UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 12-60460-CIV-ZLOCH

C.V. by and through his next friends Michael and Johnette Wahlquist, et al.,

Plaintiffs,

vs.

O R D E R

JUSTIN SENIOR, in his official capacity as Secretary of the Agency for Health Care Administration, et al.,

Defendants.
_____/

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STATE OF FLORIDA,

Defendant.
_____/

THIS MATTER is before the Court upon the Report & Recommendation On The State's Motion To Dismiss A.G.'s Claim As Moot (DE 557), filed herein by United States Magistrate Judge Patrick M. Hunt, and the State's Motion To Dismiss A.G.'s Claims As Moot (DE 540). The State Defendants[1] and Private Plaintiff A.G. (hereinafter, "A.G.") have each filed Objections to said Report.

[1] Defendants Justin Senior, in his official capacity as Secretary of the Agency for Health Care Administration, Celeste Philip, M.D., in her official capacity as the Surgeon General of the State of Florida and Secretary of the Florida Department of Health, and Cassandra Pasley, in her official capacity as Director of the Florida Department of Health's Children's Medical Service, are referred to herein collectively as the "State Defendants."

See DE Nos. 563 & 565. The Court has conducted a de novo review of the entire record herein and is otherwise fully advised in the premises.

Earlier in this litigation, Plaintiffs, including A.G., vigorously argued that class certification was necessitated by the risk that their claims would become moot from death or "aging out of Florida Medicaid (EPSDT)." DE 401, p. 5. That program is available only to children——in this context, defined as Medicaid recipients under the age of twenty-one. See 42 U.S.C. §§ 1396d(a)(4)(B) & (r)(5) (2015); Fla. Stat. § 409.905(2) (2016). A.G. is now twenty-one years old. The State Defendants thus contend that A.G.'s claims are moot because he is no longer eligible for services under the EPSDT program. A.G. believes that his claims are still live because he is eligible for other Medicaid services provided by the State under other programs. After thorough consideration, the Court concludes that A.G.'s claims set forth in the Second Amended Complaint (DE 62) (hereinafter "Complaint") are moot.

I. Background

The Medicaid program is a collaborative program between the federal government and states that choose to participate, which provides health care services to certain qualified individuals. See 42 U.S.C. §§ 1396-1396v. States that elect to participate in

the Medicaid program must submit to the Secretary of Health and Human Services a Medicaid State Plan detailing the scope of the state's program. 42 U.S.C. § 1396. The Medicaid Act lists twenty-nine services, eight of which must be covered under the state's Medicaid State Plan. See 42 U.S.C. § 1396d(a)(1)-(29); 42 U.S.C. § 1396a(a)(10)(A). The remaining twenty-one services are optional for adults, but must be provided to children through the "early and periodic screening, diagnostic, and treatment" program (hereinafter, "EPSDT"). See 42 U.S.C. §§ 1396d(a)(4)(B) & (r)(5). For example, private duty nursing is an optional service for adults, but must be provided to children through EPSDT. See 42 U.S.C. § 1396d(a)(8); 42 U.S.C. § 1396a(a)(10)(A). States that participate in the Medicaid program must "either provide for the establishment of a single State agency to administer or to supervise the administration of the plan." 42 U.S.C. § 1396(b)(5).

The State of Florida (hereinafter, the "State") participates in the Medicaid program, and the Agency for Health Care Administration is the single agency responsible for administering the State's plan. Fla. Stat. § 409.902(1). Consistent with federal law, the State provides private duty nursing services (among others) to eligible Medicaid recipients under the age of twenty-one as part of its EPSDT program. Fla. Stat. § 409.905(2); Fla. Stat. § 409.908(3)(p). The State also provides private duty

nursing services to eligible Medicaid recipients age twenty-one and older through its iBudget Waiver program. See DE 540, p. 5 n.5. The Agency for Persons with Disabilities administers the iBudget Waiver program, see Fla. Stat. § 393.065; however, the Agency for Health Care Administration has ultimate authority over the State's Medicaid program. See Fla. Stat. § 20.42(3).

