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

JOANNA DYKES, et al.

Plaintiffs,

v. Case No.4:11-CV-116-RS-CAS

ELIZABETH DUDEK, et al.

Defendants.

_____/

DEFENDANTS' MOTION FOR SUMMARY JUDGEMENT

The Defendants, Elizabeth Dudek, in her official capacity as Secretary of the Agency for Health Care Administration (AHCA), and Michael Hansen, in his official capacity as Director of the Florida Agency for Persons with Disabilities (APD), by and through undersigned counsel, hereby file this Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 56.1. The Defendants state the following as the basis for this motion:

LEGAL STANDARD

The Defendants move for summary judgment on the basis that there is no genuine dispute as to any material fact in the case at bar and that Defendants are entitled to a judgment of dismissal as a matter of law.

Rule 56 of the Federal Rules of Civil Procedure provides that "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." "The party moving for summary judgment has the burden of showing the absence of a genuine issue as to any

material fact." Bingham, Ltd. V. U.S., 724 F.2d 921, 924 (11th Cir. 1984). Even if a movant sustains its burden of showing the absence of a genuine dispute as to any material fact, the facts must still furnish an adequate basis for the court to apply the proper legal principles in resolve a difficult question of law. Id.

"Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Matsushita Elec. Indus. Co., Ltd., v. Zenith Radio Corp., 106 S.Ct. 1348, 1356, 475 U.S. 574, 587 (1986).

MEMORANDUM OF LAW

Plaintiffs bring four claims in this action:

1) Reasonable Promptness. Plaintiffs allege that Defendants have failed to provide Medicaid services with reasonable promptness, pursuant to Title XIX of the Social Security Act, 42 U.S.C. § 1396a, 42 C.F.R. § 435.930 and 42 U.S.C. § 1983. These claims fail because the Medicaid Act only applies to people on the waitlist to the extent there are available vacancies on the wavier. As will be shown below, there are no available vacancies on the waiver.

2) Freedom of Choice. Plaintiffs allege Defendants have failed to provide the freedom of choice services, pursuant to the Social Security Act, § 1915(c)(2), as amended, 42 U.S.C. § 1396n(c)(2), and 42 U.S.C. § 1983. These claims fail because the Medicaid Act only applies to people on the waitlist to the extent there are available vacancies on the wavier. As will be shown below, there are no available vacancies on the waiver.

3) Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act (Rehab Act). Plaintiffs allege Defendants are in violation of the ADA and the Rehab Act, pursuant to the doctrine outlined in Olmstead v. Zimmering, 527 US 581 (1999). These

claims fail because the Plaintiffs already living in the community have failed to show they are "at risk" of institutionalization, and for the one remaining plaintiff living in an institution, exclusion from the DD Waiver is not the cause of her institutionalization. Other Medicaid Waivers are available that she has chosen not to use.

4) Due Process. Plaintiffs allege Defendants failed to provide notice to Plaintiffs of their right to a hearing upon their placement into a waitlist priority category, pursuant to U.S. Const. Amend XIV § 1., 42 U.S.C. § 1396a(a)(3), 42 C.F.R. § 431.220, § 431.206. These claims fail because the Due Process Rights associated with the waitlist priority categories apply to people on the waitlist only to the extent there are available vacancies on the wavier. As will be shown below, there are no available vacancies on the waiver.

Summary of Argument

Plaintiffs Michelle Congden, Joanna Dykes and Loretta Davis were enrolled on the DD Waiver[1] after the commencement of this action. (Affidavits from Terri McGarrity and Jolie LaTourelle, attached as Exhibits A and B respectively). Their claims are therefore moot. One exception to the mootness doctrine, however, is reserved for claims associated with injuries that are capable of repetition yet evading review. Honig v. Doe , 484 U.S. 305, 318, 108 S.Ct. 592, 601 (1988). As will be shown below, any alleged injuries suffered by Plaintiffs Dykes and Davis are not capable of repetition because the Florida Legislature has since intervened and provided an administrative mechanism and funds to move to the DD waiver any individuals residing in Intermediate Care Facilities for the Developmentally

[1] In this Motion, the term "DD Waiver" or "Waiver" will refer collectively to all the Home and Community Based Services Medicaid Waivers administered by APD. APD currently administers five waivers: Tier 1, Tier 2, Tier 3, Tier 4 and iBudget Florida. Sections 393.0661(3) and 393.0662 Fla. Stat. Florida is currently in the process of transitioning all wavier clients from the Tier waivers to iBudget Florida.

Disabled ("ICF/DD"). Plaintiffs Dykes and Davis were enrolled on the DD waiver via this mechanism. See Laws of Florida 2011-69, Specific Appropriation 206 and 2012-118, Specific Appropriation 222. Through this mechanism, AHCA may transfer to the DD waiver any resident of an ICF/DD that otherwise qualifies for the DD waiver.

Likewise, any alleged injury suffered by Plaintiff Congden is not capable of repetition because the DD waiver allows enrollment for any applicant deemed to be in crisis according to the crisis procedures in Rules 65G-1.046 and 65G-1.047, Florida Administrative Code (the "Crisis Rule"). Ms. Congden was admitted to the waiver after she applied via the crisis rule and was determined to be in crisis. The Crisis Rule was designed to enroll applicants in situations like Ms. Congden's, and APD has never failed to either provide services to, or assist with acquiring services for, an applicant determined to be in crisis under the Crisis Rule. (Affidavit of Denise Arnold, attached as Exhibit D).

