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United States District Court, S.D. Florida,
Fort Lauderdale Division.

C.V., BY AND THROUGH his next friends, Michael and Johnette WAHLQUIST, et al., Plaintiffs,
v.
Justin M. SENIOR, in his official capacity as Interim Secretary of the Agency for Health Care Administration, et al., Defendants.

Case No. 12-60460-CIV-ZLOCH
|
Signed 02/15/2017

Attorneys and Law Firms

Edward J. Grunewald, The North Florida Center for Equal Justice, Inc., Paolo G. Annino, FSU College of Law Public Interest Law Center, Tallahassee, FL, Matthew Wilson Dietz, Miami, FL, for Plaintiffs C.V., M.D., C.M.

Molly Jean Paris, Disability Rights Florida, Fort Lauderdale, FL, David Allen Boyer, Disability Rights Rhode Island, Providence, RI, for Plaintiff Disability Rights Florida.

Allison Goodson Mawhinney, Ashley Hoffman Lukis, GrayRobinson, P.A., Tallahassee, FL, Andrew T. Sheeran, Leslei Gayle Street, Stuart Fraser Williams, Agency for Health Care Administration Office of the General Counsel, Tallahassee, FL, for Defendant Fl Elizabeth Dudek.

Jennifer Ann Tschetter, Florida Department of Health, Tallahassee, FL, Allison Goodson Mawhinney, Ashley Hoffman Lukis, GrayRobinson, P.A., Tallahassee, FL, Andrew T. Sheeran, Agency for Health Care Administration Office of the General Counsel, Tallahassee, FL, Caryl Kilinski, Department of Health Office of the General Counsel, Tallahassee, FL, for Defendant Harry Frank Farmer, Jr., M.D.

Jennifer Ann Tschetter, Florida Department of Health, Tallahassee, FL, Andrew T. Sheeran, Agency for Health Care Administration Office of the General Counsel, Tallahassee, FL, Caryl Kilinski, Department of Health Office of the General Counsel, Tallahassee, FL, for Defendant Kristina Wiggins.

Allison Goodson Mawhinney, Ashley Hoffman Lukis, GrayRobinson, P.A., Tallahassee, FL, Jay Patrick Reynolds, Florida Department of Corrections Office of the General Counsel, Tallahassee, FL, for Defendant State Surgeon Genera John Armstrong, MD.

Allison Goodson Mawhinney, Ashley Hoffman Lukis, GrayRobinson, P.A., Tallahassee, FL, Andre Velosy Bardos, Gray Robinson, P.A., Tallahassee, FL, William Eugene Gandy, Jr., Florida Department of Health Office of the General Counsel, Tallahassee, FL, for Defendant Dr. Deputy Secretary Celeste Philip.

Andre Velosy Bardos, Gray Robinson, P.A., Tallahassee, FL, for Defendants Agency for Health Care Administration Interim Secretary Justin M., Senior, Cassandra G. Pasley Director of Children's Medical Services.

Christopher N. Johnson, GrayRobinson, P.A., Miami, FL, Andre Velosy Bardos, Ashley Hoffman Lukis, James Timothy Moore, Jr., GrayRobinson, P.A., Tallahassee, FL, Leslei Gayle Street, Andrew T. Sheeran, Stuart Fraser Williams, Agency for Health Care Administration Office of the General Counsel, Tallahassee, FL, John A. Boudet, GrayRobinson, P.A., Orlando, FL, for Defendant The State of Florida.

Chantel Doakes Shelton, Veronica Vanessa Harrell-James, DOJ-USAO, Miami, FL, Lindsey Weinstock, Elizabeth Erin McDonald, Victoria Thomas, Jillian Lenson, Amanda Pearlstein, Lauren Latterell Powell, U.S. Department of Justice, Civil Rights Division, Washington, DC, for Amicus United States of America United States Attorney's Office.

REPORT AND RECOMMENDATION

PATRICK M. HUNT, UNITED STATES MAGISTRATE JUDGE

***1** This matter is before this Court on (1) Defendants' Motion to Dismiss Count 5 as Moot, and (2) Defendants' Motion to Dismiss T.H.'s Claims as Moot. ECF No. 573, 607. The Honorable William J. Zloch previously referred the motions to the undersigned United States Magistrate Judge for a report and recommendation. ECF No. 275; *see also* 28 U.S.C. § 636(b); S.D. Fla. Mag. R. 1. Having

carefully reviewed the motions, the responses, the replies, the entire case file, and applicable law, and being otherwise fully advised in the premises, the undersigned hereby RECOMMENDS that each motion be GRANTED.