The Complaint (DE 62) begins by describing Plaintiffs, including A.G., as "medically fragile children or children who need skilled care services." DE 62, ¶ 1. Regarding A.G. specifically, the Complaint (DE 62) alleges as follows:

> 145. [As of August 23, 2012] A.G. is a 17-year-old child who requires Skilled Care Services . . .
>
> 147. A.G. was born in Cairo, Egypt on July 28, 1995 . . .
>
> 154. A.G. is a qualified person with a disability within the meaning of the ADA and Section 504.
>
> 155. A.G. meets the criteria for mental retardation or mental illness on a Level I PASRR screen.
>
> 156. No Level II PASRR evaluation or review was ever performed.
>
> 157. Due to A.G.'s improving condition and reduction of funds paid to Lakeshore from Medicaid, Lakeshore is denying needed services, such as physical and speech therapies.
>
> 158. A.G.'s primary language is Arabic, and contrary to Title VI of the Civil Rights Act of 1964, Lakeshore denied A.G. any assistance with respect to its services, benefits, or encounters and as such, left A.G. further isolated and bereft of needed programs and services for any improvement.

> 159. A.G. needs Medicaid services such as private duty nursing in order to be placed at home or in a community setting.

DE 62, ¶¶ 145, 147, & 154-59. Like A.G., each of the other Plaintiffs alleged that they need (or need more) private duty nursing services in order to avoid unnecessary institutionalization or in order to be placed in a community setting. See DE 62, ¶¶ 127, 143, 176, 178, 192, 194, 209, 211, 223, 224, 235, 237, 249, 251, 262, & 265. The Complaint (DE 62) specifically identifies policies applicable only to children that Plaintiffs allege cause an unwarranted denial of medically necessary services, and consequently, unnecessary instititutionalization or a risk of unnecessary instititutionalization. See DE 62, ¶¶ 277 & 278. Indeed, Plaintiffs alleged that they

> have been placed in nursing homes and are at risk of being placed in a nursing home because Defendants have unlawfully shifted the burden for providing skilled nursing services to parents or caregivers of children who are not skilled nurses. In contrast, there are not similar regulations, rules, customs, practices, policies, acts, and omissions utilized to deny benefits and to unnecessarily institutionalize and segregate similarly situated adults with disabilities.

DE 62, ¶ 277 (emphasis added).

The Complaint (DE 62) sets forth five counts: Count 1, violation of Title II of the Americans With Disabilities Act; Count 2, violation of Section 504 of the Rehabilitation Act; Count 3, violation of the EPSDT provisions of the Medicaid Act asserted

pursuant to 42 U.S.C. § 1983; Count 4, violation of the reasonable promptness provisions of the Medicaid Act asserted pursuant to 42 U.S.C. § 1983; and Count 5, violation of the Nursing Home Reform Amendments to the Medicaid Act asserted pursuant to 42 U.S.C. § 1983. Notably, each Count incorporates by reference the allegations contained in paragraphs 277 and 278. See DE 62, ¶¶ 300, 311, 319, 324, & 329.

Not surprisingly, then, this case has focused exclusively on the State's administration of its Medicaid program to children. For example, Plaintiffs, including A.G., sought to certify a class comprised of "[a]ll current and future Medicaid recipients in Florida under the age of 21, who are (1) institutionalized in nursing facilities, or (2) medically complex or fragile and at risk of institutionalization in nursing facilities." DE 329 (emphasis added). After the Magistrate Judge recommended that Plaintiffs' proposed class not be certified, Plaintiffs, including A.G., proffered a new proposed class definition: "All current Medicaid recipients in the state of Florida under the age of 21, who are (1) unnecessarily institutionalized in nursing facilities, or (2) medically complex or fragile and at risk of unnecessary institutionalization by receiving materially less private duty nursing services, personal care or respite care services than ordered by their treating physicians." DE 397 (emphasis added).

In the course of litigating their Second Renewed Motion For Class Certification (DE 329), Plaintiffs, including A.G., described the "common thread [that] binds all members of this putative class; they are all 'medically complex' or 'medically fragile' children subject to Defendants' systemic policies and practices." DE 329. As in their Complaint (DE 62), Plaintiffs, including A.G., then set out the specific polices that they alleged were "exemplary of Defendants' overarching process of unnecessarily institutionalizing medically complex and medically fragile children." Id. Plaintiffs, including A.G., urged that class certification was necessary because "mootness is a real risk in this proceeding." DE 401. To make their point, Plaintiffs fastidiously set forth the precise risk of mootness faced by each of the ten named Plaintiffs. As to A.G., Plaintiffs asserted:

> A.G. will turn 21 years old on July 28, 2016, ten months from the date of this filing. See Johnson v. Opelousas, 658 F.2d 1065, 1069-1072 (11th Cir. 1981) (finding trial court abused its discretion in denying certification where plaintiff only had ten months until his claims were mooted by reaching the age of majority.) It is probable that he will age out of EPSDT before the conclusion of this lawsuit.

