of causation must be a strong one, as that requirement 'contemplates proof that the supervisor's conduct led *inexorably* to the constitutional violation.' " *Ramirez–Lluveras,* 759 F.3d at 19 (emphasis in original). "[D]eliberate indifference to violations of constitutional rights can forge the necessary linkage between the acts or omissions of supervisory personnel and the misconduct of their subordinates." *Maldonado–Denis,* 23 F.3d at 582; see *Clancy,* 441 Mass. at 321 (holding that "this affirmative connection requires something ... such as 'tacit approval of, acquiescence in, or purposeful disregard of, rights-violating conduct' " (citations omitted)).

Therefore, the plaintiffs' facts plausibly suggesting that Murphy and Spencer were deliberately indifferent to the constitutional violations at Bridgewater also plausibly suggest this affirmative link: as superintendent and commissioner, Murphy and Spencer had statutory obligations to monitor the seclusion and restraint practices at Bridgewater;[19] failure to satisfy those obligations through their deliberate indifference "led *inexorably* to the constitutional violation[s]" that the plaintiffs experienced.[20] Compare *Hannon v. Beard,* 979 F.Sup.2d 136, 142 (D.Mass.2013) (dismissing claims against governor for failure to show affirmative link where claims were "no more than vague allegations against a distant public figure").

4. Conclusion

The plaintiffs have therefore met their burden of alleging facts that plausibly suggest that Murphy and Spencer are liable as supervisors under 42 U.S.C. § 1983 for the alleged violations of the plaintiffs' constitutional rights while patients at Bridgewater.

B. Qualified Immunity

But Murphy and Spencer argue that nonetheless, the court must dismiss Count I because they are entitled to qualified immunity. "Determining whether a defendant is entitled to qualified immunity involves two questions: (1) 'whether the facts that a plaintiff has alleged ... or shown ... make out a violation of a constitutional right,' " and "(2) 'whether the right at issue was "clearly established" at the time of defendant's alleged misconduct [.]' " *Miranda–Rivera v. Toledo–D'Avila,* 813 F.3d 64, 72 (1st Cir.2016) (citations omitted); *Nelson v. Salem State Coll .,*

446 Mass. 525, 531 (2006). If the answer to both questions is in the affirmative, the defendant is not entitled to qualified immunity. See *Stamps v. Framingham,* 813 F.3d 27, 34 (1st Cir.2016). Murphy and Spencer argue that the plaintiff cannot establish either element.

***10** First, as concluded above, the plaintiffs have alleged facts that plausibly suggest that the defendants violated their constitutional rights to be free of unlawful restraint. See *Youngberg,* 457 U.S. at 314–19; *Hopper,* 408 Mass. at 624–25. The plaintiffs have therefore satisfied the first prong.

"The second prong, in turn, has two elements:' ... (a) whether the legal contours of the right in question were sufficiently clear that a reasonable [person in the defendant's position] would have understood that what he was doing violated the right, and (b) whether in the particular factual context of the case, a reasonable [person in the defendant's position] would have understood that his conduct violated the right.' " *Stamps,* 813 F.3d at 34; *Nelson,* 446 Mass. at 531. Contrary to the defendants' argument, the focus of this inquiry is not whether it is clearly established that a violation of the Restraint Law constitutes a constitutional violation. As noted above, the plaintiffs' liberty interest in freedom from unlawful restraint arises from the Due Process Clause of the federal constitution. *Youngberg,* 457 U.S. at 316, 319.

The Supreme Judicial Court has already resolved the issue of qualified immunity in this context. In *Hopper,* the Court held that involuntarily committed patients have "a *clearly established* federal due process right ... not to be physically restrained unduly. For that reason, no defendant [may be] entitled to qualified immunity from liability for the consequences of any violation of ... [a patient's] Federal Civil rights that he may have caused." 408 Mass. at 625 (emphasis added). Therefore, "[t]he contours of [the plaintiffs'] rights were sufficiently clear ... [during their stays at Bridgewater], that a reasonable official would have understood what those rights were." *Id.*

As the plaintiffs have alleged facts plausibly suggesting that Murphy's and Spencer's conduct violated the plaintiffs' clearly established due process rights, Murphy and Spencer are not entitled to qualified immunity on Count I.

III. Claims Under G.L.c. 123, § 21—Counts II and III

The Restraint Law, G.L.c. 123, § 21, prohibits " 'as required' authorization of restraint" and provides that "[n]o restraint is authorized except as specified in this section in any public or private facility for the care and treatment of mentally ill persons including Bridgewater." G.L.c. 123, § 21, tenth par. Specifically, the Restraint Law states that "[r]estraint of a mentally ill patient may only be used in cases of emergency, such as the occurrence of, or serious threat of, extreme violence, personal injury, or attempted suicide ..." G.L.c. 123, § 21, third par. There must be "written authorization for such restraint" by a designated[21] individual "who is present at the time of the emergency[;]" if that individual "is not present at the time of the emergency, ... restraint may be used for a period of one hour provided that within one hour the person in restraint shall be examined" by a designated individual; "if said examination has not occurred within one hour, the patient may be restrained for up to an additional one hour period until such examination is conducted ..." *Id.*

***11** "No order for restraint for an individual shall be valid for a period of more than three hours beyond which time it may be renewed upon personal examination" by a designated individual. G.L.c. 123, § 21, seventh par. "[N]o adult shall be restrained for more than six hours beyond which time an order may be renewed only upon personal examination by a physician." *Id.* While an individual is restrained, there must be "a person in attendance specially trained to understand, assist and afford therapy to the person in restraint. The person may [be] in attendance immediately outside the room in full view of the patient when an individual is being secluded without mechanical restraint ..." G.L.c. 123, § 21, ninth par. (footnote omitted). "[I]n emergency situations when a person specially trained is not available, an adult[ ] may be kept in restraint unattended for a period not to exceed two hours ... [and] the person kept in restraints must be observed every five minutes." *Id.*

A "restraint form" must be generated whenever an individual is restrained. "The reasons for the original use of restraint, the reason for its continuation after each renewal, and the reason for its cessation shall be noted upon the restraining form ..." G.L .c. 123, § 21,

seventh par. "No later than twenty-four hours after the period of restraint, a copy of the restraint form shall be delivered to the person who was in restraint. A place shall be provided on the form or on attachments thereto, for the person to comment on the circumstances leading to the use of restraint and on the manner of restraint used." G.L.c. 123, § 21, eleventh par. The restraint form and any attachments "shall become part of the chart of the patient. Copies of all restraint forms and attachments ... with respect to Bridgewater state hospital [patients] [shall be sent] to the commissioner of correction, who shall review and sign them within thirty days ... [S]uch reports, excluding patient identification, shall be made available to the general public ... with respect to Bridgewater state hospital [patients] at the department of correction's central office." G.L.c. 123, § 21, twelfth par.

