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

CLINTON L., et al., Plaintiffs, v. RICK BRAJER[1], in his official capacity as Secretary of the Department of Health and Human Services, and PAMELA SHIPMAN, in her official capacity as CEO and Area Director of the Piedmont Behavioral Healthcare Local Management Entity, Defendants.	)	1:10CV123

MEMORANDUM ORDER

Following this Court's Memorandum Opinion and Judgment filed on August 28, 2014 (Docs. #161, 162), Plaintiffs moved pursuant to Rule 59(e) of the Federal Rules of Civil Procedure for an Order altering or amending the Judgment (Doc. #163). Plaintiffs argue that the Court committed clear errors of law and also request that the Court direct the parties to bear their own costs. For the reasons stated below, Plaintiffs' Motion to Alter or Amend Judgment is DENIED.

I.

First, Plaintiffs argue that the Court committed a clear error of law when it "modified the standard" from Pashby v. Delia, 709 F.3d 307 (4th Cir. 2013),

[1] Secretary of the North Carolina Department of Health and Human Services Rick Brajer is substituted for Aldona Wos, the Secretary at the time the action was tried. See Fed. R. Civ. P. 25(d); Doc. #114.

demanded "a higher standard of proof than that which is explicitly set out by the Fourth Circuit," and required Plaintiffs to show that they are at "substantial," "serious," or "severe" risk of institutionalization.[2] (Doc. #164 at 1-2.) According to Plaintiffs, the Pashby court required a showing of a "significant" risk of institutionalization, which could be shown by evidence that a plaintiff "may, might, probably would, or [was] likely to enter [an institutional placement] due to the termination of their [community-based services]." (Id. at 2 quoting Pashby, 703 F.3d at 322.)

Plaintiffs correctly note that the Pashby plaintiffs successfully supported their argument for a preliminary injunction with declarations that they may, might, probably would or were likely to be institutionalized as a result of the defendant's actions. However, the Pashby court sat in a different posture than this Court. It was reviewing for abuse of discretion the district court's grant of a preliminary injunction, which only requires that a plaintiff show, among other things, a likelihood of success on the merits. See Pashby v. Cansler, 279 F.R.D. 347, 354 (E.D.N.C. 2011). In addition, on appeal, the defendant argued that the plaintiffs were unlikely to succeed on the merits because the policy change at issue had not "resulted in the actual institutionalization" of the plaintiffs and, instead, they were only at risk of institutionalization. Pashby, 709 F.3d at 321-22. Therefore, the

[2] In their response to Plaintiffs' Motion to Alter or Amend Judgment, Defendants argue that this issue is not properly before the Court. (Doc. #166 at 2-3.) The Court disagrees and addresses Plaintiffs' arguments.

court had to determine, first, if the law required actual institutionalization and, second, if the plaintiffs had proffered enough support to show a likelihood of success on the merits.

As to the first issue, the Fourth Circuit explained that direction from the Department of Justice, among others, "refuted [the defendant's] argument" that actual institutionalization was required. Id. at 322 (citing U.S. Dep't of Justice, Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and Olmstead v. L.C., http://www.ada.gov/olmstead/q&a_olmstead.htm (last updated June 22, 2011) ("Enforcement Statement")). In other words, "individuals who must enter institutions to obtain . . . services for which they qualify may be able to raise successful Title II and Rehabilitation Act claims because they face a risk of institutionalization." Id.

As to the second issue, for purposes of the preliminary injunction they sought, the Pashby plaintiffs, as a whole, demonstrated a significant risk of institutionalization. Id. While some plaintiffs declared that they may or might enter an institution, others declared that they probably would or were likely to do so. Id. One plaintiff declared that he would have no choice but to do so. Id.

