

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

CLINTON L., by his guardian and next)
friend CLINTON L., SR.; TIMOTHY B.,)
by his guardian and next friend ROSE B.;)
VERNON W., by his guardian and next)
friend VERNON D.W.; STEVEN C.;)
JASON A., by his guardian and next friend)
BRENDA ARTHUR; and DIANE D.,)
by her guardian and next friend)
THOMAS SMITH,)

Plaintiffs,)

v.)

1:10CV123

LANIER CANSLER, in his official)
capacity as Secretary of the Department)
of Health and Human Services, and)
DAN COUGHLIN, in his official)
capacity as CEO and Area Director)
of Piedmont Behavioral Healthcare)
Local Management Entity,)

Defendants.)

ORDER

This matter is before the Court on Defendants' Motion to Dismiss [Doc. #44] and Motion to Stay Discovery [Doc. #49] and Plaintiffs' Motion for a Status Conference [Doc. #54] and Motion for Appointment of a Special Master [Doc. #56]. For the reasons set forth below, Defendants' Motion to Dismiss will be denied, and Defendants' Motion to Stay Discovery will be denied as moot. Plaintiffs' Motion for Status Conference will be granted to the extent that this matter has been scheduled for a status conference on June 21, 2011 at 9:30 a.m., and Plaintiffs may raise their contentions at that hearing. Finally, Plaintiffs' Motion for Appointment of Special Master will be denied.

I. FACTUAL BACKGROUND¹

Plaintiffs Clinton L., Timothy B., Vernon W., Steven C., Jason A., and Diane D. suffer from a variety of disabling conditions, including dual diagnoses of mental retardation and mental illness. They receive health care and other services through North Carolina's Department of Health and Human Services Division of Mental Health, Developmental Disabilities, and Substance Abuse Services. The health care and other services are administered and managed by Piedmont Behavioral Healthcare ("PBH"), which is the Local Management Entity for Cabarrus, Davidson, Rowan, Stanly and Union Counties. One type of service administered by PBH is the "Supervised Living" service, which is a residential service that includes room and support care for individuals who need 24-hour supervision and for whom care in a more intensive treatment setting is considered unnecessary on a daily basis. The Plaintiffs in this case previously received Supervised Living services that allowed them to live alone with 24-hour care and supervision. Thus, although Plaintiffs lived alone, they had a staff person with them in their home 24 hours a day. However, as a result of state budget cuts, PBH announced on January 11, 2010 that it was changing the rates that it would pay to providers for Supervised Living services for 1-person and 2-person placements (that is, placements where individuals lived on their own or with one other person with 24-hour staff supervision). Under this change, PBH reduced the rates for 1- or 2-person placements down to \$116.15 per day, which was the rate for 3-person placements (that is, placements in an apartment or residence where an individual lives with two

¹ This Factual Background was previously set out in the Court's Order granting a preliminary injunction in this case, but is restated here to provide background information as part of the present Order.

other people with 24-hour staff supervision). This change only affected the state-funded portion of what PBH coordinates; it did not relate to the Medicaid funding for Supervised Living, which PBH administers as the “Innovations Waiver” program.

Plaintiffs brought the present suit against Defendant Dan Coughlin in his official capacity as CEO and Area Director of PBH (referred to as “Defendant PBH” or “PBH” for ease of reference) and against Defendant Lanier Cansler in his official capacity as the Secretary of the North Carolina Department of Health and Human Services. Plaintiffs contend that due to the reduction in the reimbursement rates for the state funding, they are being “forced into congregate living environments that have already been found to be inappropriate for their care” and that when the congregate placements fail, “Plaintiffs will face forced institutionalization.” Plaintiffs have asserted claims under both the Americans with Disabilities Act (“ADA”) and the Rehabilitation Act.² Under Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 119 S. Ct. 2176, 144 L. Ed. 2d 540 (1999), unnecessary institutionalization of individuals is a form of discrimination under the ADA, and persons must be served in the community when (1) the state determines that community-based treatment is appropriate; (2) the individual does not oppose community placement; and (3) community placement can be reasonably accommodated. Title II of the ADA 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.” 42 U.S.C.