The plaintiffs bring two claims under the Restraint Law.

A. Violation of G.L.c. 123, § 21—Count II

In Count II, the plaintiffs allege that Murphy, as Bridgewater's superintendent, violated the Restraint Law by subjecting the plaintiffs to unjustified restraint and by failing to comply with his responsibilities under the statute. Murphy disputes that the Restraint Law applies to him because he is not a "superintendent" within the definitions set forth in G.L.c. 123, § 1, and that, regardless, the Restraint Law does not provide a private right of action.

1. Application to Bridgewater Superintendent

The Restraint Law places certain obligations on certain identified individuals, namely the superintendent of the facility where the restraint is taking place, the director of the facility, or the designated physician. G.L.c. 123, § 21, third par., seventh par., ninth par., thirteenth par. Section 1 of G.L.c. 123 defines "superintendent" as "the superintendent or other head of a public or private facility[,]" and the term "facility" as "a public or private facility for the care and treatment of mentally ill persons, except for the Bridgewater State Hospital." The defendants apply these definitions to G.L.c. 123, § 21, and argue that the Restraint Law does not apply to the superintendent of Bridgewater. This argument fails for two reasons.

***12** First, the tenth paragraph of G.L.c. 123, § 21, expressly provides that "[n]o restraint is authorized except as specified in this section [i.e., the Restraint Law] in any public or private facility for the care and treatment of mentally ill persons *including Bridgewater.*" (Emphasis added). The requirements and prohibitions of the Restraint Law therefore apply to Bridgewater. Second, the definitions set forth in G.L.c. 123, § 1, apply to "sections two to thirty-seven" of G.L.c. 123 "*unless the context otherwise requires* " ... (Emphasis added.) Given the express application of the Restraint Law to Bridgewater by G.L.c. 123, § 21, tenth par., this statute presents a "context" which militates against using the meanings set forth in G.L.c. 123, § 1. The "superintendent" referred to in the Restraint Law is therefore the Bridgewater superintendent. See *Halebian v. Berv,* 457 Mass. 620, 628 (2010) (holding that, when interpreting statute, court must "give effect to each word and phrase in a statute, and seek to avoid an interpretation that treats some words as meaningless").

2. Private Right of Action

The defendants alternatively argue that the Restraint Law does not provide a private right of action. As the Restraint Law does not expressly provide a private right of action for a party to allege that the provisions of G.L.c. 123, § 21 have been violated, "[t]he inquiry ... becomes whether a private right of action can be inferred ..." See *Frawley v. Police Comm'r of Cambridge,* 473 Mass. 716, 722 (2016). Courts "have generally been reluctant to infer a private cause of action from a statute in the absence of some indication from the Legislature supporting such an inference." *Loffredo v. Center for Addictive Behaviors,* 426 Mass. 541, 544 (1998). Courts may "nonetheless infer a private right of action unless the Legislature explicitly prohibits [them] from doing so." *Salvas v. Wal–Mart Stores, Inc.,* 452 Mass. 337, 373 (2008).

The Legislature has provided an indication supporting the inference of a private cause of action in two ways. First, the Restraint Law provides that "[r]esponsibility and *liability* for the implementation of the provisions of this section shall rest with ... the superintendent ..." G.L.c. 123, § 21, thirteenth par. (emphasis added). The word "liability" means "[t]he quality or state of being legally obligated or accountable; legal responsibility to another or to society, enforceable by civil remedy or criminal punishment ..." Black's Law Dictionary 925 (7th ed.1999); see *Worcester v. College Hill Props., LLC,* 465 Mass. 134, 138–39 (2013) ("In interpreting the meaning of a statute, [courts] look first to the plain statutory language ... [and] enforce the statute according to its plain wording ..." (citations and internal quotation marks omitted)); *Seideman v. Newton,* 452 Mass. 472, 478 (2008) (deriving statutory "words' usual and accepted meanings from sources presumably known to the statute's enactors, such as their use in other legal contexts and dictionary definitions" (citations and internal quotation marks omitted)); cf. *R.W. Granger & Sons, Inc. v. J & S Insulation, Inc.,* 435 Mass. 66, 75 (2001) (holding that term "[l]iability for purposes of G.L.c. 176D, § 3(9)(f), encompasses both 'fault' and 'damages' ").

***13** Second, G.L.c. 123, § 22, also supports the inference that the Restraint Law creates a private cause of action. That section states:

> Physicians, qualified psychologists, qualified psychiatric nurse mental health clinical specialists, police officers and licensed independent clinical social workers *shall be immune from civil suits for damages for restraining* ... any person [in] a facility or the Bridgewater state hospital if the physician, qualified psychologist, qualified psychiatric nurse mental health clinical specialist, police officer or licensed independent clinical social workers acts pursuant to this chapter.

G.L.c. 123, § 22 (emphasis added); see, e.g., *Temple v. Marlborough Div. of Dist. Court Dep't,* 395 Mass. 117, 132 (1985) (holding that plaintiff's psychiatrist was "immune from suit for damages under G.L.c. 123, § 22, ... in advising that the plaintiff be temporarily committed"). As discussed above, the Restraint Law places certain obligations on certain identified individuals, i.e., the superintendent of the facility where the restraint is taking place, the director of the facility, or the designated physician. G.L.c. 123, § 21, third par., seventh par., ninth par., thirteenth par. It is reasonable to infer that, by immunizing physicians from civil suits for restraining patients at Bridgewater, the Legislature not only contemplated that patients would bring civil actions to challenge restraint decisions in violation of the Restraint Law, but also intended that the superintendent *could* be held liable for those violations. Compare *Salvas,* 452 Mass. at 373 (holding that G.L.c. 149, § 100, does not create private right of action where, in part, another section of that chapter "authorizes employees claiming to be aggrieved by violations of certain [enumerated] sections" to institute civil actions in their own names, but does not mention § 100).