The remaining plaintiffs are Joshua Woodward, Amanda Pivinski and Heather Young.

All three remaining plaintiffs have brought claims under the Medicaid Act and the Americans with Disabilities Act (ADA). This court noted in its order denying Defendants' Motion to Dismiss, that the Medicaid Act claims are actionable only insofar as there are "available slots" on the waiver. (Doc. 60). The term "slots" is not used in the waivers at issue in this case, but the same concept applies. The DD Waiver refers to "vacancies." Enrollment on the DD waiver is determined by whether there are available funds for the needs of the particular applicants at issue. Appendix B-3, Section f. of each of the DD Waivers is titled "Selection of Entrants on the Waiver." (Exhibits I and J). It provides in relevant part:

> When the level of funding appropriated by the Florida Legislature provides funding for additional vacancies on the waiver, individuals shall

be added to the waiver in the following order unless otherwise specified in the Appropriations Act for the current fiscal year.

1. Individuals determined by assessment using the Crisis Identification Tool to be in crisis shall have first priority for services.
2. Individuals with valid Court Orders or diversions from programs for persons adjudged incompetent to stand trial.
3. Children on the wait list who are from the child welfare system with an open case in the Department of Children and Family Services' statewide automated child welfare information system.
4. All other individuals shall be considered for enrollment on the waiver in the date order in which they are listed on the statewide waitlist, beginning with the earliest dates.[2]

Rather than have "available slots," the DD Waiver enrolls individuals when "funding appropriated by the Florida Legislature provides funding for additional vacancies on the waiver." Since vacancies are determined by funding, there will never be a fixed number of "slots," as that term might imply, because different individuals have different needs. Rather, when funds become available, APD must first determine the needs of the applicants at issue. Only after that review may APD determine the number of individuals to be added to the waiver, or the number of available "vacancies." A particular amount of funds may be sufficient to fund many applicants with minimal needs or only a few applicants with intense needs, depending on the applicants at that particular time. As such, it is impossible for Defendants to know, outside the context of a particular group of applicants, a precise number of available "slots." Rather, vacancies are determined by an analysis of a particular pool of applicants, their needs and the available funds. The Waiver itself, in Appendix B-3, Section f., along with the Crisis Rule and

[2]Due to its amendment history as the former Family and Supported Living Waiver (FSL), Appendix B-3, Section f. of the Tier 4 Waiver describes the process in slightly different language, but is substantively the same for purposes of this Motion. It provides in relevant part: "In accordance with legislative language, individuals on the waiting list may be enrolled on the FSL Waiver through Crisis determination due to funding limitations." (Exhibit J).

the Waitlist priority Statute (§ 393.065 Fla. Stat.) determine for APD which particular applicant pool to examine at any given time and with any given amount of available funds.

Claims under the Medicaid Act are actionable only to the extent that plaintiffs are "eligible" for Medicaid services. Bryson v. Shumway, 308 F.3d 79, 88 (1st Cir. 2002), Susan J. v. Riley, 616 F. Supp. 2d 1219 (M.D. Ala. 2009). As noted by this court, plaintiffs are only eligible for services to the extent there are available "slots." (Doc. 60). In the language of the DD Waiver, plaintiffs are only eligible for the waiver to the extent there are "vacancies" on the DD Waiver. Attached as Exhibit E is an affidavit from Marta Hardy, APD Deputy Director of Administration, in which she asserts that APD does not currently have any vacancies on the Waiver except for those individuals found to be in crisis, for foster children turning eighteen (18) years of age, and for those individuals ordered to the waiver by the courts. As will be shown below, because none of Plaintiffs Woodward, Pivinski or Young have been determined to fall into one of those three categories, they are not "eligible" for the Medicaid services and their Medicaid claims must fail.

Under the same eligibility analysis, the Due Process claims must also fail. However, although the Due Process claims fail, APD nevertheless provides all applicants placed on the waitlist notice of their right to a Medicaid Fair Hearing and a hearing under Chapter 120, Florida Statutes, to challenge their placement on the waitlist. (Affidavit of Terri McGarrity, attached as Exhibit A). Furthermore, all waitlisted individuals may request a reconsideration of their waitlist priority category at any time, regardless whether APD has taken any new State action. Rule 65G-11.003(3) Florida Administrative Code.

The final claims of Plaintiffs Woodward, Pivinksi and Young fall under the ADA. Each plaintiff alleges that Defendants violated the ADA by not enrolling them on the DD Waiver, which plaintiffs allege is a violation of Olmstead v. Zimmering, 527 US 581 (1999).

Both Plaintiffs Woodward and Pivinski reside in the community and will be referred to as the "Community Plaintiffs." The remedy Olmstead offers is removal from an institution and placement in the community. The Community Plaintiffs, however, already reside in the community. Some Courts have allowed Olmstead claims to proceed when plaintiffs are not in an institution if plaintiffs can show they are "at risk of institutionalization." [3] However, as will be shown below, the DD waiver is unique and distinguishable from the cases adopting this doctrine because Florida has adopted the Crisis Rule. For individuals already residing in the community, the criteria Florida uses to determine whether someone is in crisis are at least coextensive with any analysis to determine whether someone is "at risk of institutionalization." In some cases, it is broader. Under the Crisis Rule, when APD determines whether to enroll an individual on the Waiver, it analyses more than the mere risk of institutionalization. Though the two analyses may frequently overlap, the Crisis Rule is broader, incorporates more variables, and therefore reaches a greater number of individuals than a mere risk assessment for institutionalization. As will be shown below, because the Crisis Rule casts a wider net than a mere analysis of the Community Plaintiffs' "risk of institutionalization," it is not possible for the Community Plaintiffs to be at risk of institutionalization and at the same time not be eligible for enrollment under the Crisis Rule.

