IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

MICHAEL DUBOIS, et al.,

Plaintiffs,

vs. CASE NO.: 4:03cv107-SPM

RHONDA MEDOWS, et al.,

Defendants.
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ORDER ON PENDING MOTIONS

Pending before the Court is Defendants' Motion to Dismiss the Complaint (doc. 20), Plaintiff's Unopposed Motion for An Enlargement of Time to File a Response to Defendants' Motion to Dismiss (doc. 22), and Plaintiffs' Motion for Class Certification (doc. 12).

I. BACKGROUND

Plaintiffs seek declaratory and injunctive relief against officials of the State of Florida, in their official capacities, for delays in providing home and community based services to a proposed class of more than 226 persons with brain or spinal cord injuries. Each of the three named plaintiffs allege that they are on a waiting list and that they meet the eligibility requirements for the services. Plaintiff Michael Dubois has been on the waiting list since August 11, 2000; Plaintiff

Melvin M. since April 8, 2002; and Plaintiff Charles Smith since January 23, 2001.

The community-based services at issue are available through the Brain or Spinal Cord Injury Medicaid Home and Community Based Waiver Program (BSCI Waiver Program), which Florida has operated since 1999. The BSCI Waiver Program is funded by medicaid and allows up to 300 individuals with traumatic brain and spinal cord injuries in Florida to receive medically necessary services while living at home, as an alternative to institutional or nursing home care. The goal of the BSCI Waiver Program is to provide cost-effective alternatives to institutional care for individuals with brain or spinal cord injuries.

Plaintiffs allege that due to under-funding and poor administration, only 176 individuals are receiving BSCI Waiver Program services in Florida, despite a waiting list of 226 who meet eligibility requirements. As a consequence, Plaintiffs allege, they have been forced to choose between living at home without services or living in an institutional setting that excludes them from full participation in the community.

According to Plaintiffs, their rights have been violated in the following ways:

1. Violation of the “integration mandate” of Title II of the Americans

with Disabilities Act[1] and Section 504 of the Rehabilitation Act[2] by failing to provide services in the most integrated setting appropriate to their needs.

2. Violation of the "reasonable promptness" provision of the Medicaid Act[3] by failing to provide available services with reasonable promptness.

3. Violation of the "freedom of choice" provision of the Medicaid Act[4] by failing to provide freedom of choice among available services to meet health and welfare needs.

4. Violation of the Due Process clause of the Fourteenth Amendment by failing to provide written notice and a hearing regarding the denial or delay of

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[1] 42 U.S.C. § 12132, as implemented by 28 C.F.R. § 35.130(d) ("A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.").

[2] 29 U.S.C. § 794(a), as implemented by 28 C.F.R. § 41.51(d) ("Recipients shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons.").

[3] 42 U.S.C. § 1396(a)(8) ("[A]ll individuals wishing to make application for medical assistance under the plan shall have opportunity to do so and . . . such assistance shall be furnished with reasonable promptness to all eligible individuals.").

[4] 42 U.S.C. § 1396(a)(23)(A) ("[A]ny individual eligible for medical assistance (including drugs) may obtain such assistance from any institution, agency, or community pharmacy, or person, qualified to perform the services or services required . . . who undertakes to provide him such services . . . .") and 42 U.S.C. § 1396n(C)(2) ("A waiver shall not be granted unless . . . (C) such individuals . . . are informed of the feasible alternatives, if available under the waiver, at the choice of the such individuals, to the provision of inpatient hospital services [or] nursing facility services . . . .').

available services as required under the Medicaid Act[5].

II. MOTION TO DISMISS

A. Standing

To establish standing under the "case or controversy" requirement of Article III, a party must show "(1) that he has suffered an actual or threatened injury, (2) that the injury is fairly traceable to the challenged conduct of the defendant, and (3) that the injury is likely to be redressed by a favorable ruling." Harris v. Evans, 20 F.3d 1118, 1121 (11th Cir. 1994). Under a related doctrine of ripeness, the injury is further assessed to determine whether adjudication would be premature because the injury is too speculative and may not occur. Ala. Power Co. vs. United States Dep't of Energy, 307 F.3d 1300, 1310 n.9 (11th Cir. 2002). The basic function of the ripeness doctrine is to prevent courts from "entangling themselves in abstract disagreements over administrative policies, and also to protect agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." Id. (quoting Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967).

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[5] 42 U.S.C. § 1396(a) ("A State plan for medical assistance must . . . (3) provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for medical assistance under the plan is denied or not acted upon with reasonable promptness."), as implemented by 42 C.F.R § 431.200.