I therefore conclude that the Legislature intended that G.L.c. 123, § 21, would create a private right of action.[22] The defendants' motion to dismiss Count II on this basis fails as well.

B. Declaratory Judgment for Violations of G.L.c. 123, § 21, and Declaration of Rights—Count III

In Count III, the plaintiffs seek a declaration against the defendants that, through the isolation, restraint, and overall confinement to which they subjected the plaintiffs, and through the failure to provide their employees with minimally adequate training, they violated G.L.c. 123, § 21, and they violated the plaintiffs' liberty protections under Articles 10 and 12 of the Declaration of Rights. Section 1 of G.L.c. 231A authorizes the Superior Court "on appropriate proceedings [to] make binding declarations of right, duty, status and other legal relations sought thereby, either before or after a breach or violation thereof has occurred in any case in which an actual controversy has arisen ..."[23] The declaratory judgment process "may be used ... to obtain a determination of the legality of the administrative practices and procedures of

any municipal, county or state agency or official which practices or procedures are alleged to be in violation of the Constitution of the United States or of the constitution or laws of the commonwealth ...” G.L.c. 231A, § 2.

***14** The defendants seek to dismiss this claim on a number of bases: that, through the Settlement Agreement, the plaintiffs waived their right to bring this claim; that the plaintiffs have not alleged that Murphy and Spencer threatened, intimidated, or coerced them in violation of the Massachusetts Civil Rights Act; and that the Commonwealth and DOC are entitled to sovereign immunity for violations of the Restraint Law and the Declaration of Rights.[24]

1. Settlement Agreement

The defendants assert that the plaintiffs waived their right to bring this declaratory action through the Settlement Agreement. The plaintiffs respond that the Settlement Agreement has excluded from its waiver provision the allegations that they make in Count III.

While the Settlement Agreement resolved all of the claims alleged in the Norfolk Action, the parties agreed that certain matters were not settled or waived. The declaratory judgment claim in Count III fits within two of the categories as to which plaintiffs may still sue. First, the plaintiffs may “file any claim for monetary damages” against the defendants. Although the plaintiffs do not expressly seek monetary damages in Count III, see Amended Complaint, at 69, the court is not foreclosed from awarding monetary damages on the plaintiffs’ declaratory judgment claims. See *Ritter v. Bergmann,* 72 Mass.App.Ct. 296, 301 (2008) (holding that “ ‘court which hears the bill for declaratory relief has jurisdiction to grant the further relief” including “award of damages” (citation omitted)).

Second, in paragraphs 40–41 of the Settlement Agreement, the parties placed outside the scope of the Settlement Agreement: whether restraining patients being transferred within Bridgewater violates the Restraint Law; whether secluding patients for patient “counts” violates the Restraint Law; and whether seclusion and restraint orders must be renewed only upon personal examination by a physician or psychiatrist after a patient has been in seclusion or restraint for more than six hours. The plaintiffs include allegations to this effect in Count III. See Amended Complaint, par. 237. Therefore, even if Count III were not a claim for potential monetary damages, the plaintiffs have not waived their right to make the allegations in Count III.

Thus, the Settlement Agreement does not preclude the plaintiffs from bringing Count III, and the defendants’ motion fails on this basis as well.

2. Threats, Intimidation, and Coercion

The defendants argue that the plaintiffs are prohibited from bringing an action directly under the Declaration of Rights and therefore must proceed under the Massachusetts Civil Rights Act, G.L .c. 12, §§ 11H, 11 *I,* which requires a plaintiff to prove “that (1) the exercise or enjoyment of some constitutional or statutory right; (2) has been interfered with, or attempted to be interfered with; and (3) such interference was by threats, intimidation, or coercion.” *Glovsky v. Roche Bros. Supermarkets, Inc.,* 469 Mass. 752, 762 (2014) (citations omitted). The defendants assert that the facts in the plaintiffs’ amended complaint do not plausibly suggest these elements.

***15** The defendants are correct that the plaintiffs “cannot base a claim directly upon ... the Massachusetts Declaration of Rights,” and that the proper procedure is to assert a claim under the Massachusetts Civil Rights Act See *Martino v. Hogan,* 37 Mass .App.Ct. 710, 711, 720 (1995). The plaintiffs, however, have not brought a claim directly under the Massachusetts Declaration of Rights but rather under the Declaratory Judgment Act. As the plaintiffs point out, G.L.c. 231A, § 2, expressly provides that the declaratory judgment procedure “may be used in the superior court to enjoin and to obtain a determination of the legality of the administrative practices and procedures of any ... state agency or official which practices or procedures are alleged to be in violation of the ... constitution or laws of the commonwealth ...” See, e.g., *Coulombre v. Board of Registrars of Voters of Worcester,* 3 Mass.App.Ct. 206, 207 (1975) (holding that “[i]t was proper for plaintiff to have sought relief under G.L.c. 231A” where plaintiff alleged that defendant’s “refusal to register him as voter” violated his rights under Declaration of Rights).

The defendants' motion to dismiss Count III therefore fails on this basis.

3. Sovereign Immunity

"The doctrine of sovereign immunity provides that the Commonwealth 'cannot be impleaded into its own courts except with its consent.' " *Walter E. Fernald Corp. v. Governor,* 471 Mass. 520, 523 (2015). "Such consent may be provided 'by statute'; it also may be 'implicit[ ], where governmental liability is necessary to effectuate the legislative purpose.' " *Id.* (alteration in original) (citations and internal quotation marks omitted). "The rules of construction governing statutory waivers of sovereign immunity are stringent" and courts "have found a waiver of sovereign immunity only where consent to suit is 'expressed by the terms of a statute, or appear[s] by necessary implication from them.' " *Boston Med. Ctr. Corp. v. Secretary of the Executive Office of Health & Human Servs.,* 463 Mass. 447, 454 (2012) (alteration in original) (citations omitted); *Woodbridge v. Worcester State Hosp.,* 384 Mass. 38, 42 (1981).