[3] see Fisher v. Oklahoma Health Care Auth., 335 F. 3d 1175 (10th Cir. 2003) and Cruz v. Dudek, 2010 WL 428595 (S.D. Fla. 2010) (Here the issue was raised in the context of preliminary injunction).

Plaintiff Heather Young resides in a nursing home. As shown below, Ms. Young's exclusion from the DD Waiver is not the cause of her institutionalization. The Florida Legislature has provided AHCA with an administrative mechanism[4] to transfer Ms. Young, and others residing in nursing homes, to the Medicaid waivers which are tied to a nursing facility level of care. Nursing home residents have the choice to either enroll on one of these waivers or to remain in their current setting.

I. The claims of Plaintiffs Congden, Dykes and Davis are Moot because these Plaintiffs have been enrolled on the DD Waiver and the alleged injuries are not capable of repetition while evading review.

Plaintiffs Congden, Dykes and Davis will be referred to as the "Plaintiffs on the Waiver." Their claims are moot because they have already been enrolled on the DD Waiver.

"A case becomes moot 'when the issues presented are no longer 'live' or the parties lack a cognizable interest in the outcome." Reich v. Occupational Safety and Health Review Comm'n, 102 F.3d 1200, 1201 (11th Cir. 1997), citing Powell v. McCormack, 395 U.S. 486, 496, 89 S.Ct. 1944, 1950-1951 (1969). However, "[t]he Supreme Court has recognized an exception to this principle in certain cases where injunctive relief is sought." Reich v. Occupational Safety and Health Review Comm'n, 102 F.3d 1200, 1201 (11th Cir. 1997), citing County of Los Angeles v. Davis, 440 U.S. 625, 99 S.Ct. 1379 (1979).

Unlike civil remedies, which address past violations, injunctive relief is intended to address "ongoing or future violations." Reich, 120 F.3d at 1202. "A claim for injunctive relief may become moot if: (1) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." Id. at 1201.

[4] Laws of Florida 2011-69, Specific Appropriation 208

Plaintiffs Congden, Dykes and Pivinski have all been enrolled on the DD Waiver. (Affidavits of Terri McGarrity and Jolie LaTourelle, Exhibits A and B respectively). Because these plaintiffs are now enrolled on the waiver, it is no longer possible that they will go without DD Waiver services. The interim event of enrolling these Plaintiffs on the DD Waiver has completely and irrevocably eradicated any effects of the alleged injuries.

An otherwise moot case may remain justiciable if the alleged unlawful conduct is "capable of repetition, yet evading review." Honig v. Doe, 484 U.S. 305, 318, 108 S.Ct. 592, 601 (1988).

"[A] case may be considered within the 'capable of repetition, yet evading review' exception only where: '(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." Nat. Broadcasting Co., Inc. v. Communications Workers of America, 860 F.2d 1022, 1023 (11th Cir. 1988), citing Weinstein v. Bradford, 423 U.S. 147, 149, 96 S.Ct. 347, 348-49 (1975).

The standard of "capable of repetition, yet evading review" requires that the threat of future injury is more than "conjectural" or "hypothetical." Bourgeois v. Peters, 387 F.3d 1303, 1309 (11th Cir. 2004). For the Plaintiffs on the Waiver, any future removal from the DD Waiver is pure conjecture as it depends on future medical and behavioral needs. Now that they are on the Waiver, their chances of leaving the Waiver are the same as for any other enrollee on the Waiver. If individuals situated like the Plaintiffs on the Waiver were granted standing for an Olmstead Claim, then the group of individuals with standing would also include individuals who have never lived a day in an institution, who have never lived a single day after the age of three off the waiver, and who will never face any risk of institutionalization. History indicates that a

majority of Wavier enrollees are on the Waiver for life. (Affidavit of Denise Arnold, Exhibit D). In short, allowing standing for the Plaintiffs on the Waiver for the Olmstead claims would confer standing to every other enrollee on the waiver. This is precisely the type of situation the "conjectural" and "hypothetical" test from Bourgeois seeks to avoid.

Furthermore, there are facts particular to each of the Plaintiffs on the Waiver that render any possible injury suffered from a hypothetical future exclusion from the DD Waiver unlikely.

A. Michelle Congden was enrolled on the Waiver via the Crisis Rule and the existence of the Crisis Rule renders it impossible that she could face the same circumstances in the future without being eligible for the Waiver

At the time this action was filed, Ms. Congden alleged in the Amended Class Action Complaint (Doc. 30, ¶ 50 and 55-56), that she lived in the community with her Sister, and that:

> Because of CONGDEN's age, the age of her caregiver, and her living situation, it would be decades before she met the requirements for any of the preceding [waitlist] categories other than Category 6 and will, therefore, never move up in the priority for enrollment to the waiver. CONGDEN is relegated to the very end of a waitlist without a chance of progression, giving rise to a subclass of persons who are precluded from participating in and receiving services other than through segregated, isolated, institutional placement . . . Without the day program, personal care assistance, and behavior analysis that CONGDEN seeks from the DD Waiver, her health, safety and welfare will decline. This places CONGDEN at risk of institutionalization.