² Plaintiffs do not assert any Constitutional claims in this case, and instead assert only statutory claims under the ADA and the Rehabilitation Act.

§ 12132. Regulations implementing Title II of the ADA require that a public entity administer its services, programs and activities in “the most integrated setting appropriate” to the needs of qualified individuals with disabilities. 28 C.F.R. § 35.130(d). The Rehabilitation Act imposes similar obligations on recipients of federal financial assistance. 29 U.S.C. § 794; 28 C.F.R. § 41.51(d).

Defendants have filed a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6), contending that this Court lacks subject matter jurisdiction over these claims and that Plaintiffs have failed to state a claim upon which relief can be granted. The Court will consider these contentions in turn.

II. MOTION TO DISMISS PURSUANT TO RULE 12(b)(1) FOR LACK OF SUBJECT MATTER JURISDICTION

A. Legal Standards

Defendants first bring their Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. In evaluating a Motion to Dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), “when a defendant asserts that the complaint fails to allege sufficient facts to support subject matter jurisdiction, the trial court must apply a standard patterned on Rule 12(b)(6) and assume the truthfulness of the facts alleged. On the other hand, when the defendant challenges the veracity of the facts underpinning subject matter jurisdiction, the trial court may go beyond the complaint, conduct evidentiary proceedings, and resolve the disputed jurisdictional facts. And when the jurisdictional facts are inextricably intertwined with those central to the merits, the court should resolve the relevant factual disputes only after appropriate discovery, unless the

jurisdictional allegations are clearly immaterial or wholly unsubstantial and frivolous.” Kerns v. U.S., 585 F.3d 187, 193 (4th Cir. 2009).

In the present case, Defendants contend that this Court lacks subject matter jurisdiction because there is no risk of institutionalization to any of the Plaintiffs as a result of the rate cuts, and that as such, Plaintiffs lack standing and the case is not ripe. In this regard, the Court notes that under Article III of the Constitution, this Court only has jurisdiction over actual “cases” or “controversies.” See City of Los Angeles v. Lyons, 461 U.S. 95, 101, 103 S. Ct. 1660, 1665, 75 L. Ed. 2d 675 (1983). As part of this “case or controversy” requirement, “Plaintiffs must demonstrate a personal stake in the outcome,” often referred to as “standing.” Id. “To meet the constitutional minimum for standing, a plaintiff must allege personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief. This formula includes three elements: (1) injury in fact; (2) traceability; and (3) redressability. The injury in fact prong requires that a plaintiff suffer an invasion of a legally protected interest which is concrete and particularized, as well as actual or imminent. The traceability prong means it must be likely that the injury was caused by the conduct complained of and not by the independent action of some third party not before the court. Finally, the redressability prong entails that it must be likely, and not merely speculative, that a favorable decision will remedy the injury.” Friends of the Earth, Inc. v. Gaston Cooper Recycling Corp., 204 F.3d 149, 154 (4th Cir. 2000) (internal quotations and citations omitted). With respect to the “injury in fact” requirement, the Fourth Circuit has noted that “[t]he Supreme Court has consistently recognized that threatened rather than actual injury can satisfy Article III standing requirements,” and

“[t]hreats or increased risk thus constitutes cognizable harm.” Id. at 160; cf. Lyons, 461 U.S. at 101-02, 103 S. Ct. at 1665 (holding that a plaintiff seeking declaratory or injunctive relief must show present harm or a likelihood of future harm). “If the plaintiff can show that his claim to relief is free from excessive abstraction, undue attenuation, and unbridled speculation, the Constitution places no further barriers between the plaintiff and an adjudication of his rights.” Friends of the Earth, 204 F.3d at 155.