"[T]he Legislature did not intend to waive sovereign immunity for the universe of actions brought under the declaratory judgment act." *Walter E. Fernald Corp.,* 471 Mass. at 525. "That is to say, ... a plaintiff cannot sidestep the common-law shield of sovereign immunity, to the extent that that shield remains intact, by using the procedural device of an action for declaratory judgment ." *Id.* The court must therefore consider whether the Commonwealth has waived its sovereign immunity with respect to G.L.c. 123, § 21, and to the Declaration of Rights. See *id.;* see also *Revere Hous. Auth. v. Commonwealth,* 351 Mass. 180, 182 (1966) (holding that sovereign immunity "does not apply to a situation where the Commonwealth has specifically authorized itself to be sued or where the statute under which the bill was brought indicates that the Legislature must have contemplated that the Commonwealth could be made a party").

***16** With respect to both the Restraint Law and the Declaration of Rights, "[t]he Legislature has not expressly consented to a direct action against the Commonwealth ..." *Lopes v. Commonwealth,* 442 Mass. 170, 176 (2004). Therefore the question is whether such consent appears "by necessary implication" from the terms of the laws. *Boston Med. Ctr. Corp.,* 463 Mass. at 454; *Woodbridge,* 384 Mass. at 42.

a. G.L.c. 123, § 21

In arguing that the Legislature has not implicitly waived sovereign immunity as to suits under the Restraint Law, the defendants rely on *Woodbridge,* where the Supreme Judicial Court held in 1981 that the Commonwealth did not consent to suit under G.L .c. 123, § 23. 384 Mass. at 42–43. Although I ultimately reach the same conclusion as in that case, I do not adopt the Court's rationale in *Woodbridge* as support.

In *Woodbridge,* the Court considered an earlier version of G.L .c. 123, the "tenor" of which "as it relates to patients' rights [was] one of aspiration and encouragement, rather than of the creation of a formal system of actionable guaranties." *Id.* at 42. "In requiring that such standards be the highest practicable, ... the Legislature did not intend to subject the State to liability in damages for any failure to attain them." *Id.* at 42–43.

At the time that *Woodbridge* was decided, G.L.c. 123, § 21 (1970), provided:

> Any person who transports a mentally ill or mentally retarded person to or from a facility for any purpose authorized under this chapter shall not use any restraint which is unnecessary for the safety of the person being transported or other persons likely to come in contact with him.
>
> * * *
>
> In the case of inpatients or residents in facilities of the department, restraint may be used only in cases of emergency such as the occurrence of, or serious threat of, extreme violence[,] personal injury or attempted suicide; provided, however, that written authorization for such restraint is given in advance by the superintendent or by a physician designated by him for this purpose or if the superintendent or the designated physician is not available, nonchemical means of restraint may be used; provided, however, that said use is reported to the superintendent or to the designated

> physician within eight hours of said use. Any use of restraint shall be reviewed at least every eight hours by said superintendent or physician, who shall authorize in writing its continuation or cessation and shall make a written record of the reasons for any such use and of his review.

St.1970, c. 888, § 4. In its current iteration, the Restraint Law is far more comprehensive and, as concluded above, provides for a private right of action. The *Woodbridge* Court's reliance on the "aspiration[al] and encourag[ing]" tenor of G.L.c. 123 as a basis on which to conclude that the Legislature did not intend to subject the Commonwealth to liability, 384 Mass. at 42–43, is therefore not relevant to this court's analysis.

***17** As discussed above, the current version of the Restraint Law provides for a private right of action against certain specified individuals on whom the statute imposes certain obligations, i.e., the superintendent, the director, and the designated physician. See G.L.c. 123, § 21, thirteenth par. By identifying specific individuals whom an aggrieved party may hold liable, the Legislature has implied that the Commonwealth has not consented to a suit under the Restraint Law. See, e.g., *Lopez v. Commonwealth,* 463 Mass. 696, 701–02 (2012) (holding that Commonwealth consented to suit under G.L.c. 151B, §§ 4 and 5, where Commonwealth is expressly listed among parties who are subject to liability for unlawful practices under G.L.c. 151B).

Sovereign immunity therefore bars the plaintiffs from bringing a claim against the Commonwealth and the DOC, a state agency, for violations of the Restraint Law (but not against Spencer and Murphy in their individual capacities). The defendants' motion to dismiss this portion of Count III as against the Commonwealth and the DOC is therefore *ALLOWED.*

b. Declaration of Rights

The plaintiffs allege that they have a liberty interest under Article 10[25] of the Massachusetts Declaration of Rights that entitles them to safe confinement conditions, adequate medical care, freedom from unreasonable restraints, and treatment by staff adequately trained to protect those interests; and under Article 12[26] of the Massachusetts Declaration of Rights that entitles them the right to be free from imprisonment and from deprivation of privileges and immunities afforded to them by state law. Waiver does not appear by necessary implication from the language of either portion of the Declaration of Rights. Given the stringency of "[t]he rules of construction governing statutory waivers of sovereign immunity[,]" *Boston Med. Ctr. Corp.,* 463 Mass. at 454, I decline to conclude that the Commonwealth has consented to suit under Article 10 or Article 12. The defendants' motion to dismiss Count III as to the Commonwealth and the DOC on this basis is therefore *ALLOWED* as well.[27]

IV. Violations of Americans with Disabilities Act and Rehabilitation Act—Counts IV and V

The plaintiffs contrast the services and treatment they received at Bridgewater with the services and treatment that other Bridgewater patients received and that are provided at DMH facilities and allege that the disparities were illegal and discriminatory. In Count IV, they allege the defendants violated the ADA and the Rehabilitation Act,[28] by providing these unequal services; in Count V, they seek a declaration that the defendants violated those federal statutes.

To state a claim for violations of Title II of the ADA and of Section 504 of the Rehabilitation Act, the plaintiffs must demonstrate "(1) that [they are] ... qualified individual[s] with a disability; (2) that [they were] excluded from participating in, or denied the benefits of a public entity's services, programs, or activities or [were] otherwise discriminated against; and (3) that such exclusion, denial of benefits, or discrimination was by reason of [their] disability." *Kiman v. New Hampshire Dep't of Corr.,* 451 F.3d 274, 283 (1st Cir.2006), quoting *Parker v. Universidad de Puerto Rico,* 225 F.3d 1, 5 (1st Cir.2000); see *Lesley v. Chie,* 250 F.3d 47, 52–53 (1st Cir.2001) (setting forth elements under Rehabilitation Act).