I. Motion to Dismiss T.H.'s Claims as Moot

T.H. will turn twenty-one years old on February 25, 2017, shortly before the currently scheduled Pretrial Conference in this case. The State Defendants have prospectively filed a motion to dismiss her claims as moot. ECF No. 607. They argue that the policies that the individual Plaintiffs challenge will no longer apply to T.H. once she turns twenty-one and, thus, her claims must be dismissed. *Id.*

The State Defendants recently made the same argument as to A.G., and the District Court agreed. ECF No. 540, 596. The District Court expressly found that this case concerns *only* children under the age of twenty-one. *See* ECF No. 596 at 14. In particular, the District Court stated, "the Complaint (DE 62) does not state a claim with respect to the State's iBudget Waiver program, or any other Medicaid policy applicable to adults."[1] *Id.* Therefore, the District Court concluded that it cannot, at least in this case, fashion meaningful relief to adults. *Id.*

"All the world's a stage, And all the men and women merely players." William Shakespeare, *As You Like It*, act 2, sc. 7. But different players have different roles. The District Court is the ultimate director in this case. In regard to this issue, Defendants' role is to seek extension of the District Court's conclusion, and they have done so swiftly and concisely. ECF No. 607. T.H.'s role is to challenge the validity of the District Court's conclusion, and he has done so respectfully and admirably. ECF No. 613.

The undersigned is not in a position to alter the District Court's conclusion, however. The proper stage for the rendition of T.H.'s arguments is before an audience of three Circuit Court Judges, and now is not the time for that act.[2] *See* ECF No. 580. Therefore, based on the District Court's prior conclusion on this nearly identical issue, the undersigned would be amiss not to recommend that T.H.'s claims be dismissed as moot.

II. Motion to Dismiss Count 5 as Moot

***2** When Plaintiffs brought this case, they categorized Plaintiffs into two groups—those who were institutionalized and those who were "at risk" of institutionalization. ECF No. 62 at 3. In a separate motion to dismiss, the State Defendants argue that a significant portion of Plaintiffs' Complaint concerning the State's alleged failure to properly administer its Pre-Admission Screening and Resident Review ("PASRR") program only applies to the institutionalized Plaintiffs. ECF No. 573. Considering no Plaintiffs are currently institutionalized, the State Defendants now seek to dismiss those allegations as moot. The State Defendants argue that dismissal of those allegations "will substantially narrow the issues for trial." *Id.* at 5.

To fully understand the State Defendants' argument, it is necessary to briefly explain the PASRR program. To do so, the undersigned adopts the parties' explanation in their joint Pretrial Stipulation:

> Congress created the PASRR requirement in 1987, when it amended the Medicaid Act to require each State that participates in the Medicaid program to establish a PASRR program. 42 U.S.C. § 1396r(e)(7)(A). Under the PASRR program, individuals who have serious mental illness or intellectual disability or related conditions must not be admitted to nursing facilities unless, at minimum, the State has determined prior to admission that, because of the physical and mental condition of the individual, the individual requires the level of services provided by a nursing facility, and, if the individual requires such level of services, whether the individual requires specialized services. *Id.* § 1396r(b)(3)(F), (e)(7)(A); 42 C.F.R. §§ 483.112(a), 483.116, 483.118. Evaluating whether an individual requires the level of services that nursing facilities provide necessarily includes, *inter alia*, assessing whether "[t]he individual's total needs are such that his or her needs can be met in an appropriate community setting." *Id.* § 483.132(a)(1).
>
> The PASRR process provides two levels of review that are required to take place before admission to a nursing facility. First, an applicant for admission to a nursing facility must be provided a "Level I" PASRR screening to determine whether the applicant is suspected of having serious mental illness or intellectual disability, or a related condition. 42 C.F.R. § 483.128(a). Second, if the applicant is suspected of having serious mental illness or intellectual disability, or a related condition, then the applicant must be given a "Level II" PASRR evaluation to determine whether the applicant requires the level of services that nursing facilities provide (which includes a determination of whether "[t]he

individual's total needs are such that [they] can be met in an appropriate community setting"), and, if so, whether the applicant requires specialized services. 42 C.F.R. §§ 483.120, 483.112(b), 483.128(a), 483.134(b), 483.132(d).

ECF No. 509 at 30–31.

In their response, Plaintiffs argue that the instant motion violates Local Rule 7.1(e) because Defendants previously raised a similar argument that was rejected, but failed to bring this fact to the Court's attention in the current motion. ECF No. 587 at 1–3. The undersigned finds that Local Rule 7.1(e) does not apply, however. By its plain terms, the rule merely requires a party seeking the *same* relief that was previously addressed by a *different* Judge to bring that fact to the subsequent Judge's attention. The intent of the rule is obvious: a litigant should not be permitted to "judge shop" for favorable rulings on issues that have already been decided. A failure to comply with the rule may result in the subsequent ruling being set aside.