Defendants argue that Plaintiffs lack standing and that their claims are not ripe because Plaintiffs are not entitled to receive BSCI Waiver Program Services immediately, and because Plaintiffs have not alleged that their ranking on the waiting list brings them within the 300 placements the program allows. These arguments are unavailing for the following reasons.

First, ". . . when standing becomes an issue on a motion to dismiss, general factual allegations of injury resulting from defendant's conduct may be sufficient to show standing." Bischoff v. Osceola County, 222 F.3d 874, 878 (11th Cir. 2000). In this case, Plaintiffs have alleged actual injuries that logically flow from all of their claims. These allegations are sufficient to demonstrate standing at this stage of the proceeding.

Second, Plaintiffs allege injuries that, regardless of their positions on the waiting list or their entitlement to immediate services, are subject to remedy through this suit. For example, Plaintiffs' "integration mandate" claims alleged in Counts I and II are based on provisions of the ADA and the Rehabilitation Act that impose integration obligations independent of the current limits of BSCI Waiver Program. See Olmstead v. L.C., 527 U.S. 581, 607 (1999)(recognizing the States' obligation under the ADA to provide community-based treatment through reasonable accommodation). The injury at issue is that Plaintiffs are eligible for the services but have been kept on a waiting list that has not moved at a reasonable pace. See id. at 606. "[A] comprehensive, effectively working plan

for placing qualified persons with [] disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace," id., would remedy the harm suffered by Plaintiffs, even if they were not provided services immediately.

Plaintiffs' "reasonable promptness" claim in Count III and "freedom of choice" claim in Count IV present a similar issue. Plaintiffs allege that through under-funding and poor administration, the Defendants have created a situation where services are purportedly available but they are not actually being provided. The injury alleged is not the denial of immediate services. It is the de facto denial of choice among available services and the denial of available services with reasonable promptness by keeping Plaintiffs on a waiting list while services are not actually being provided.

Finally, Plaintiffs' due process claim in Count V concerns the requirements for notice and an opportunity for a hearing when Medicaid services are delayed or denied. Defendants make no reasoned argument that these due process requirements are dependent upon Plaintiffs being entitled to immediate services or being at the top of the waiting list. Notice and an opportunity for a hearing, which Plaintiffs allege they have not been provided, is required whenever a request for services is denied or not acted upon with reasonable promptness.

Plaintiffs have sufficiently demonstrated that they are suffering injuries as a result of Defendants' failure to properly provide Medicaid services and administer the BSCI Waiver Program. Accordingly, Defendant's motion to

dismiss for lack of standing will be denied.

B. Eleventh Amendment Immunity

Defendants argue that Plaintiffs' integration mandate claims in Counts I and II, which are made pursuant to Title II of the ADA and Section 504 of the Rehabilitation Act, are barred by Eleventh Amendment immunity. This argument is unavailing for two reasons.

First, Eleventh Amendment immunity has been waived with regard to the Rehabilitation Act claims in this case by the acceptance of federal funds. See Garrett v. Univ. of Ala., 344 F.3d 1288 (11th Cir. 2003). Second, Plaintiffs' claims can proceed under the doctrine of Ex parte Young[6] notwithstanding any Eleventh Amendment immunity issues. Ex parte Young allows private parties to sue state officers in their official capacities for prospective injunctive relief against ongoing violations of federal law. See Summit Med. Associates, P.C. v. Pryor, 180 F.3d 1326, 1336-37 (11th Cir. 1999). The doctrine applies to federal claims generally, including claims under Title II of the ADA. See Bd. of Trustees v. Garrett, 531 U.S. 356, 374 n9. (2001), see also, Henrietta D. v. Bloomberg, 331 F.3d 261, 288 (2d Cir. 2003) (noting that federal appellate court rulings are now in accord on Ex Parte Young and Title II of the ADA).

Accordingly, Defendants' motion to dismiss on Eleventh Amendment

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[6] Ex parte Young, 209 U.S. 123 (1908).

immunity grounds will be denied.

C. Validity of Causes of Actions

1. integration mandate claims

Defendants argue that Plaintiffs' integration mandate claims are deficient as a matter of law because Plaintiffs have failed to allege that they are being denied services in a discriminatory manner based on their disabilities. Similar arguments were rejected by the United States Supreme Court in Olmstead, 527 U.S. at 598-600. In Olmstead, the Court recognized that "unjustified institutional isolation of persons with disabilities," as Plaintiffs allege, is a form of discrimination proscribed by the ADA. Id. at 600.