***18** To state a claim for discrimination under the Rehabilitation Act, the plaintiffs must "show (1) that [they are] disabled; (2) that [they] sought services from a federally funded entity; (3) that [they were] 'otherwise qualified' to receive those services; and (4) that [they

were] denied those services 'solely by reason of [their] ... disability.' " *Lesley,* 250 F.3d at 53 (ellipses in original), quoting 29 U.S.C. § 794(a). "Plaintiffs' claim of discrimination [under the Rehabilitation Act] is analyzed under the same standards as those used to determine whether Title II has been violated, ... [and the plaintiffs] must additionally plead that [Bridgewater] received federal funding, which they have indeed done." *Rivera–Concepción v. Puerto Rico,* 786 F.Sup.2d 442, 460 (D.P.R.2010); see *Nunes v. Massachusetts Dep't of Corr.,* 766 F.3d 136, 144 (1st Cir.2014) (holding that court "need make no distinction between the two statutes" where "[b]oth statutes" prohibit discrimination against disabled individuals using "nearly identical language"). Moreover, "[b]ecause Title II of the ADA is modeled on § 504 of the Rehabilitation Act, '[courts] rely interchangeably on decisional law applying § 504.' " *Kiman,* 451 F.3d at 285 n. 10, quoting *Parker,* 225 F.3d at 4.

Accepting, for the purposes of this motion, that the plaintiffs can satisfy the first element (that the plaintiffs are disabled), the defendants argue that the plaintiffs cannot state a claim for violations of these statutes because they have not alleged facts plausibly suggesting the second and third elements.[29] Specifically, they argue that the plaintiffs compare the adequacy of mental health services at Bridgewater only to that of other DMH facilities, not to that received by non-disabled individuals. The defendants also point out that the plaintiffs have not alleged that the treatment they received at Bridgewater was motivated by discrimination. The plaintiffs respond that they have pleaded facts plausibly suggesting that they have satisfied the second and third elements because they are not challenging the adequacy of mental health care at Bridgewater, but rather the mismanagement of Bridgewater that enabled the systemic abuse of seclusion and restraint, and because, pursuant to *Olmstead v. L.C.,* 527 U.S. 581 (1999), they do not have to allege disparate treatment.

A. Negligent Medical Care v. Discriminatory Medical Care

The ADA does not provide a remedy for medical malpractice, and "courts have differentiated ADA claims based on negligent medical care from those based on discriminatory medical care." *Kiman,* 451 F.3d at 284, and cases cited. Therefore, to fall within the ADA, "a plaintiff's showing of medical unreasonableness ... must be framed within some larger theory of disability discrimination." *Id.,* quoting *Lesley,* 250 F.3d at 55. "For example, a plaintiff may argue that her physician's decision was so unreasonable ... as to imply that it was pretext for some discriminatory motive, such as animus, fear, or apathetic attitudes. Or ... a plaintiff may argue that her physician's decision was discriminatory on its face, because it rested on stereotypes of the disabled rather than an individualized inquiry into the patient's condition." *Id.* at 284–85, quoting *Lesley,* 250 F.3d at 55.

***19** Here, the plaintiffs allege that the defendants subjected them to seclusion and restraint for punitive and disciplinary purposes rather than under emergency circumstances; the renewals of their seclusion and restraints would occur even when the plaintiffs were calm, compliant, or sleeping; and as a matter of general practice, the defendants would seclude and/or restrain the plaintiffs without first trying to de-escalate situations or trying to treat the plaintiffs to avoid having to seclude and restrain them. These facts plausibly suggest that the defendants secluded and restrained the plaintiffs because of their disabilities, rather than based on "an individualized inquiry into [each plaintiff's] condition ..." See *id.* at 585, quoting *Lesley,* 250 F.3d at 55; see also *Olmstead,* 527 U.S. at 597 (holding that "[u]njustified isolation ... is properly regarded as discrimination based on disability").

As the plaintiffs have framed their allegations against the defendants "within [a] larger theory of disability discrimination[,]" the plaintiffs' challenge is not to the adequacy of mental health services at Bridgewater. See *Kiman,* 451 F.3d at 284. These facts plausibly suggest that the defendants provided the plaintiffs with discriminatory services at Bridgewater in violation of the ADA and the Rehabilitation Act, and, consequently, the defendants' motion to dismiss Counts IV and V fails on this basis.

B. Non–Disabled Comparators

The defendants also seek to dismiss these counts because

the plaintiffs have failed to compare their situation to that of non-disabled individuals. They rely on *Atkins v. Orange,* 251 F.Sup.2d 1225 (S.D.N.Y.2003), arguing that the court in that case dismissed the plaintiffs' ADA and Rehabilitation Act claims on similar grounds. The plaintiffs contend that their claim for reasonable accommodations under the ADA does not require a comparison with non-disabled individuals, and that they have satisfied their burden by contrasting the treatment the plaintiffs received at Bridgewater with the services and treatment that other Bridgewater patients received and that are available at DMH facilities. They point to *Olmstead* as support for their position.

1. *Atkins v. Orange,* 251 F.Sup.2d 1225 (S.D.N.Y.2003)

In *Atkins,* the court addressed, in pertinent part, the defendant's motion to dismiss the plaintiffs' claims that the defendants violated the ADA and Rehabilitation Act by discriminating against them based on their mentally disabled status. 251 F.Sup.2d at 1227–28. The plaintiffs alleged several instances of mistreatment; most relevant to this case, they "allege[d] that defendants discriminated against them by 'punishing them for their symptoms of mental illness by placing them in keeplock isolation thereby exacerbating their mental illness' ..." *Id.* at 1231; see *id.* at 1228–29 (detailing mistreatment plaintiffs allegedly suffered). The jail's procedure was to place prisoners in isolation "whenever an inmate presents risk of danger to self or others." *Id.* at 1232.

