UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

JOANNA DYKES; DAVID WALKER, by and through his next friend, Michele Beauregard; **LORETTA DAVIS,** by and through her next Friend, Trish Mlekodaj; **HEATHER YOUNG**, by and through her next friend Robert Stark; **MICHELLE CONGDEN; AMANDA PIVINSKI; JOSHUA WOODWARD; ALYSSA FERRARO,** by and through her next friend, Sharon Ferraro and **DISABILITY RIGHTS FLORIDA, Inc.**, a Florida non-profit corporation,

Plaintiffs,

v. Case No. 4:11-cv-00116-RS-WCS

ELIZABETH DUDEK in her official capacity as Secretary of the Florida Agency for Health Care Administration, and **MICHAEL HANSEN** in his official capacity as Director of the Florida Agency for Persons with Disabilities, and **RICK SCOTT** in his official capacity as Governor of the State of Florida.**,**

Defendants.
________________________________/

MOTION TO DISMISS FOR LACK OF STANDING

The Defendants, Elizabeth Dudek, in her official capacity as Secretary of the Florida Agency for Health Care Administration, Michael Hansen,[1] in his official capacity

[1] Pursuant to Rule 25(d), Federal Rules of Civil Procedure, Michael Hansen is automatically substituted as a party as successor of Brian Vaughan.

as Director of the Florida Agency for Persons with Disabilities, and Rick Scott, in his official capcity as Governor of the State of Florida,[2] hereby submit this motion to dismiss the claims of Plaintiffs Michelle Congden, Amanda Pivinski, Joshua Woodward, and Allysa Ferraro in Count Three of the Amended Complaint for lack of standing. As support therefor, Defendants submit the following memorandum of law.

MEMORANDUM OF LAW

I. Requirements for Standing

The U.S. Constitution extends jurisdiction to the federal courts only over "cases" and "controversies." U.S. Constitution, Article III, Section 2, Clause 1. The Supreme Court has held that the "irreducible constitutional minimum of standing contains three elements." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). First, the plaintiff must have suffered an "injury-in-fact" which is both: (a) "concrete and particularized"; and (b) "actual or imminent, not conjectural or hypothetical." Id. (internal quotation marks omitted). Second, a plaintiff must establish a "causal connection" between the injury and the defendant's acts. Id. Finally, the injury must be "likely to be redressed by a favorable decision." Simon v. E. Kentucky Welfare Rights Org., 426 U.S. 26, 38 (1976). In addition to the constitutional requirements, "[s]tanding doctrine embraces several judicially self-imposed limits on the exercise of federal jurisdiction, such as the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative

[2] As explained in Governor Scott's pending Motion to Dismiss, Docket Entry 23, the Governor is not a proper defendant in this action. Governor Scott joins in this motion only to preserve his rights in the event that his Motion to Dismiss is denied.

branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." Allen v. Wright, 468 U.S. 737, 751 (1984).

A plaintiff seeking to establish standing "must clearly and specifically set forth facts" sufficient to satisfy the constitutional requirements. Whitmore v. Arkansas, 495 U.S. 149, 155 (1990). On deciding a defendant's motion to dismiss, a federal court "must evaluate standing based on the facts alleged in the complaint, and … may not speculate concerning the existence of standing or piece together support for the plaintiff." Shotz v. Cates, 256 F.3d 1077, 1081 (11th Cir. 2001) (internal quotation marks omitted). It is not enough for a plaintiff's complaint to set forth "facts from which [a court] could imagine an injury sufficient to satisfy Article III's standing requirements." Miccosukee Tribe of Indians of Florida v. Florida State Athletic Comm'n, 226 F.3d 1226, 1229 (11th Cir. 2000).