Additional arguments Defendants raise, regarding whether placements can be reasonably accommodated or whether doing so would require fundamental alteration of the State's program, are affirmative defenses that will not defeat Plaintiffs' claim at the pleading stage. Accordingly, Defendants' motion to dismiss Plaintiffs' integration mandate claims will be denied.

2. reasonable promptness and freedom of choice claims

As grounds for dismissal of these claims, Defendants repeat the arguments they made regarding standing. Defendants argue that these claims are deficient because Plaintiffs have not alleged that their ranking on the waiting list puts them among the 300 placements the BSCI Waiver Program is designed to cover. As discussed with regard to standing, Plaintiffs allegations are

sufficient to state a claim for relief. Accordingly, the motion to dismiss these claims will be denied.

3. due process claim

Relying on McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994), Defendants argue that Plaintiffs have not stated a valid claim for denial of procedural due process given the opportunities Plaintiffs still have available to request a hearing regarding the denial of services. Defendants' reliance on McKinney is misplaced.

McKinney involved a government employee who alleged that the Board of County Commissioners showed bias against him during his termination hearings. McKinney v. Pate, 20 F.3d 1550, 1555 (11th Cir. 1994). In resolving the case, the McKinney court applied the rule delineated by the Supreme Court in Parratt v. Taylor, 451 U.S. 527 (1981) and Hudson v. Palmer, 468 U.S. 517 (1984) regarding random and unauthorized deprivations.

In Parratt and Hudson, the Supreme Court explained that when a deprivation of property results from random and unauthorized conduct, predeprivation procedures are impractical because the state cannot predict that the deprivation will occur. Parratt, 451 U.S. at 541; Hudson, 468 U.S. at 533. Therefore, the Court held the lack of a pre-deprivation hearing will not give rise to a procedural due process violation unless the state fails to provide a meaningful postdeprivation remedy. Parratt, 451 U.S. at 541; Hudson, 468 U.S. at 536. The holdings in Parratt and Hudson, however, do not extend to cases where a

foreseeable deprivation results from inadequate procedural protections. See Zinermon v. Burch, 494 U.S. 113, 138-39 (1990).

In this case, Plaintiffs do not allege that Defendants acted in a random or unauthorized manner. Instead, Plaintiffs allege that the procedural protections the Defendants have in place are inadequate to provide due process. Accordingly, McKinney does not apply and Defendants' motion to dismiss the due process claim will be denied.

III. CLASS CERTIFICATION

With regard to class certification, Defendants' primary argument is that the proposed class is overly broad and fails to take into account the particularized nature of each person's medical condition and status for placement. This argument is similar to one addressed by the United States Court of Appeals, Eleventh Circuit, in Murry v. Auslander, 244 F.3d 807, 813 (11th Cir. 2001). The Murry court found that the problem could be resolved by modifying the class definition to include "only those individuals whom the state already has determined or will determine to be eligible and qualified to receive medically necessary [Waiver services]." Murry 244 F.3d at 813. The same modification will work in this case.

With regard to the other requirements for class certification under Federal Rule of Civil Procedure 23(a), Plaintiffs have demonstrated that class certification is appropriate. In particular, the numerosity requirement is satisfied since the

class consists of over 226 individuals. The commonality requirement is satisfied because there are common questions of law and fact concerning the propriety of the state's administration of the BSCI Waiver Program. The typicality requirement is likewise met because given the similarity of claims and defenses. Finally, the adequacy requirement is met because Plaintiffs' counsel has demonstrated competence with these claims and there is no indication that the interests of the named Plaintiffs and the proposed class are in conflict.

A class action is appropriate under Federal Rule of Civil Procedure 23(b) where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief of corresponding declaratory relief with respect to the class as a whole . . . ." Fed. R. Civ. P. 23(b)(2). Because the relief sought in this case, i.e. to correct deficiencies in the administration of the BSCI Waiver Program, would benefit the class as a whole, and because all requirements of Rule 23(a) have been met, class certification is appropriate. Based on the foregoing, it is

ORDERED AND ADJUDGED:

1. Plaintiff's Unopposed Motion for An Enlargement of Time to File a Response to Defendants' Motion to Dismiss (doc. 22) is granted. The response (doc. 28) was considered.

2. Defendants' Motion to Dismiss the Complaint (doc. 20) is denied.

3. Plaintiffs' Motion for Class Certification (doc. 12) is granted. The

class is defined as follows: All individuals with traumatic brain or spinal cord injuries who the state has already determined or will determine to be eligible to receive BSCI Waiver Program services and have not received such services.

DONE AND ORDERED this 1st day of March, 2004.

s/ Stephan P. Mickle

Stephan P. Mickle
United States District Judge