In addition to establishing standing, Plaintiffs must also establish that the claims asserted in their Complaint are “ripe.” Typically, questions of ripeness arise when plaintiffs attempt to challenge a statute or regulation that they have not been prosecuted for violating, and “[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.” Texas v. U.S., 523 U.S. 296, 300, 118 S. Ct. 1257, 1259, 140 L. Ed. 2d 406 (1998) (internal quotations omitted). “Ripeness ‘requires us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.’” Id. at 300-01, 118 S. Ct. at 1260 (citing Abbott Laboratories v. Gardner, 387 U.S. 136, 148, 87 S. Ct. 1507, 1515, 18 L. Ed. 2d 681 (1967)). The rationale of the ripeness requirement is “to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements,” and to ensure an adequate record to allow for effective judicial review. Abbott Laboratories v. Gardner, 387 U.S. 136, 148, 87 S. Ct. 1507, 1515, 18 L. Ed. 2d 681 (1967).

B. Application in the Present Case

In this case, Plaintiffs have alleged that Defendants violated the ADA by imposing rate

cuts that “forced [Plaintiffs] into congregate living environments that have already been found to be inappropriate for their care.” Plaintiffs further allege that when the congregate placements fail, “Plaintiffs will face forced institutionalization” in violation of the ADA. In their Motion to Dismiss for lack of subject matter jurisdiction, Defendants contest these allegations, essentially arguing that the allegations are not true, and that Plaintiffs do not, in fact, face a risk of institutionalization in the circumstances. Because Defendants challenge the veracity of Plaintiffs’ allegations as part of the Motion to Dismiss for lack of subject matter jurisdiction, the Court may go beyond the Complaint in considering the jurisdictional issues, based on the framework set out in Kerns, as noted above. See Kerns v. U.S., 585 F.3d at 193; see also Benham v. City of Charlotte, 635 F.3d 129, 136 n.5 (4th Cir. 2011) (noting that the Kerns framework would apply in evaluating potential standing issues). However, in this case, the dispute over the potential risk of institutionalization is inextricably intertwined with the underlying claims of illegal forced institutionalization in violation of the ADA. Under Kerns, this Court therefore may “resolve the relevant factual disputes only after appropriate discovery, unless the jurisdictional allegations are clearly immaterial or wholly unsubstantial and frivolous.” Kerns v. U.S., 585 F.3d at 193 (noting that “when the jurisdictional facts and the facts central to a tort claim are inextricably intertwined, the trial court should ordinarily assume jurisdiction and proceed to the intertwined merits issues, [and] . . . a trial court should dismiss under Rule 12(b)(1) only when the jurisdictional allegations are ‘clearly . . . immaterial, made solely for the purpose of obtaining jurisdiction or where such a claim is wholly unsubstantial and frivolous.’” (quoting Bell v. Hood, 327 U.S. 678, 682-83, 66 S. Ct. 773, 776, 90 L. Ed. 939 (1946))).

Therefore, the Court will only dismiss the case at this stage for lack of subject matter jurisdiction if the jurisdictional allegations are “clearly immaterial or wholly unsubstantial and frivolous.”

Here, the Court concludes that Plaintiffs’ jurisdictional allegations are not clearly immaterial or wholly unsubstantial or frivolous. In this regard, although Defendants contend that Plaintiffs have not suffered any “injury in fact,” and that the case is not “ripe,” the Court concludes that Plaintiffs have made material, non-frivolous allegations that they are suffering immediate injury from Defendants’ conduct, which allegedly resulted in congregate placements with an expected result of forced institutionalization. To the extent that Defendants contend that these allegations are “rank speculation,” Plaintiffs have presented evidence to support these allegations, including evidence that indicates that each of the Plaintiffs has previously been institutionalized when their community placements failed, and all of them face a current risk of institutionalization should their present community placements fail. Some of that evidence was presented as part of the previous hearing in this case on Plaintiffs’ Motion for Preliminary Injunction, and following that hearing, the Court concluded that Plaintiffs had established a likelihood of success on their claim that institutionalization of Plaintiffs would violate the ADA. Thus, this Court has already agreed that Plaintiffs could establish a sufficient risk of institutionalization to warrant issuance of a preliminary injunction in this matter. In addition, Plaintiffs have now presented additional evidence in support of their allegation that they have already been and continue to be directly impacted by the funding cuts, including evidence regarding their moves to new congregate placements. Indeed, Plaintiffs contend in their Response that at least one of the Plaintiffs has required crisis respite care and several of the