After this action was filed, Ms. Congden was determined to be in crisis through APD's crisis procedure and was enrolled on the Waiver. (Exhibit A).

Florida's Crisis Rule provides for enrollment on the Waiver for any one determined to be in crisis. The Crisis Rule provides three levels of crisis:

> (1) "First priority crisis category: The applicant is currently homeless, living in a homeless shelter, or living with relatives in an unsafe environment . . ." 65G-1.047(4), Florida Administrative Code.
>
> (2) "Second priority crisis category: The applicant exhibits behaviors that, without provision of immediate waiver services, may create a life-threatening situation for the applicant or others, or that may result in bodily harm to the applicant or others requiring

> emergency medical care from a physician . . .” 65G-1.047(5), Florida Administrative Code.
>
> (3) “Third priority” crisis category: The applicant’s current care giver is in extreme duress and is no longer able to prov ide for the applicant’s health and safety because of illness, injury, or advanced age. The applicant needs immediate waiver services to remain living with the car egiver or to r elocate to an alternative living arrangem ent . . .” 65G1.047(6), Florida Administrative Code.

Ms. Congden was determ ined to be a danger to hers elf or others and in crisis under the second priority crisis category. (Exhibit A).

Even if this court determined that it was not hypothetical or conjectural that Ms. Congden may one day again live in the com munity, not enrolled on the waiver, and experience the sam e circumstances she experienced at the tim e of her crisis application, the Cris is Rule would b e available to re-enroll her on the DD Waiver. The Crisis Rule successfully enrolled Ms. Congden on the Waiver the first time, and there is no reaso n the Crisis Rule would reach a different result the second tim e, or a third tim e, if Ms. C ondgen applied for enrollm ent under the same circumstances. In sho rt, the Crisis Rule work ed exactly th e way it was design ed to work: it identified an individual who was a danger to herself or others, a nd enrolled her on the waiver to alleviate that danger.

The crisis r ule makes it im possible for Ms. Congden, or any other individual sim ilarly situated, to face the same medical, behavioral and life circumstances as Ms. Congden’s again but yet be ineligible for the DD. W aiver. Ms. Congde n’s alleged injury is th erefore not capable of repetition . She is enrolled on the DD W aiver and is receiving Medicaid services. (Exhibit A). Her claims are therefore moot.

B. Joanna Dykes and Loreta Davis w ere enrolled on the w aiver from an ICF/DD through a m echanism created by the Florida legislature and the existence of this mech anism renders it impossible that they could face the same circumstances in the future without being eligible for the Waiver.

Like Ms. Congden, Plaintiffs Dykes and Davis were both enrolled on the waiver after

the commencement of this action. The Florida Legislature, in both the 2011 and 2012 sessions, provided AHCA the authority to transfer eligible ICF/DD residents to the DD Waiver along with the appropriated funds for each transferred resident. Laws of Florida 2011-69, Specific Appropriation 206 and 2012-118, Specific Appropriation 222. The proviso language from Laws of Florida 2011-69, Specific Appropriation 206, provides as follows:

> From the funds in Specific Appropriations 206 and 207 [the ICF/DD appropriation], the Agency for Health Care Administration, in consultation with the Agency for Persons with Disabilities, is authorized to transfer funds, in accordance with the provisions of chapter 216, Florida Statutes, to Specific Appropriation 231 for the Developmental Disabilities Home and Community based waiver, Tier 1 through 3; Family Supported Living Waiver (Tier 4);and the Developmental Disabilities Individual Budget Waiver; to transition the greatest number of appropriated eligible beneficiaries from ICF/DD to community based alternatives in order to maximize the reduction in Medicaid ICF/DD occupancy. Priority for the use of these funds will be given to the planning and services areas with the greatest potential for transition success.

The 2012 Appropriations Act grants AHCA the same authority with slightly altered language for Fiscal Year 2012/2013. Laws of Florida 2012-118, Specific Appropriation 222. APD and AHCA have developed and implemented a plan to identify all waiver eligible individuals in ICF/DDs who wish to enroll on the DD Wavier and transfer them to the DD wavier by the end of fiscal year 2012/2013. So far, APD has identified a total of fourteen individuals who reside in ICF/DDs, wish to transfer to the DD Waiver and are eligible for the DD waiver. Through this program, APD has transitioned Plaintiffs Dykes and Davis, along with one other individual. The current plan is to transition the remaining identified individuals before June 30 2013. (Affidavit from Vicki Draughon, attached as Exhibit C).

Because the Legislature has provided AHCA the authority to transfer ICF/DD residents to the Waiver, and AHCA and APD have developed and implemented a plan to move all the eligible residents from the ICF/DDs to the DD Waiver, it is not possible for Plaintiffs Dykes and

Davis, nor any others similarly situated, to return to an ICF/DD and yet not be eligible to return to the waiver. Any injury associated with residing in and ICF/DD while being excluded from the DD Waiver is therefore not capable of repetition. Though AHCA and APD plan to complete the transition by the end of Fiscal Year 2012/2013, this court has indicated an unwillingness to speculate on whether the Florida Legislature will renew proviso language each year,[5] and should therefore not consider any argument or conjecture requiring an assumption that the proviso will not be renewed.