***20** The court held that the plaintiffs did not state a claim for discrimination under the ADA and Rehabilitation Act because they failed to allege, in pertinent part, "that violent and self-destructive inmates who are disabled due to mental illness are treated any differently than violent, self-destructive inmates who are not disabled due to mental illness ... [and] that the mentally disabled are the only prisoners subjected to this procedure while the non-mentally disabled prisoners are excluded therefrom." *Id.* (footnote omitted). "With no allegation of disparate treatment, no claim for discrimination under the ADA or Rehabilitation Act lies." *Id.*

The facts in *Atkins* arc distinguishable from those in this case. There, the isolation at issue occurred at a facility that housed both mentally disabled and non-mentally disabled individuals, and the facility's procedure made both groups eligible for isolation for the same reasons. Conversely, in this case, the plaintiffs seek to compare facilities that house only mentally disabled individuals. *Atkins* therefore does not serve as persuasive support for the defendants' position.

2. *Olmstead v. L.C.,* 527 U.S. 581 (1999)

The question before the Supreme Court in *Olmstead* was "whether the [ADA's] proscription of discrimination may require placement of persons with mental disabilities in community settings rather than in institutions." 527 U.S. at 587. The plaintiffs brought their action against the defendants arguing, in pertinent part, that their continued "institutionalization" in the psychiatric unit of a state hospital despite the determination that they were qualified for the less restrictive "community-based treatment" violated the ADA. *Id.* at 593–94. In essence, then, the issue was whether institutionalizing, i.e., isolating, an individual in more restrictive settings than necessary is discriminatory. See *id.* In concluding that it is discriminatory, the Court discussed comparators in two contexts.

First, the Court noted that Congress "explicitly identified unjustified 'segregation' of persons with disabilities as a 'for[m] of discrimination.' " *Id.* at 600 (alteration in original), quoting 42 U.S.C. §§ 12101(a)(2), 12101(a)(5). The Court rejected the defendants' argument that the plaintiffs were not subjected to discrimination because the plaintiffs "had identified no comparison class, i.e., no similarly situated individuals given preferential treatment[,]" reasoning that "Congress had a more comprehensive view of the concept of discrimination advanced in the ADA." *Id.* at 598. "First, institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life." *Id.* at 600 (emphasis added). "Second, confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment." *Id.* at 601. "Dissimilar treatment

correspondingly exists in this key respect: In order to receive needed medical services, persons with mental disabilities must, because of those disabilities, relinquish participation in community life they could enjoy given reasonable accommodations, while persons without mental disabilities can receive the medical services they need without similar sacrifice." *Id.*

***21** Here, however, the plaintiffs do not challenge the fact of their institutionalization in a facility for mentally disabled individuals. Rather, they argue that the treatment they received at Bridgewater was harsher than the treatment that other patients at Bridgewater and at DMH facilities received. Additionally, as noted above, the plaintiffs seek to compare facilities that house only mentally disabled individuals. The *Olmstead* Court's generalized view of the dissimilar treatment between mentally disabled and non-mentally disabled individuals is accordingly not relevant to this analysis. See *id.*

Second, the Court in *Olmstead* held that a state's responsibility to provide community-based treatment to qualified persons with disabilities is not boundless. 527 U.S. at 603. A state may "resist modifications [i.e., accommodations] that 'would fundamentally alter the nature of the service, program, or activity.' " *Id.* at 597, quoting 28 C.F.R. § 35.130(b)(7). "Sensibly construed, the fundamental-alteration component of the reasonable-modifications regulation would allow the State to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the state has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities." *Id.* at 604. Therefore, "[i]n evaluating a State's fundamental-alteration defense, the [court] must consider, in view of the resources available to the State, not only the cost of providing community-based care to the litigants, but also the range of services the State provides others with mental disabilities, and the state's obligation to mete out those services equitably." *Id* . at 597. "If, for example, the state were to demonstrate that it had a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated, the reasonable-modifications standard would be met." *Id.* at 605–06.

This comparison of services offered to individuals with mental disabilities is only relevant where a plaintiff claims that he has been denied reasonable accommodations, and the state defends against the plaintiff's request by contending that the accommodations would fundamentally alter the nature of the service, program, or activity. 28 C.F.R. § 35.130(b)(7) ("A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity"). "The reasonable accommodation concept embodied in the federal disability statutes is meant to address the unique hurdles that people with disabilities face, and it recognizes that mere equality of treatment is not enough." *Henrietta D. v. Giuliani,* 119 F.Sup.2d 181, 212–13 (E.D.N.Y.2000); see *Ruskai v.. Pistole,* 775 F.3d 61, 79 (1st Cir.2014) ("(B)ecause 'the handicapped typically are not similarly situated to the nonhandicapped,' straightforward application of disparate impact theory 'could lead to a wholly unwieldy administrative and adjudicative burden' " (quoting *Alexander v. Choate,* 469 U.S. 287, 298 (1989))). The question becomes, then, whether the plaintiffs have stated a claim that they were denied reasonable accommodations.

***22** Under the ADA and the Rehabilitation Act, "deliberately requiring a plaintiff to endure unnecessary hardship in order to access a program or service, when that hardship could easily be eliminated by a reasonable accommodation, can amount to a form of 'discrimination' against that plaintiff." *Shedlock v. Department of Corr.,* 442 Mass. 844, 855 (2004). In their ADA and Rehabilitation Act claims against the defendants, the plaintiffs allege that the staff at DMH facilities receive ongoing training in methods to avoid using seclusion and restraint whereas the Bridgewater correctional officers who often make the seclusion and restraint decisions do not, and that DMH facilities provide personalized treatment plans, exercise programs and other activities, and regular therapy sessions with licensed mental health professionals; by denying the plaintiffs these services and treatment programs, the defendants have failed to make reasonable accommodations for the plaintiffs in violation of the ADA and Rehabilitation Act.