Plaintiffs have had more violent outbursts as a result of their forced moves into more congregate placements, resulting in some instances in the involvement of law enforcement officers. Any remaining question as to whether that injury is sufficiently likely to lead to their institutionalization in violation of the ADA is part of the ultimate determination on the merits, and is not appropriately resolved on a motion to dismiss for lack of subject matter jurisdiction prior to discovery.

Finally, the Court notes to the extent that Defendants have presented affidavits, medical records, and expert opinions and conclusions in support of their position, Plaintiffs contend that discovery is required to enable them to adequately respond to these substantive allegations and conclusions. As noted above, where these evidentiary disputes related to jurisdictional issues are intertwined with the underlying substantive claims, the appropriate course under the Fourth Circuit's decision in Kerns is to allow discovery to proceed and then consider these issues on a full record at summary judgment. In these circumstances, the Court concludes that Plaintiffs' jurisdictional allegations are not "clearly immaterial or wholly unsubstantial and frivolous" in alleging an "injury in fact" for purposes of establishing standing and a sufficiently concrete and present injury for purposes of establishing ripeness. Any further analysis of Defendants' contentions must be made after an appropriate period of discovery. Therefore, Defendants' Motion to Dismiss pursuant to Rule 12(b)(1) will be denied.

III. MOTION TO DISMISS PURSUANT TO RULE 12(b)(6) FOR FAILURE TO STATE A CLAIM

Defendants have also asserted a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), contending that Plaintiffs have failed to state a claim upon which relief can

be granted. In reviewing a Motion to Dismiss for failure to state a claim pursuant to Rule 12(b)(6), the Fourth Circuit has directed that “we ‘take the facts in the light most favorable to the plaintiff,’ but ‘we need not accept the legal conclusions drawn from the facts,’ and ‘we need not accept as true unwarranted inferences, unreasonable conclusions, or arguments.’” Giarratano v. Johnson, 521 F.3d 298, 302 (4th Cir. 2008) (quoting Eastern Shore Mkts., Inc. v. J.D. Assocs. Ltd. P’ship, 213 F.3d 175, 180 (4th Cir. 2000)). “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974, 167 L. Ed. 2d 929 (2007)).

In this case, the Court already considered similar contentions as part of the request for a Preliminary Injunction. In considering that Motion for Preliminary Injunction, the Court noted that two separate issues have been raised in this case: (1) a challenge to rate cuts that will force Plaintiffs into “congregate living environments that have already been found to be inappropriate for their care” and (2) a challenge that as a result of the rate cuts and change in services, Plaintiffs will ultimately face forced institutionalization. In ruling on the Motion for Preliminary Injunction, the Court noted that the first issue was related to Plaintiffs’ opposition to a reduction in services and opposition to moving into a different type of community-based placement, while the second issue was related to the allegation that PBH’s actions would ultimately result in institutionalization of Plaintiffs. On the first issue, the Court noted that Plaintiffs had not pointed to any authority that would support the conclusion that they were

entitled to a particular provider or type of community-based placement under the ADA. However, as to the second issue, the Court concluded that Plaintiffs had established a likelihood of success on their claim that institutionalization of Plaintiffs would violate the ADA. Defendants have presented no basis to change that conclusion, other than to contend that Plaintiffs do not face any risk of institutionalization as a factual matter. However, as discussed above, Plaintiffs have alleged, at this stage in the case, that they face institutionalization as a result of Defendants' actions, and those contentions are not implausible under that standards set out above. Further analysis of these competing factual contentions may only come as part of a summary judgment determination after Plaintiffs have been provided an opportunity for discovery. Therefore, Defendants' Motion to Dismiss pursuant to Rule 12(b)(6) will be denied.