The claims of Plaintiffs Dykes and Davis should be dismissed as moot because they have both been enrolled on the DD Waiver, and the Florida Legislature intervened to permit AHCA and APD to implement a transition plan that makes it impossible for any future eligible individual to reside in an ICF/DD without access to the DD Waiver if they wish to move.

The remaining Plaintiffs are Joshua Woodward, Amanda Pivinski and Heather Young. They bring claims under the Medicaid Act, Due Process and the Americans with Disabilities Act (ADA). These claims should be rejected and will be addressed separately.

II. The Medicaid claims and Due Process claims fail because the Medicaid Act and Due Process apply only to plaintiffs eligible for Medicaid services, and there are no available vacancies on the Waiver, causing the remaining plaintiffs to be "ineligible" for Medicaid Services

Claims under the Medicaid Act are actionable only to the extent that plaintiffs are "eligible" for Medicaid services. Bryson v. Shumway, 308 F.3d 79, 88 (1st Cir. 2002), Susan J. v. Riley, 616 F. Supp. 2d 1219 (M.D. Ala. 2009). As noted by this court, plaintiffs are only eligible for services to the extent there are available "slots." (Doc. 60). Likewise, this court also noted that the Due Process claims turn on whether there are available "slots." (Doc. 60). As explained above, in the language of the DD waiver, plaintiffs are only eligible for the Waiver to

[5] Lee v. Dudek, Case 4:08-cv-00026-RH-WCS (N.D. Florida 2012)

the extent there are "vacancies" on the DD Waiver. The number of vacancies is determined by an analysis of the available funds and the needs of a particular applicant pool at a particular time. (See pages 4-6 above and Appendix B-3, Section f. of any of the DD Waivers, attached as Exhibit J).

Attached as Exhibit E is an affidavit from Marta Hardy, APD Deputy Director for Administration, in which she affirms that APD does not currently have any vacancies on the Waiver except for those individuals found to be in crisis, for foster children turning eighteen (18) years old, and for those individuals ordered to the waiver by the courts. Because none of the plaintiffs have demonstrated, nor alleged, that they fall into one of those three categories, they are not "eligible" for the DD Waiver. Since the Medicaid Act applies only insofar as a plaintiff is eligible for Medicaid services, and the current plaintiffs are not eligible for Medicaid services, the Medicaid Act does not apply and their Medicaid Act claims should be denied.

Under the same eligibility analysis, the Due Process claims must also fail. However, although the Due Process claims fail, APD nevertheless provides all applicants placed on the waitlist notice of their right to a Medicaid Fair Hearing and a hearing under Chapter 120, Florida Statutes, to challenge their placement on the waitlist. (See Affidavit of Terri McGarrity, attached as Exhibit A). Furthermore, all waitlisted individuals may request a reconsideration of their waitlist priority category at any time, regardless whether APD has taken any new State action. Rule 65G-11.003(3) Florida Administrative Code.

III. The ADA Claims of the Community Plaintiffs fail because the Crisis Rule makes it impossible for an individual to be "at risk of institutionalization" but not be in crisis as determined by the Crisis Rule

Some courts have allowed Olmstead claims to proceed by plaintiffs residing in the community if they can show they are "at risk of institutionalization." See Fisher v. Oklahoma

Health Care Auth., 335 F. 3d 1175 (10th Cir. 2003) and Cruz v. Dudek , 2010 WL 428595 (S.D. Fla. 2010) (Here the issue was raised in the context of preliminary injunction). Florida's Crisis Rule, however, distinguishes the facts of this case from the other cases that have adopted this doctrine. For the community plaintiffs and others similarly situated, it is not possible for them to become "at risk of institutionalization" without at the same time becoming eligible for enrollment on the DD Waiver through the Crisis Rule.

As mentioned above, the Crisis Rule permits enrollment on the DD Waiver for any applicant determined to be homeless, a danger to oneself or others, or have a caregiver that is no longer able to maintain the applicant's health or safety, and the Rule provides a laundry list of "indicia" for the agency to consider when making this determination. Furthermore, applicants denied crisis enrollment are afforded a Fair Hearing under the Medicaid Act and Chapter 120, Florida Statutes, wherein a neutral hearing officer determines findings of fact and conclusions of law based on the "indicia." The list of "indicia" in the Crisis Rule is so vast it bears quoting in full. Subsections (4), (5) and (6) of Rule 65G-1.047, Florida Administrative Code, are reprinted in full here:

> (4) "First priority" crisis category: The applicant is currently homeless, living in a homeless shelter, or living with relatives in an unsafe environment. In such cases, the following indicia, supported by credible evidence, are relevant to a crisis determination in this category:
> (a) Without immediate provision of waiver services, the health and safety of the applicant are at risk;
> (b) The applicant has no shelter available and needs emergency placement by the Agency or another state agency;
> (c) Alternative funding is not available for other placement and services to the applicant;
> (d) The applicant temporarily is staying with friends or relatives but residence is not expected to last more than several weeks;
> (e) The applicant's caregiver has no legal obligation to provide shelter to the applicant and the caregiver's commitment to shelter the applicant is low;
> (f) Factors affecting the applicant's safety in the current setting include risk of physical abuse of the applicant or risk of insufficient supervision and support;

(g) The home has insufficient room to shelter the applicant, or the applicant must share a room in an inappropriate living arrangement, based on the ages, genders, and conditions of the persons sharing the room;

(h) The applicant's desire for placement creates a reasonable expectation that the applicant will be cooperative with placement;

(i) Violence or illegal activities within the applicant's current living environment by the applicant or others has required the intervention of local or state law enforcement authorities;

(j) Complaints of neglect, exploitation, or abuse of the applicant to Protective Services, or other adverse environmental conditions affecting the applicant, have been investigated and confirmed pursuant to Chapter 39, Part II, or Section 415.104, F.S.;

(k) The applicant requires services of greater intensity.