Generally, "[i]n cases where the alleged violation involves the denial of a reasonable modification/accommodation, 'the ADA's reasonable accommodation requirement usually does not apply

unless 'triggered by a request.' " *Kiman,* 451 F.3d at 283 (footnote omitted), quoting *Reed v. LePage Bakeries, Inc.,* 244 F.3d 254, 261 (1st Cir.2001). Sometimes, however, "the [person]'s need for an accommodation will be obvious; and in such cases, different rules may apply." *Id.* (alteration in original), quoting *Reed,* 244 F.3d at 261 n. 7. This situation may arise, for example, where a patient's "mental illness hampered [his] ability to request an accommodation" because his "disability was ... continual, and [he] [did not] function[ ] normally most of the time." See *Reed,* 244 F.3d at 261 n. 7; *Leach v. Commissioner of Mass. Rehab. Comm'n,* 63 Mass.App.Ct. 563, 567 (2005). The allegations in the amended complaint plausibly suggest that, as a result of the plaintiffs' conditions while at Bridgewater, their mental disabilities hampered their ability to request accommodations. See *id.*

The plaintiffs have therefore stated a claim "based upon defendants' failure to provide them reasonable accommodations," i.e ., access to mental health treatment and services from which they could benefit. See *Henrietta D.,* 119 F.Sup.2d at 213. "A comparison with the manner in which benefits are administered to the non-disabled is thus not required, for the question of equality of administration is irrelevant to a claim for reasonable accommodations." *Id.* The defendants' motion to dismiss Counts IV and V on this basis accordingly fails as well.

ORDER

For the foregoing reasons, the defendants' motion to dismiss is *ALLOWED IN PART* and *DENIED IN PART.* The motion is *ALLOWED* as to Count III only insofar as that count is brought against the Commonwealth and the Department of Correction, and as to Count IV and Count V only insofar as those counts are brought against Spencer and Murphy. The motion is otherwise *DENIED.*

All Citations

Not Reported in N.E.3d, 2016 WL 3479000

Footnotes

1 In her capacity as Guardian of Peter Minich.

2 Felipe Zomosa; Jeff and Judy Doe, in their capacities as Guardians of Jeffrey Doe.

3 Robert Murphy; Massachusetts Department of Correction; Commonwealth of Massachusetts.

4 The plaintiffs have settled with the remaining defendants.

5 More specifically, the plaintiffs were Joanne Minich in her capacity as Guardian of Peter Minich; Vilma and Daniela Zomosa as next friends of Felipe Zomosa; Jeff and Judy Doe, in their capacities as Guardians of John Doe, and all others similarly situated.

6 *Minich v. Spencer,* Civil No. NOCV2014–00448 (Norfolk Superior Court).

7 The plaintiffs attached a report from the Disability Law Center to their amended complaint. "In evaluating a rule 12(b)(6) motion, [the court may] take into consideration 'the allegations in the complaint, ... and exhibits attached to the complaint ..." *Schaer v. Brandeis Univ.,* 432 Mass. 474, 477 (2000). Additionally, the defendants refer to the plaintiffs' amended complaint and settlement agreement in the Norfolk Action. Considering "matters of public record" is also permissible on a Rule 12(b)(6) motion. *Id.*

8 For the sixty-day period between November 9, 2013, and January 9, 2014, Minich was secluded in a room in the ITU for twenty-four hours a day, for all but 8.5 hours, despite the fact that, at times, Minich was calm, compliant, and sleeping. Amended

Complaint, par. 81.

9 Restraint consisted of mechanical restraints binding his arms, his legs, and, at times, his head to a bed or other stationary object; he was restrained once for forty-one hours, and once for thirty-four hours. Amended Complaint, par. 69.

10 For example, between July 10, 2013, and August 2, 2013, Zomosa spent less than twenty-four hours out of seclusion, Amended Complaint, par. 112; he was placed in seclusion and/or restraints six times in August 2013 despite the lack of immediate emergency, Amended Complaint, par. 120; he spent seventeen days in seclusion in September 2013, again despite the lack of immediate emergency, Amended Complaint, par. 121; and he spent sixteen days in seclusion between March 2014 and April 2014. Amended Complaint, par. 124.

11 The plaintiffs make this allegation based on records from Bridgewater, even while suggesting that the number is inaccurately low. Amended Complaint, par. 106; see Amended Complaint, pars. 108–09.

12 Given the illegibility of the notes and forms from Bridgewater, the exact number of hours Doe spent in seclusion and restraint is unclear. Amended Complaint, pars. 144–45.

13 Correctional officers receive the same training as correctional officers who work in correctional facilities; they receive little training in mental health issues or techniques to de-escalate situations to avoid seclusion and restraint. Amended Complaint, par. 187. Conversely, staff in DMH facilities receive ongoing training in mental health issues, including methods to avoid using seclusion and restraint. Amended Complaint, par. 188.

14 The plaintiffs offer the following statistics: "In 2013, Bridgewater patients (numbering between 300 and 350) were secluded for more than 148,000 total hours, more than 400 hours per patient. The comparable hours for approximately 625 patients at five [DMH] ... facilities were 2,600, or just over 4 hours per patient." *Id.*

15 The governor of Massachusetts terminated Spencer in 2014 for misconduct related to an abuse investigation at Bridgewater, Amended Complaint, par. 40; Murphy resigned as Bridgewater superintendent. Amended Complaint, par 8. Spencer and Murphy held their offices at all times relevant to this case.

16 Murphy and Spencer also argue that the plaintiffs base this claim on the alleged violation of G.L.c. 123, § 21, and, as the violation of a state statute does not constitute a violation of 42 U . S.C. § 1983, the court must dismiss Count I. See *Sanchez v. Pereira–Castillo,* 590 F.3d 31, 40 (1st Cir.2009) ("Section 1983 'creates a remedy for violations of federal rights committed by persons acting under color of state law.' " (citation omitted)); *Soto v. Flores,* 103 F.3d 1056, 1061 (1st Cir.1997) ("A claim under section 1983 has two essential elements. First, the challenged conduct must be attributable to a person acting under color of state law ...; second, the conduct must have worked a denial of rights secured by the Constitution or by federal law"); see also *Hopper v. Callahan,* 408 Mass. 621, 626 n. 3 (1990) (holding that Massachusetts courts "have not decided that the seclusion of a person in the absence of an emergency, and thus in violation of [G.L.c. 123,] § 21, is either automatically a violation of § 1983 rights or a ground for personal liability under § 1983"). The plaintiffs, however, have alleged that the abuse of seclusion and restraint at Bridgewater violated their federal constitutional rights as articulated in *Youngberg v. Romeo,* 457 U.S. 307, 314–19 (1982), discussed below. This argument therefore fails.