II. Plaintiffs' Injuries Do Not Confer Standing

At the outset, the injury that Plaintiffs Michelle Congden, Amanda Pivinski, Joshua Woodward, and Allysa Ferraro (hereinafter the "Community Plaintiffs") are alleged to have suffered is not clear. All four of these individuals reside in their communities. See Amended Complaint, ¶¶50, 57, 65, and 71. None of these Plaintiffs is currently institutionalized. It appears from the Amended Complaint, that the injury-in-fact that the Community Plaintiffs have suffered is the *possibility of institutionalization*. See Id., ¶¶2, 5, 6, 51, 56, 62-64, 70, 81-83, 103a, 128, 203, 210-211, and 215. In the alternative, some provisions in the Amended Complaint seem to allege that the injury the Community Plaintiffs have suffered is simply the failure of the Defendants to provide

them services through the Florida Medicaid Developmental Disabilities Waiver program ("DD Waiver"). See Id., ¶¶ 11, 13-14, 104, 140, 158, 202, 208, and 212-213. The Amended Complaint is ambiguous as to the precise nature of the injury-in-fact it is alleging. The alternative theories of injury require different analyses as to standing, but under either theory, Community Plaintiffs currently lack standing to sue.

A. Possibility of Institutionalization as the Injury-in-Fact

To the extent that the injury at issue is the *possibility of institutionalization,* the Community Plaintiffs lack standing to bring a claim under Title II of the Americans with Disabilities Act ("ADA") because they have not suffered an "injury-in-fact." As noted above, the Community Plaintiffs must show that they are "under threat of suffering" an injury that is "actual and imminent, not conjectural or hypothetical." Summers v. Earth Island Inst., 555 U.S. 488, 455 (2009). Only two of the Community Plaintiffs – Amanda Pivinski and Allysa Ferraro – even allege that their institutionalization is "imminent" and even these Plaintiffs fail to explain why or how such institutionalization is imminent. See Amended Complaint, at ¶¶ 64 and 83 (alleging no facts explaining why these Plaintiffs' current living situations in the community will not continue to be viable options for them).

Likewise, the other Community Plaintiffs – Michelle Congden and Joshua Woodward – do not allege that the risk of institutionalization is imminent for them. Nor do they allege specific facts that would support such a conclusion. For example, Plaintiffs admit that Plaintiff Woodward "does not need much assistance with activities of daily living" and allege only that he needs "assistance with speech therapy, an

employment coach, and behavior assistance." Id., at ¶ 67. Such an individual cannot be reasonably stated to face imminent institutionalization.

Plaintiff Congden simply asserts that, without DD Waiver services, "her health, safety and welfare will decline" and that this places her "at risk of institutionalization." Id., at ¶ 56. Such a risk is not imminent. Nowhere does Congden allege that such institutionalization would or could happen imminently, and any such risk appears to be conjectural and hypothetical.

In short, Plaintiffs Congden and Woodward ask the Court to imagine circumstances that could arise that could lead to their institutionalization. This is exactly what the Eleventh Circuit in Miccosukee Tribe of Indians of Florida held *not* to constitute a sufficient showing of standing.

Indeed, the Amended Complaint assumes that the Community Plaintiffs will remain at the Category 6 level of prioritization on the DD Waiver waitlist. Amended Complaint, at ¶¶ 55, 61, 70, and 81. This means that the Community Plaintiffs concede that their caregivers are not "expected to … [be] unable to provide care within the next twelve months," and do not claim that "other caregivers are unable, unwilling or unavailable to provide [alternative] care." If Community Plaintiffs were able to make such allegations, they would be eligible for Category 3 prioritization on the waitlist and their risk of institutionalization would be far more likely.[3] Rule 65G-11.002(5)(a), Florida Administrative Code. As such, the Community Plaintiffs virtually concede that they are not at imminent risk of institutionalization.

[3] Category 4 and Category 5 prioritization levels are unavailable to Community Plaintiffs. See Rule 65G-11.002, Florida Administrative Code.