Here, the Court is fully aware of its prior ruling because, as Plaintiffs explained, it was made by the undersigned and adopted by the District Court.[3] Furthermore, in that ruling, the Court did *not* address the specific mootness issue that Defendants raise in the instant motion. According to Plaintiffs, Defendants' prior motion, ECF No. 237, sought dismissal of only Counts 1 and 2 *in toto* based on the fact that no Plaintiff was currently institutionalized, i.e., all remaining Plaintiffs fall into the "at risk" category, and individuals "at risk" of institutionalization lack standing to raise an *Olmstead* claim.[4] *See* ECF No. 246 at 7. As applied to the only formerly institutionalized Plaintiffs with live claims at the time—T.H. and A.G.—the Court interpreted Defendants' argument to be an assertion of mootness, which it rejected.[5] ECF No. 287 at 13. Defendants' current motion, in contrast, seeks dismissal of Plaintiffs' allegations related to the PASRR program because those allegations apply only to institutionalized Plaintiffs, and no Plaintiffs are currently institutionalized. ECF No. 573. While some of those allegations are located in Counts 1 and 2, the crux of the allegations is located in Count 5.

***3** More importantly, as the undersigned has previously explained, mootness—like standing—is a jurisdictional issue. ECF No. 504 at 6. Therefore, even if Defendants had violated that Local Rule, which they did not, the relief Plaintiffs seek—for the Court to disregard Defendants' motion—would be improper. To the extent this Court lacks jurisdiction, it may not ignore this fact. *See Univ. of S. Alabama v. Am. Tobacco Co.*, 168 F.3d 405, 410 (11th Cir. 1999) ("Simply put, once a federal court determines that it is without subject matter jurisdiction, the court is powerless to continue."). Accordingly, the undersigned will consider Defendants' arguments with respect to Plaintiffs' allegations below.[6]

A. Count 5

Count 5 is the primary subject of the instant motion because Count 5 raises a § 1983 claim based upon Defendants' alleged violations of the Nursing Home Reform Amendments to the Medicaid Act, which requires the implementation of a PASRR program for States that participate in the Medicaid program. 42 U.S.C. § 1396r(e)(7). In sum, Count 5 alleges that the State's administration of its PASRR program is inadequate. ECF No. 62 at 44–45. According to Plaintiffs, "[a]s a result of the Defendants' ongoing violations [of the PASRR program], the institutionalized Plaintiffs and members of the sub-class of institutionalized Plaintiffs continue to be harmed." ECF No. 62 at 45. In their Prayer for Relief, Plaintiffs ask this Court to "[e]nter a permanent injunction requiring the Defendants to perform adequate Level I and Level II PASRR reviews *to institutionalized children* and to provide such services as determined by the Level II screening." *Id.* at 46 (emphasis added).

When Defendants sought to dismiss A.G.'s claims as moot, the undersigned addressed his claims one by one. When the undersigned reached Count 5, the undersigned stated that "Count 5 was brought only on behalf of the institutionalized Plaintiffs." ECF No. 557 at 9. This statement was made based on a plain reading of the claim and on Plaintiff's own interpretation. *See id.* Considering A.G. was no longer institutionalized, the undersigned recommended that Count 5 be dismissed as to A.G. Plaintiffs did not object to that finding, and the District Court agreed. ECF No. 596 at 12 n.3.

In their current motion, the State Defendants note that "[a]ll Plaintiffs are in the exact same position as A.G.—not residing in nursing facilities." ECF No. 573 at 5. Hence, the State Defendants now seek to dismiss Count 5 *in toto*. *Id.*

In response, Plaintiffs state that their failure to object "was solely based on A.G.'s individual factual circumstances in preparation for trial of this matter." ECF No. 587 at 3. Although not entirely clear, Plaintiffs appear to argue that for each remaining Plaintiff—T.H., M.D., C.M., and C.V.—Defendants must present individualized facts to show that they are no longer "at risk" of unnecessary institutionalization, which, they say, is not

permissible on a motion to dismiss. *See id.* at 4. Plaintiffs state, "Instead of presenting factual situations, these Defendants are seeking a finding by this court that children who are 'at risk' of institutionalization no longer have standing by virtue of the fact that they are no longer or were never actually institutionalized." *Id.*

***4** Plaintiffs mischaracterize Defendants' argument, and their own argument is misplaced. Defendants do not challenge the standing of all Plaintiffs, either by wording or by purpose, and they do not seek a finding that Plaintiffs are no longer "at risk" of unnecessary institutionalization. The true issue, as clearly articulated by Defendants, is that Plaintiffs chose to bring Count 5 on behalf of institutionalized children only, and no children in this case are currently institutionalized.