17 The issue of whether the appropriate Bridgewater employees made the seclusion and restraint orders and renewals arises in the context of the plaintiffs' claims under G.L.c. 123, § 21.

18 The Disability Law Center issued the results of its investigation into Bridgewater's seclusion and restraint practices in July 2014; the Massachusetts Disabled Persons Protection Commission issued the results of its investigation into Bridgewater's seclusion and restraint practices in December 2014. Although the organizations issued their reports after the plaintiffs had left Bridgewater, Murphy and Spencer were likely aware that the investigations had been taking place. See Exhibit A to Amended Complaint (writing in July 2014 that Disability Law Center had "notified ... Commissioner Luis S. Spencer that [the organization] intended to initiate an investigation of conditions and practices at [Bridgewater], based on [its] concern that individuals with

mental illness were subject to abuse and neglect at that facility, including a deep concern about the excessive restraint and seclusion" and thanking Murphy specifically for making "daily efforts to provide care and treatment to the patients at" Bridgewater).

19 In their opposition to the defendants' motion to dismiss, the plaintiffs observe that Spencer, as commissioner, entered into a contract with the Massachusetts Partnership for Correctional Healthcare ("MPCH") which obligated MPCH to comply with statutory and constitutional mandates concerning patient treatment, the contract imposed on Spencer the corresponding obligation to ensure that MPCH's clinicians complied with those mandates. Additionally, at oral argument on this motion, the plaintiffs stated that Murphy held a daily meeting about seclusion and restraint at Bridgewater. The plaintiffs, however, do not make these allegations in their amended complaint, and therefore I do not consider them.

20 "A causal link may also be forged if there exists a known history of widespread abuse sufficient to alert a supervisor to ongoing violations." *Maldonado–Denis,* 23 F.3d at 582. Accord *Ramirez–Lluveras,* 759 F.3d at 19. "[P]roof of that sort must truly show 'widespread' abuse; 'isolated instances of unconstitutional activity ordinarily are insufficient ...' " *Ramirez–Lluveras,* 759 F.3d at 19, quoting *Maldonado–Denis,* 23 F.3d at 582. The 2009 formal reprimand that Murphy and Spencer received arose from the restraint-related death of a Bridgewater patient; since 2009, there were at least three additional restraint-related deaths, plausibly suggesting the existence of widespread abuse. See *id.*

21 The individuals the Restraint Law designates as able to authorize such restraints are the superintendent of the facility, the director of the facility, or a specified physician.

22 Moreover, *O'Sullivan v. Secretary of Human Servs.,* 402 Mass. 190 (1988), concerned "an action for declaratory and injunctive relief brought by two patients at Bridgewater ... against various state officials, alleging violations of G.L.c. 123, § 21 ..." *Id.* at 191. "The Legislature must be assumed to know the preexisting law and the decisions of [the Supreme Judicial] [C]ourt." *Worcester,* 465 Mass. at 139 (citation omitted). Therefore, if the Legislature had not intended to create a private right of action with the Restraint Law, it could have amended the statute expressly after *O'Sullivan* to prohibit such claims.

23 Although the plaintiffs are no longer housed at Bridgewater, the defendants have not argued that the plaintiffs' claim is moot. And it is certainly true that given the plaintiffs' mental condition, they could be sent back to Bridgewater. Therefore they "have established an 'actual controversy' because the initial dispute between the parties, while moot, is 'capable of repetition, yet evading review[.]' " *Libertarian Ass'n of Mass. v. Secretary of the Commonwealth,* 462 Mass. 538, 541 (2012); see, e.g., *O'Sullivan v. Secretary of Human Servs.,* 402 Mass. 190, 192 (1988) (holding that, although issue of "plaintiffs' treatment at Bridgewater is moot" because they had "been transferred to facilities outside the jurisdiction of the Department of Correction[,] ... the issue raised is likely to arise again and appears 'capable of repetition, yet evading review' ").

24 The defendants also argued that, as Murphy and Spencer are no longer superintendent and commissioner, respectively, the plaintiffs cannot seek prospective declaratory relief. At oral argument, the defendants effectively abandoned this argument. That was wise, because the argument would have failed; as the plaintiffs point out, this claim against Murphy and Spencer in their official capacities is a claim against their offices, and, through Mass.R.Civ.P. 25(d), their successors "[are] automatically substituted as part[ies] ... An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution." Mass.R.Civ.P. 25(d)(1).

25 Article 10 of the Massachusetts Declaration of Rights provides:
Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of this protection; to give his personal service, or an equivalent, when necessary; but no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. In fine, the people of this commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent. And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefore.

26 Article 12 of the Massachusetts Declaration of Rights provides:
No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally,

described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defense by himself, or his council at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

27 The parties have not provided and research has not disclosed any case law discussing the question of whether the Commonwealth can be held liable for violations of the Declaration of Rights. Compare *Villanueva v. United States,* 662 F.3d 124, 127 (1st Cir.2011) (holding that "sovereign immunity ... shields the United States from suit" based on constitutional tort claims because "the United States simply has not rendered itself liable under [28 U.S.C.] § 1346(b) for constitutional tort claims" (quoting *Federal Deposit Ins. Corp. v. Meyer,* 510 U.S. 471, 478 (1994))). In *LaChance v. Commissioner of Corr.,* 463 Mass. 767 (2012), which the plaintiffs referenced at oral argument, the Supreme Judicial Court affirmed the lower court's declaration that "the defendants had violated [the plaintiff's] right to due process under the State and Federal Constitutions." *Id.* at 768. The Commonwealth, however, was not a defendant in that action; rather, the defendants were individuals sued in their official and individual capacities. *Id.* at 767 & n. 1.

28 As Bridgewater receives federal financial assistance, Section 504 of the Rehabilitation Act applies to the defendants. Amended Complaint, par. 213.

29 The defendants also argue that the plaintiffs cannot state a claim for violations of these statutes against Murphy and Spencer in their individual capacities. The plaintiffs concede this point. Therefore, Counts IV and V are *DISMISSED* against Murphy and Spencer in their individual capacities.