IV. REMAINING MOTIONS

In addition to filing the Motion to Dismiss, Defendants also moved to stay discovery pending the Court's ruling on the Motion to Dismiss. Having concluded that the Motion to Dismiss should be denied, the Court concludes that the Motion to Stay Discovery [Doc. #49] is now moot and will be denied. As such, discovery in this case may now proceed.

For their part, Plaintiffs have filed a Motion for Status Conference and Motion for Appointment of a Special Master. With respect to the Motion for a Status Conference [Doc. #54], Plaintiffs contend that a status conference is necessary to determine whether Defendants are in compliance with the Preliminary Injunction entered by the Court in this case. The Preliminary Injunction entered by the Court required that Defendant Coughlin, as CEO and Area Director of the PBH Local Management Entity, ensure that each Plaintiff was provided

with a clinically-appropriate community-based placement option, as an alternative to institutionalization, during the pendency of this suit. Plaintiffs now contend that Defendants have implemented additional reductions in Plaintiffs' plans of care, resulting in temporary institutionalization for two of the Plaintiffs and a substantial increase in the risk of institutionalization for each of them. In considering this matter, the Court notes that a status conference in this case has been scheduled for June 21, 2011 at 9:30 a.m. Therefore, Plaintiffs' Motion for Status Conference will be granted, and any concerns regarding Defendant Coughlin's compliance with the Preliminary Injunction may be raised at the status conference.

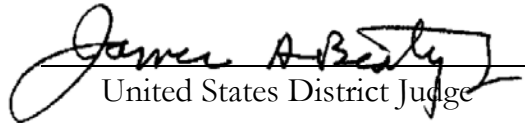
Finally, Plaintiffs have also filed a Motion for Appointment of Special Master [Doc. #56], requesting that the Court appoint a Special Master to review Plaintiffs' plans of care to ensure that the plans are clinically appropriate and sufficient to maintain Plaintiffs' community placements as an alternative to institutionalization. Under Federal Rule of Civil Procedure 53, a reference to a Special Master to recommend findings of fact is appropriate if the appointment is warranted by "some exceptional condition." In addition, under Rule 53, the Court may appoint a Special Master to "address pretrial and post trial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district." Finally, the Court also has inherent authority to appoint a special master for the purpose of enforcing a judicial decree. However, having considered Plaintiffs' request, the Court concludes that it does not appear that appointment of a Special Master is necessary or appropriate in this case at this time. There are no "exceptional conditions," nor any pretrial matters that cannot be addressed by this Court. It also does not appear that a Special Master is necessary for enforcement of this

Court's Orders at this time. Plaintiffs are free to retain their own expert to review the plans of care, without requiring reference to a Special Master. Plaintiffs' Motion for Appointment of a Special Master will therefore be denied.

V. CONCLUSION

For the reasons set forth above, IT IS ORDERED that Defendants' Motion to Dismiss [Doc. #44] is DENIED, and Defendants' Motion to Stay Discovery [Doc. #49] is DENIED as moot. IT IS FURTHER ORDERED that Plaintiffs' Motion for Status Conference [Doc. #54] is GRANTED to the extent that this case has been scheduled for a status conference on June 21, 2011, at 9:30 a.m. FINALLY, IT IS ORDERED that Plaintiffs' Motion for Appointment of a Special Master [Doc. #56] is DENIED.

This, the 15th day of June, 2011.


United States District Judge