For all intents and purposes, Defendants' motion is really a motion to dismiss for lack of subject-matter jurisdiction. *See Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1182 (11th Cir. 2007). When presented with such a motion, the Court is permitted to look to facts outside the Complaint to determine if it lacks subject-matter jurisdiction. *See Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1336 (11th Cir. 2013) (citing *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1279 (11th Cir. 2009)). The undisputed fact that no Plaintiff is currently institutionalized is such a fact that the Court has considered.[7]

As stated above, A.G.'s claims were previously dismissed in full. Although Plaintiffs suggest that A.G.'s claims are distinguishable from the remaining Plaintiffs', signifying that the remaining Plaintiffs' claims could survive notwithstanding the dismissal of A.G.'s, Plaintiffs have offered no legal or factual support for their position. Instead, they argue that it is Defendants' burden to present factual differences, but the Court is not allowed to consider them. In reality, since A.G.'s claims have been dismissed, T.H. is presently the only remaining Plaintiff that Count 5 ever applied to. Plaintiffs appear to argue that the capable of repetition, yet evading review exception to the mootness doctrine applies to her claims, *see* ECF No. 587 at 3–4, as the undersigned previously found, *see supra* note 5. However, as explained above, all of T.H.'s claims must now be dismissed for the same reason as A.G.'s. *See supra* Part I.

The other remaining Plaintiffs have never been institutionalized. As a result, Count 5 has never applied to them and nor will an exception to the mootness doctrine. Plaintiffs do not raise any other arguments that could save their claims. Therefore, without considering the factual differences of these Plaintiffs, the undersigned concludes that Count 5 must be dismissed.

B. Counts 1 and 2

Defendants' motion is entitled a Motion to Dismiss Count 5 as Moot. But while the State's administration of the PASRR program is the primary target of Count 5, Counts 1 and 2 also contain similar allegations. Counts 1 and 2 allege that the Defendants have discriminated against the Plaintiffs in violation of the ADA and Rehabilitation Act, respectively, by "[a]dministering the PASRR program in such a way that the institutionalized Plaintiffs and members of the institutionalized sub-class have been inappropriately admitted to nursing facilities" and by "[a]dministering the PASRR program in such a way that the institutionalized Plaintiffs and members of the institutionalized sub-class are not provided the necessary specialized services to which they are entitled while residing in nursing facilities." *Id.* at 41, 43. As part of the same motion, Defendants seek for this Court to declare those allegations moot as well. ECF No. 573 at 4–5.

***5** In response, Plaintiffs do not argue that Defendants misconstrue those allegations or that the allegations somehow apply to all remaining (non-institutionalized) Plaintiffs. Rather, they argue that the remaining Plaintiffs still require the safeguards of the PASRR program in order to avoid inappropriate institutionalization. ECF No. 587 at 5.

Plaintiffs are undoubtedly correct, as indicated by the fact that the PASRR review process is federally mandated and intended to prevent inappropriate institutionalization. But, again, Plaintiffs have missed the true issue. The point is that federal courts are courts of limited jurisdiction. This Court's jurisdiction is circumscribed by the allegations in the Complaint and the relief requested by Plaintiffs. Plaintiffs are the master of their Complaint. Merely alleging hypothetical or conjectural future injury is insufficient. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). When this Court cannot provide meaningful relief, as requested by Plaintiffs, or when the benefit from redress is purely speculative, this Court lacks jurisdiction to address the subject-matter of the Complaint. *See id.* at 561; *Soliman v. U.S. ex rel. INS*, 296 F.3d 1237, 1242–43 (11th Cir. 2002).

Plaintiffs intentionally and appropriately[8] chose to make their allegations and request for relief concerning the PASRR program applicable to institutionalized individuals only. There are no Plaintiffs who are currently institutionalized in this case, and there is no real indication that there will be before trial. Additionally, at

least as to this issue, Plaintiffs have failed to specifically show that any exception to the mootness doctrine applies for any remaining Plaintiff. Therefore, this Court has no ability to provide the relief requested by Plaintiffs. The allegations in Counts 1 and 2 regarding the PASRR program, and the accompanying request for relief, must be dismissed as moot.