(5) "Second priority" crisis category: The applicant exhibits behaviors that, without provision of immediate waiver services, may create a life-threatening situation for the applicant or others, or that may result in bodily harm to the applicant or others requiring emergency medical care from a physician. In such cases, the following indicia supported by credible evidence are relevant to a determination of crisis under this category:

(a) Without immediate waiver services, the health and safety of the applicant or others in the household is at risk;

(b) The applicant's injury to self or others is frequent or intense;

(c) The applicant or others are at risk for serious injury or permanent damage;

(d) There is documentation of medical treatment for the applicant's injury to self or others;

(e) No other supports are available to address the applicant's behaviors;

(f) Other attempted behavioral assessments and interventions have proven ineffective;

(g) The relative ages, sexes, and sizes of the aggressor and the subjects of aggression place the subjects of aggression at risk of injury;

(h) The caregiver has insufficient ability to control the applicant;

(i) The ages or disabilities of the applicant or caregiver exacerbate the problems;

(j) Violence or illegal activity within the applicant's current living environment by the applicant or others has required the intervention of local or state law enforcement authorities;

(k) Complaints of neglect, exploitation, or abuse of the applicant, or other adverse environmental conditions affecting the applicant have been investigated by Protective Services and confirmed pursuant to Chapter 39, Part II, or Section 415.104, F.S.;

(l) The applicant requires services of greater intensity.

(6) "Third priority" crisis category: The applicant's current caregiver is in extreme duress and is no longer able to provide for the applicant's health and safety because of illness, injury, or advanced age. The applicant needs immediate waiver services to remain living with the caregiver or to relocate to an alternative

> living arrangement. In such cases, the following indicia, supported by credible evidence, are relevant to a determination of crisis in this category:
>
> (a) Without immediate provision of waiver services, the applicant's health and safety are at imminent risk;
>
> (b) Other potential caregivers, such as another parent, stepparent, brother, sister or other relative or person, are unavailable or are unwilling or unable to provide care;
>
> (c) The caregiver's physical or mental condition prevents the provision of adequate care;
>
> (d) The caregiver is deceased, about to expire, or permanently disabled;
>
> (e) The caregiver's age impairs the caregiver's ability to provide sufficient care to the applicant;
>
> (f) The caregiver cannot provide sufficient care because of the age or size of the applicant, or the physical, functional, or behavioral demands of the applicant;
>
> (g) The services provided by the caregiver are limited in amount, duration, or frequency, rendering the applicant semi-dependent or totally dependent;
>
> (h) The caregiver's economic situation is unstable and unlikely to improve as a result of the care-giving demands of the applicant;
>
> (i) The caregiver's obligations to the needs of other dependents prevent the caregiver from providing the applicant with adequate care, or the caregiver's obligation of care to the applicant places other dependents at risk of insufficient care;
>
> (j) Violence or illegal activities within the applicant's current living environment by the applicant or others has required intervention by local or state law enforcement authorities;
>
> (k) Complaints of neglect, exploitation, or abuse of the applicant, or other adverse environmental conditions affecting the applicant have been investigated by Protective Services and confirmed pursuant to Chapter 39, Part II, or Section 415.104, F.S.;
>
> (l) The individual requires services of greater intensity.

Not only do the indicia cover any situation leading to a "risk of institutionalization," they reach a much broader class of applicants for enrollment than would a mere risk assessment for institutionalization. At any rate, the Community Plaintiffs have not demonstrated, nor have they alleged, that they are currently in a living situation that puts them at a risk of institutionalization yet would not permit them to enroll on the waiver via the Crisis Rule. The community plaintiffs

cannot make such an allegation because they have not applied for enrollment on the waiver through the Crisis Rule,[6] at least not yet.

The Community Plaintiffs' answers to interrogatories indicate they are not currently at risk of institutionalization but plan to apply for crisis enrollment in the future if they become at such a risk, which is exactly the type of situation the Crisis Rule is designed to address, as it did in the case of Plaintiff Michelle Congden described above. Each Community Plaintiff's answers to interrogatories will be addressed in turn.