Moreover, not only did the Department of Justice determine that the ADA and Olmstead apply to individuals "at serious risk of institutionalization," a determination that "especially swayed" the Pashby court, id., but the Department of Justice further explained that an individual can show "sufficient risk of

institutionalization . . . if a public entity's . . . cut to . . . services will likely cause a decline in health, safety, or welfare that would lead to the individual's eventual placement in an institution." Enforcement Statement Answer 6 (emphasis added). Here, Plaintiffs have not presented sufficient evidence that the reduction in the reimbursement rate for supervised living services likely caused or was likely to cause a decline in any of their health, safety, or welfare that would lead to institutionalization.

Despite the important differences between the Pashby case and this case, Plaintiffs were not held to a higher standard of proof or a higher standard of risk than the law requires. The difference in the applicable standard of proof is the difference between a plaintiff's burden at the preliminary injunction stage to show a likelihood of success on the merits (as in Pashby) and the burden at trial to succeed on the merits (as is the case here). After a review of the evidence, and for all of the reasons stated in the Court's Memorandum Opinion, none of Plaintiffs was able to meet the burden that he or she faced a significant risk of institutionalization as a result of the reduction in the reimbursement rate for supervised living services. Therefore, Plaintiffs' motion to amend or alter the judgment as to this issue is denied.

II.

Next, Plaintiffs argue that the Court committed a clear error of law when, in two footnotes in the Memorandum Opinion, it noted in response to Plaintiffs' suggestions otherwise that Plaintiffs offered no evidence that the preliminary

injunction entered on May 12, 2010 played any likely role in Diane's or Timothy's care and/or placement.[3] (Doc. #164 at 7 (citing Mem. Op. p. 31 n. 20, p. 43 n. 23).) Plaintiffs argue that Defendants bear the burden of proof to establish that any change in their actions was not the result of the preliminary injunction. (Doc. #164 at 7.) Regardless of who bears the burden of proof, the evidence does not show that Plaintiffs' care or placement was the result of the preliminary injunction. Instead, the care and placements were determined by the individuals' care needs and personal guardian preferences.

Effective October 17, 2010 through January 15, 2011, a special rate request form was submitted for Diane seeking a continued reimbursement rate of $250.00 a day.[4] (PX-61.) The justification for the request described Diane's difficulties adjusting to different staffing levels and continued outbursts of aggression towards others, property damage, verbal aggression, and self-injurious behaviors and medication refusals. (Id. at PBH008117.) Melissa Covert, a care manager for Cardinal Healthcare, testified that she considered those to be valid clinical justifications for the special rate request. (9/20/13 Tr. 42:1-22 (Covert).)

[3] As they did earlier, Defendants argue that this issue is not properly before the Court. (Doc. #166 at 8-9.) The Court disagrees and addresses Plaintiffs' arguments.

[4] Prior to February 2010, the reimbursement rate for Diane's supervised living service was $250.00 a day. (PX-60 at PBH008114.) The February 2010 rate reduction was in place a short time, because, in April 2010, the reimbursement rate returned to $250.00 a day. (DX-292 at PBH009947.)

Similarly, effective January 16, 2011 through April 16, 2011, a special rate request form sought a continued $250.00 a day. (PX-62.) Diane's continued difficulty adjusting to her new living situation, outbursts, and violent behavior were provided as justifications for the request. (9/20/13 Tr. 43:1-18 (Covert) (testifying that a special rate may be extended if a client exhibits maladaptive behavior in a new setting and with a new staffing pattern that are atypical for the normal adjustment period); PX-62 at 008088-89.) These justifications supported "extending the enhanced rate for a long period of time[.]" (9/20/13 Tr. 43:21-44:24 (Covert).)

Effective June 1, 2011, a special rate request form sought a new rate of $391.15 per day. (PX-37.) The justifications for the increased rate included Diane's medical necessity criteria, long history of physical and verbal aggression, legal charges, property destruction, self-injurious behavior, and medication refusal. (Id. at PBH007801; 9/20/13 Tr. 45:2-46:9 (Covert).) As Plaintiffs point out, in addition to explaining Diane's care needs, there is a note stating, "This is a case we're involved in litigation with over decrease in rate for services. The patient has decompensated since services were decreased." (PX-37 at PBH007801.) Nevertheless, after detailing the justifications for the enhanced rate request, Covert was asked, "And was this sufficient justification for the specific enhanced rate?" to which she responded, "Yes. At that point in time, to me it sounds very justified." (9/20/13 Tr. 46:22-25 (Covert); see also id. at 47:1-11.)