Id. Ultimately, the Court denied Plaintiffs' request for class certification.

Since the filing of the Complaint (DE 62), two important circumstances have changed, which no Party disputes. At the time that Complaint (DE 62) was filed, A.G. resided in a nursing

facility. A.G. has since transitioned to the community. A.G. has also since turned twenty-one years old, and is no longer eligible to participate in the EPSDT portion of the State's Medicaid program.

In addition, two important deadlines have passed—both before A.G. turned twenty-one. First, on January 21, 2016, the Court's deadline for filing an amended complaint passed, and no Party has since requested amendment. See DE 387. Second, on April 30, 2016, discovery closed, and no Party has sought to reopen it. See id.

In light of A.G.'s age, and because Plaintiffs seek only prospective relief, the State Defendants moved to dismiss A.G.'s claims as moot. See DE 540. In his Report (DE 557), the Magistrate Judge recommends that Counts 3 and 5 be dismissed as moot. As to Count 3, the Magistrate Judge concluded that because A.G. is no longer eligible for EPSDT services under the State's Medicaid program, that claim is moot. The Magistrate Judge concluded that A.G.'s claim in Count 5 is moot because A.G. no longer resides in an institution. A.G. did not object to either of these conclusions.[2] The Magistrate concluded that A.G.'s claims set forth in Counts 1, 2, and 4 are unaffected by A.G.'s age and may therefore proceed. The State objects to the Magistrate's

[2] A.G. objected only to "the Magistrate Judge's finding under Counts One and Two that private duty nursing is the only service at issue." DE 563, at 2.

conclusion in this regard.

II. Analysis

Article III of the Constitution allows federal courts to exercise their jurisdiction only over "Cases" and "Controversies." U.S. Const. art. III, § 2. This limitation "presents an important restriction on the power of the federal courts," Sociality Workers Party v. Leahy, 145 F.3d 1240, 1244 (11th Cir. 1998), for it prevents the judiciary from encroaching upon powers granted to the elected branches.

One restriction on federal courts' authority flowing from the case-or-controversy requirement is the doctrine of mootness. See Adler v. Duval Cty. Sch. Bd., 112 F.3d 1475, 1477 (11th Cir. 1997) ("an action that is moot cannot be characterized as an active case or controversy."). "A case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." Florida Assoc. Of Rehab. Facilities, Inc. v. State of Fla. Dept. of Health and Rehab. Servs., 225 F.3d 1208, 1217 (11th Cir. 2000) (internal marks omitted). That is, "[w]hen events subsequent to the commencement of a lawsuit create a situation in which the court can no longer give the plaintiff meaningful relief, the case is moot and must be dismissed." Id.

Age-related mootness issues are no novelty to federal courts. Indeed, federal courts routinely dismiss as moot the claims of

parties who, by virtue of their age, are no longer subject to the policies they challenge——at least where the party seeks only prospective relief. E.g., Honig v. Doe, 484 U.S. 305, 318 (1988) ("Respondent John Doe is now 24 years old and, accordingly, is no longer entitled to the protections and benefits of the EHA, which limits eligibility to disabled children between the ages of 3 and 21 . . . It is clear, therefore, that whatever rights to state educational services he may yet have as a ward of the State . . . the Act would not govern the State's provision of those services and thus the case is moot as to him."); Craig v. Boren, 429 U.S. 190, 192 (1976) (finding that attainment of the age of twenty-one mooted a plaintiff's claims where he challenged state laws prohibiting the sale of certain beers to males under the age of twenty-one); Atherton Mills v. Johnston, 259 U.S. 13, 15-16 (1922) ("The lapse of time since the case was heard and decided in the District Court has brought the minor, whose employment was the subject matter of the suit, to an age which is not within the ages affected by the act. The act, even if valid, cannot affect him further. The case for an injunction has, therefore, become moot and we cannot consider it."); Tucker v. Phyfer, 819 F.2d 1030 (11th Cir. 1987) (concluding that a plaintiff's claims for prospective relief were moot where he challenged conditions at a juvenile detention center, but attained the age of eighteen and was released

from the facility while the case was pending).