First, Plaintiff Amanda Pivinski has never applied for crisis enrollment.[7] In one answer she listed a number of events that have occurred since January 1, 2010 that have reduced the ability of her caregivers to care for her.[8] When asked when she expects her caregivers to no longer be able or willing to care for her, she replied, "I don't know."[9] When asked whether her caregivers intended to have Plaintiff reside in an institution before November 1, 2011, she answered, "No."[10] However, when asked whether she intends to apply for crisis enrollment if her caregivers are no longer available or are expected to be unavailable, she answered "yes."[11]

Plaintiff Joshua Woodward offered similar answers. First, he never applied for crisis enrollment.[12] He also provided a number of events occurring since January 1, 2010 that have reduced the ability of his caregivers to care for him, all of which were medical events.[13] When asked to describe each event expected to occur before December 31, 2012 that would reduce his

[6] See answers to Interrogatories for both Amanda Pivinski and Joshua Woodward, Exhibits F and G.
[7] Answer to Interrogatory 3, Exhibit F.
[8] Answer to Interrogatory 12, Exhibit F.
[9] Answer to Interrogatory 14, Exhibit F.
[10] Answer to Interrogatory 16, Exhibit F.
[11] Answer to Interrogatory 15, Exhibit F.
[12] Answer to Interrogatory 3, Exhibit G.
[13] Answer to Interrogatory 10, Exhibit G.

natural or community supports, he provided a number of expected medical events and a loss of income.[14] He further asserted that the poor health of one of his caregivers caused him to not have a caregiver currently available to him.[15] But when asked to indicate when he expects his caregivers to be unavailable to continue providing care to him, he answered, "Unknown."[16] When asked to indicate whether he or his caregivers intended to have him reside in an institution prior to November 1, 2011, he answered, "Not at this time."[17] When asked to indicate whether he or his caregivers intended to have him reside in an institution prior to March 1, 2012, he answered, "Not at this time."[18] However, when asked whether he intends to apply for crisis enrollment if his caregivers are no longer available or are expected to be unavailable, he answered "yes."[19]

As summarized above, both Community Plaintiffs indicated that their most likely path to a risk of institutionalization is the future inability of their caregivers to care for them. Also, neither they nor their caregivers have any intention of placing them in an institution in the near future. Rather, both Plaintiffs intend to apply for crisis enrollment in the event that the caregivers are no longer able to care for them, thus avoiding institutionalization.

Not only are the Crisis Rule's indicia of crisis at least coexstensive with any risk assessment for institutionalization, if not broader, the Community Plaintiffs themselves have indicated they intend to use the Crisis Rule in the future for just such a purpose, that is, to avoid institutionalization.

[14] Answer to Interrogatory 11, Exhibit G.
[15] Answer to Interrogatory 12, Exhibit G.
[16] Answer to Interrogatory 13, Exhibit G.
[17] Answer to Interrogatory 15, Exhibit G.
[18] Answer to Interrogatory 16, Exhibit G.
[19] Answer to Interrogatory 14, Exhibit G

The facts of the Community Plaintiffs combined with the existence of the Crisis Rule clearly distinguish the case at bar from other cases allowing plaintiffs in the community to bring an Olmstead claim. In Cruz, at 13, the court described the plaintiffs' risk of institutionalization this way:

> In the case at bar, it is clear that Plaintiffs are at risk of institutionalization if they do not receive the services available under the TBI/SCI Waiver Program. Both Plaintiffs in the case at bar are individuals with disabilities who are eligible to and do receive services from Florida's Medicaid program. Each Plaintiff desires to and is able to live in their own home with adequate support services. However, because of the way Florida administers its Medicaid program, they are at risk of institutionalization. Plaintiff De La Torre has recently lost his caregiver, and without additional community-based services from Florida's Medicaid plan, he will have to enter a nursing home to receive the services he needs to survive. Plaintiff Cruz is also at risk of institutionalization, as demonstrated by his repeated hospitalizations in recent months due to the fact that he does not receive adequate services from Florida's Medicaid plan.

If Plaintiff De La Torre in Cruz had been on the waitlist for the DD Waiver, he would not have been at risk of institutionalization because the Crisis Rule permits enrollment on the waiver of individuals who have "recently lost a caregiver," as allowed by the Third Priority crisis category. 65G-1.047(6), Florida Administrative Code. Likewise, if Plaintiff Cruz had been on the DD Waiver waitlist, his repeated hospital visits caused by not receiving adequate service would not have put him at risk of institutionalization because one of the idicia for every crisis category is whether "the individual requires services of greater intensity." 65G-1.047(4)-(6), Florida Administrative Code.

In summation for the Community Plaintiffs, they cannot be considered at risk of institutionalization for three reasons:

First, a mere reading of the Crisis Rule indicates it is at least co extensive with any risk analysis for institutionalization, and Denise Arnold, Deputy Director of Programs, has provided

an Affidavit affirming that APD has never failed to provide services to, or assist with acquiring services for, an applicant determined to be in Crisis in accordance with the Crisis Rule. (Exhibit D). If the crisis rule is coextensive with the risk assessment, then it is not possible for someone to be at risk of institutionalization and yet be ineligible for waiver enrollment.

Second, the Community Plaintiffs themselves indicate they intend to use the Crisis Rule in the future in exactly this fashion, that is, to avoid institutionalization if the circumstances so require.

Third, at least in the few applicable cases in the District Courts of the Eleventh Circuit, the doctrine allowing plaintiffs in the community to bring Olmstead claims has only been applied in fact situations distinguishable from the case at bar, because the DD Waiver allows enrollment through the Crisis Rule, while the other waivers did not.

Because the Community Plaintiffs cannot be considered at risk of institutionalization, their Olmstead claims must fail.

IV. The ADA Claim of Heather Young fails because her exclusion from the DD Waiver is not the cause of her institutionalization.