Given the lack of current or imminent institutionalization, there is no "injury-in-fact" present to confer standing on the Community Plaintiffs. "The mere risk that Plaintiffs may be institutionalized … does not constitute an actual or imminent harm sufficient to satisfy the first element of standing." Bill M. ex rel. William M. v. Nebraska Dept. of Health & Human Services Fin. & Support, 408 F.3d 1096, 1099 (8th Cir. 2005), vacated and remanded on other grounds; United States v. Nebraska Dept. of Health & Human Services Fin. & Support, 547 U.S. 106 (2006).

B. Denial of Enrollment in the DD Waiver as the Injury-in-Fact

Alternatively, standing is also lacking to the extent that the Community Plaintiffs' injuries allegedly arise from the mere failure of the Defendants to provide them services through the DD Waiver. The mere failure to enroll the Community Plaintiffs onto the DD Waiver does not constitute a violation of the ADA, Section 504 of the Rehabilitation Act, or the Medicaid Act. Moreover, the injury of not being enrolled in the DD Waiver does not fall within the zone of interests protected by the ADA. While standing "in no way depends on the merits of the plaintiff's contention that particular conduct is illegal," "it often turns on the nature and source of the claim asserted." Warth v. Seldin, 422 U.S. 490, 500 (1975). "Essentially, the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." Id.

Here, the statutory provision upon which the Community Plaintiffs rely is 42 U.S.C. § 12132, which provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of

the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." This provision protects individuals who are either: (1) excluded from participation in, or denied the benefits of, services, programs, or activities of a public entity by reason of a disability, or (2) subjected to discrimination by a public entity by reason of a disability. Id.

The Community Plaintiffs have not been excluded from participation in the DD Waiver or denied the DD Waiver's benefits *by reason of a disability*. Indeed, it is because of their disabilities that the Community Plaintiffs are even eligible for participation in the DD Waiver. The DD Waiver is available only to individuals who have disabilities like those of the Community Plaintiffs. Thus, the failure of the Defendants to enroll the Community Plaintiffs in the DD Waiver cannot be by reason of their disabilities when the waiver program exists to serve precisely those people with such disabilities. Nor have the Community Plaintiffs alleged any discrimination by the Defendants that can in any way be attributed to their disabilities. The injury of not being enrolled in the DD Waiver does not fall within the zone of interests of the ADA unless and until it results in unjustified institutionalization.

Importantly, the ADA is only violated by exclusion from programs or services, denial of benefits, or discrimination, when these things are *by reason of disability*. 42 U.S.C. § 12132. The Supreme Court has held that "undue institutionalization qualifies as discrimination 'by reason of ... disability.'" Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 597 (1999). The Supreme Court has not extended this interpretation to exclusions from community based programs that do not result in undue institutionalization. In other

words, when an individual is excluded from participation in or denied the benefits of services, programs, or activities of a public entity or otherwise discriminated by a public entity, and *is not as a result unduly institutionalized*, he or she would still have to prove that such exclusion, denial, or discrimination was *by reason of his or her disability* in order to fall under the protection of the ADA.

III. Conclusion

If the injury alleged by the Community Plaintiffs is unjustified institutionalization, Community Plaintiffs lack standing because they have not actually suffered this injury and are not imminently threatened with suffering it. If the injury alleged by the Community Plaintiffs is the simple failure of the Defendants to enroll them in the DD Waiver, such injury does not fall within the zone of interests of the ADA. Any such denial would not be because of the Community Plaintiffs' disability, and therefore does not confer standing. Regardless of which alleged injury is used by the Court in its analysis, the Community Plaintiffs lack standing to bring their claims under the ADA. Therefore, Count Three of the Amended Complaint should be dismissed with respect to Plaintiffs Michelle Congden, Amanda Pivinski, Joshua Woodward, and Allysa Ferraro.

Respectfully submitted this 13th day of September 2011.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by the Notice of Electronic Filing, and was electronically filed with the Clerk of the Court via the CM/ECF system, which generates a notice of the filing to all attorneys of record, on this the 13th day of September 2011.

/s/ Andrew T. Sheeran

Andrew T. Sheeran