III. Recommendation

Based upon the foregoing, the undersigned RECOMMENDS as follows:

1. Defendants' Motion to Dismiss T.H.'s Claims as Moot, ECF No. 573, should be GRANTED and, thus, all of T.H.'s claims should be DISMISSED; and

2. Defendants' Motion to Dismiss Count 5 as Moot, ECF No. 507, should be GRANTED and, thus, Count 5, as well as Paragraphs 309d, 309e, 317d, and 317e, of the Complaint, ECF No. 62, should be DISMISSED.

Within fourteen days after being served with a copy of this Report and Recommendation, any party may serve and file written objections to any of the above findings and recommendations as provided by the Local Rules for this district. 28 U.S.C. § 636(b)(1); S.D. Fla. Mag. R. 4(b). The parties are hereby notified that a failure to timely object waives the right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions contained in this Report and Recommendation. 11th Cir. R. 3–1 (2016); *see Thomas v. Arn*, 474 U.S. 140 (1985).

DONE AND SUBMITTED at Fort Lauderdale, Florida this 15th day of February, 2017.

All Citations

Not Reported in Fed. Supp., 2017 WL 11680162

Footnotes

[1] The iBudget Waiver program—a Florida Medicaid program that receives federal funding, is administered by the Agency for Health Care Administration, and was discussed in detail in the parties' joint Pretrial Stipulation as an "uncontested" fact relevant for trial, ECF No. 509 at 12–13—provides private duty nursing services to adults. *See* Agency for Health Care Administration, Developmental Disabilities Individual Budgeting Waiver Services Coverage and Limitations Handbook, September 2015, at 1-1 to 1-2, 2-99, incorporated by reference in Rule 59G-13.070, Fla. Admin. Code.

[2] Plaintiffs only argument that does not restate its prior position as to A.G. is that T.H.'s claims are capable of repetition, yet evading review—a well-known exception to the mootness doctrine. However, that "doctrine 'applies only in exceptional situations' where '(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that *the same complaining party* will be subject to the same action again.' " *Carver Middle Sch. Gay-Straight All. v. Sch. Bd. of Lake Cty., Fla.*, 842 F.3d 1324, 1330 (11th Cir. 2016) (citations omitted). Here, T.H. will not be subject to the same challenged action again because, as found by the District Court, Plaintiffs only challenged policies and practices that are applicable to children under the age of twenty-one. *See* ECF No. 596 at 14.

[3] To be sure, it was prudent for Plaintiffs to remind the Court of its prior ruling on a similar issue.

[4] Defendants also argued that the entire case was moot due to a change in the policies that Plaintiffs challenge. ECF No. 237. However, that argument is not relevant to the instant motion.

[5] As to T.H., the undersigned found that the capable of repetition, yet evading review exception to the mootness doctrine applied because T.H. had previously been in and out of institutions. ECF No. 287 at 24. As to A.G., who was not in and out of institutions, the undersigned noted that the Defendants had not "unambiguously terminated the policies that A.G. alleges were the cause of his discriminatory segregation." *Id.* at 25. The District Court adopted the undersigned's conclusions over Defendants' objections. ECF No. 310.

[6] Despite the differences between Defendants' current and former motions, and the Court's duty to ensure it has jurisdiction, Plaintiffs state that "[t]o the extent that this Court wishes to revisit the justiciability of persons 'at risk' under the integration mandate of the Americans with Disabilities Act, the Plaintiffs adopts [sic] by reference all of the briefing filed by them and the Department of Justice in response to DE 237." ECF No. 587 at 3. Although Plaintiffs failed to cite to any briefs that they intended to incorporate, the undersigned has located and considered them. ECF No. 246 at 5–8; ECF No. 247 at 4–14. The undersigned finds that the arguments raised in those briefs are either inapposite or without merit in regard to Defendants' current motion.

[7] Plaintiffs take issue with the Declaration of Shevaun Harris, which was submitted in support of Defendants' motion. The undersigned finds that Plaintiffs' concerns are without merit. Additionally, the undersigned notes that Defendants previously submitted a Declaration by Shevaun Harris on the same topic, and Plaintiffs did not object. ECF No. 238-1. Moreover, on multiple occasions, based on the parties' assertions, the undersigned has found that no Plaintiffs are institutionalized, and Plaintiffs did not object. *See, e.g.*, ECF No. 287 at 3; ECF No. 501 at 4 n.4. Perhaps most importantly, Plaintiffs do not question the veracity of those statements and findings today.

[8] At least in this case, it is doubtful that a State could violate the PASRR review process as to an individual who was not institutionalized. Plaintiffs certainly do not allege that an individual should have been institutionalized, but was not, due to a botched Level II finding.