Plaintiff Heather Young resides in a nursing facility. Amended Complaint, ¶ 43. She alleges that, because she does not qualify for crisis enrollment onto the DD Waiver, "she will remain segregated in the nursing facility, never realizing the benefit of community services and the integration mandate of the ADA." Id., ¶ 48. This is not the case. While Plaintiff Young is currently institutionalized, she is not institutionalized for lack of DD Waiver services, as there are other community-based options available to her. As such, Plaintiff Young's institutionalization is not a violation of the ADA.

In addition to the DD Waiver, which is tied to the level of care for admission to an ICF/DD, Florida's Medicaid program includes several home and community-based waiver programs which are designed to meet the needs of eligible recipients who require a nursing facility level of care. Among these is the Aged and Disabled Adult Waiver program ("A/DA Waiver"), which is administered by the Department of Children and Families for recipients aged 18 to 59 years old. The A/DA Waiver "provides home and community-based services to eligible recipients who, but for the provision of these services, would require nursing facility placement." Florida Medicaid Aged and Disabled Adult Waiver Service Coverage and Limitations Handbook ("A/DA Handbook"), at 1-2, incorporated by reference in Rule 59G-13.030, Florida Administrative Code. The purpose of the A/DA Waiver is "to promote, maintain, and restore the health of eligible elders and adults with disabilities and to minimize the effects of illness and disabilities in order to delay or prevent institutionalization." Id.[20]

Pursuant to a legislative budget proviso, AHCA has the authority to transfer funds from the Medicaid nursing home line item appropriation to the several home and community-based waivers which are based upon a nursing facility level of care, including the A/DA Waiver, "to transition the greatest number of appropriate eligible beneficiaries from skilled nursing facilities

[20] The services available in the A/DA Waiver are: Adult Companion Services, Adult Day Health Care Services, Attendant Care Services, Caregiver Training and Support – Individual or Group, Case Aide, Case Management, Chore Services, Chore Services–Enhanced, Consumable Medical Supplies and Consumable Medical Supplies–Enhanced, Counseling Services, Emergency Alert Response System–Installation and Maintenance, Escort Services, Financial Assessment and Maintenance Risk Reduction Services, Home Delivered Meals, Home Modification Services, Home Manager and Homemaker Services, Nutritional Risk Reduction Services, Occupational Therapy Services, Personal Care Services, Pest Control Services–Initial Visit and Maintenance, Physical Risk Reduction Services, Physical Therapy Services, Rehabilitation Engineering Evaluation Services, Respiratory Therapy Services–Evaluation and Treatment, Respite Services–In-Home and Facility-Based, Skilled Nursing Services, Specialized Medical Equipment and Supplies, and Speech-Language Pathology Therapy Services. See A/DA Handbook, at 2-17 – 2-18.

to community-based alternatives in order to maximize the reduction in Medicaid nursing home occupancy." Chapter 2011-69, Laws of Florida, Specific Appropriation 208. As Judge Hinkle found in Lee v. Dudek, Case 4:08-cv-00026-RH- WCS (N.D. Florida 2012) this "proviso's practical effect [is] to make unlimited funds available for transition." (D.E. 372, at 10). There is thus no budgetary or financial barrier to transitioning a nursing home resident to the A/DA Waiver.[21]

Heather Young meets the eligibility requirements for the A/DA Waiver. See A/DA Handbook, at 2-2 – 2-3. Heather Young meets the criteria to be determined disabled by the Social Security Administration. Given that she resides in a nursing home, she meets nursing facility level of care. As such, she meets the eligibility requirements for the A/DA Waiver. See A/DA Handbook, at 2-2 – 2-3. Thus, she could transition from the nursing facility in which she currently resides to a community setting and receive services through the A/DA Waiver.

Plaintiff Young has not transitioned to the A/DA Waiver because she wishes to receive services through the DD Waiver in a group home facility licensed under Chapter 393, Florida Statutes.[22] Plaintiff Young is entitled to her preferences, but the lack of DD Waiver services is not causing her to be institutionalized in a nursing home. While the DD Waiver may provide some services that are not available in the A/DA Waiver, such as behavioral health services, these are services that are *also* not available in nursing facilities. Indeed, in her response to Defendants' First Set of Interrogatories, attached as Exhibit H, Plaintiff Young admitted that as of September 9, 2011, she was not receiving any behavioral health services in the nursing home. See Exhibit H, Answer No. 14. If Plaintiff Young is not receiving in the nursing home those

[21] The proviso language was renewed in the budget for the 2012-2013 fiscal year .See Laws of Florida 2012-118, Specific Appropriation 224.
[22] While the DD Waiver is available in a group home facility, the A/DA Waiver is not.

additional services which are available in the DD Waiver but not in the A/DA Waiver, the lack of the DD Waiver cannot be the reason she is institutionalized. Her nursing home institutionalization is thus irrelevant for the purposes of her ADA allegations. Only if she were forced *out of* the nursing home and *into* an ICF/DD – or at least was put in significant risk of being so forced – would the lack of the DD Waiver services constitute the *cause* of her institutionalization. Lacking ICF/DD institutionalization or significant risk of the same, Plaintiff Young has no valid ADA claim of unjustified institutionalization here. She has pled neither.

V. Conclusion

For the foregoing reasons, the Defendants respectfully request that this court order summary judgment in favor of the Defendants.

Respectfully submitted this 2nd day of May 2012.

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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 2nd day of May 2012.

/s/ Marc Ito

Marc Ito