Effective June 30, 2011 to September 28, 2011, a special rate request form sought the continued enhanced rate of $391.15 per day. (PX-38.) The form notes that the enhanced rate was previously approved from June 1 to June 30 and, "It was determined by the clinical teams with Monarch and PBH UM, that Diane would receive an additional increase of $319.15 [sic] per day. This agreement was based upon extensive behaviors and psychiatric need." (Id. at PBH008108.) After reviewing the stated justifications for the continued enhanced rate, Covert testified that "Everything on here supports a request for this rate." (9/20/13 Tr. 49:3-8 (Covert).) Specifically, Covert noted a housemate who had moved out, another who had moved in, and continued outbursts, aggression, property damage, self-injurious behaviors, and danger to self and community. (Id. at 49:9-20 (Covert).) In sum, the evidence shows that the provision of care to and placements for Diane were consequences of her care needs, not of the preliminary injunction.

Timothy's care during the pendency of the preliminary injunction was affected by the reduced supervised living reimbursement rate, new regulatory interpretations for Medicaid, and his mother. (See, e.g., DX-691 at PBH010187; 10/10/13 Tr. 92:1-93:22 (Yon) (explaining effect of Medicaid interpretations); id. at 92:23-96:11, 97:14-19, 104:17-105:25 (explaining efforts to arrange Medicaid compliant residential options for Timothy); id. at 96:7-97:10, 104:14-16, 105:21-25, 109:5-9, 110:5-7, 110:16-17 (explaining the role of Timothy's mother in pursuing residential options for Timothy).) After his mother decided to bring Timothy to reside with his father and her, Piedmont Behavioral Healthcare

continued to pursue community placement for Timothy outside of his home. (Id. at 111:7-9.) In June 2010, Timothy moved into a two-person home under the care of Ambleside (PX-18 at PBH006222), a placement identified and chosen by Timothy's mother after conversations with caretakers in her home (10/10/13 Tr. 111:17-112:21). As a result of complaints by Timothy's mother regarding the condition of the group home, in 2013, Timothy moved into a single-person apartment where he continued to receive services from Ambleside. (PX-13 at PBH011174; 9/10/13 Tr. 90:14-23 (Rose B).) In sum, the evidence shows that Timothy's care and placements did not result from the preliminary injunction.

Although Plaintiffs' focus is on the Court's specific findings as to Diane and Timothy, the evidence also does not support a finding that the preliminary injunction affected the care or placements of any of the other Plaintiffs. (See, e.g., Mem. Op. 44-53 (analyzing evidence concerning Clinton), 53-59 (analyzing evidence concerning Jason), 59-64 (analyzing evidence concerning Steven), 64-68 (analyzing evidence concerning Vernon); 9/18/13 Tr. 70:6-71:1, 78:24-80:11, 105:1-9 (Benton) (testifying about Jason); 10/10/13 Tr. 183:11-20, 185:15-19, 188:15-192:25 (Yon) (testifying about Steven).) Therefore, Plaintiffs' motion to alter or amend the judgment based on this issue is denied.

III.

Finally, Plaintiffs request that the Court amend the Judgment to direct the parties to bear their own costs. (Doc. #164 at 9-13.) This request is not properly before the Court. The Court did not award costs to Defendants as part of the

Judgment (see Doc. #162), nor have Defendants moved for costs. Therefore, Plaintiffs' motion to alter or amend the judgment based on this issue is denied.

IV.

For the reasons stated herein, Plaintiffs' Motion to Alter or Amend Judgment (Doc. #163) is **DENIED**.

This the 29th day of March, 2016.

/s/ N. Carlton Tilley, Jr.
Senior United States District Judge