The Magistrate Judge correctly concluded that A.G.'s claim set forth in Count 3, which alleges violations of the Medicaid Act's EPSDT policies, has become moot because of A.G.'s age. Having attained the age of twenty-one, A.G. is no longer subject to the State's EPSDT Medicaid programs. See Fla. Sta. § 409.905(2); 42 U.S.C. § 1396d(a)(4)(B). The Court thus lacks jurisdiction to grant A.G. the prospective relief he seeks with respect to Count 3.

With respect to Counts 1, 2, and 4, A.G. clings to broad language in the Complaint (DE 62) in an attempt to avoid dismissal of those claims for mootness. In particular, A.G. claims that because "[he] is eligible for Medicaid and AHCA has been named as a defendant, [his] claims are not moot." DE 545. In essence, A.G. argues that because the Complaint (DE 62) alleges that "A.G. needs Medicaid services such as private duty nursing in order to be placed at home or in a community setting," he has sufficiently stated a claim regarding any of the State's Medicaid programs for which he is eligible. DE 62, ¶ 159. Despite his attempts to characterize the allegations in the Complaint (DE 62) as challenging policies other than the EPSDT program, the Court finds that A.G.'s claims in Counts 1, 2, and 4 rise and fall with the

claim in Count 3.[3]

Counts 1, 2, and 4 allege violations of the Americans With Disabilities Act, the Rehabilitation Act, and the Medicaid Act's reasonable promptness requirement, respectively. To be sure, those statutes contain no age limitation. However, according to the Complaint (DE 62), it is the State's administration of its EPSDT policies that causes a violation of those statutes. Therefore, to the extent that Count 3 is moot, Counts 1, 2, and 4 are also moot.

Moreover, Federal Rule of Civil Procedure 8(a) requires a plaintiff's complaint to contain a "short and plain statement of the claim showing that the pleader is entitled to relief." A complaint must contain factual allegations "in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). A complaint does not suffice "if it tenders naked assertions devoid of further factual enhancement." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (internal marks omitted). Any fair reading of the Complaint (DE 62) confirms that this case concerns only children and the State's administration of its Medicaid plan to children. Indeed, by incorporating paragraph 277 of the Complaint (DE 62),

[3] The Magistrate Judge also recommended that A.G.'s claim in Count 5 be dismissed as moot because A.G. no longer resides in an institution. A.G. did not object to that recommendation. The Court adopts the Magistrate Judge's reasoning and conclusion with respect to Count 5.

Counts 1, 2, and 4 expressly denounce any contention that the State "den[ies] benefits [to] and [] unnecessarily institutionalize[s] and segregates[s] similarly situated adults with disabilities." DE 62, ¶ 277. The Complaint (DE 62) simply contains no factual allegations putting the State on notice that this case also concerns the iBudget Waiver program or any other Medicaid program the State offers to adults. Indeed, without such allegations or discovery (which is now closed), it is entirely speculative whether A.G. requested services under a program other than EPSDT, whether the State denied those services, and whether such denial was unlawful. A.G. is not entitled this late in the game to assert an entirely new legal theory based solely on broad language in the Complaint (DE 62) without factual allegations supporting that theory.

In a similar vein, A.G. is not entitled to whipsaw the Court by asserting a legal theory that is fundamentally at odds with a position he maintained earlier in the case for the simple expedience of avoiding initiating a new lawsuit. Cf. New Hampshire v. Maine, 532 U.S. 742, 750 (2001) (judicial estoppel "prohibit[s] parties from deliberately changing positions according to the exigencies of the moment") (quotation omitted). While litigating Plaintiffs' Second Renewed Motion For Class Certification (DE 329), A.G. expressly represented to the Court that his claims would

become moot when he turned twenty-one. See DE. A.G. has therefore conceded that his claims are now moot.

In sum, the Complaint (DE 62) does not state a claim with respect to the State's iBudget Waiver program, or any other Medicaid policy applicable to adults. Each of Counts 1, 2, 3, and 4 are dependent upon the Medicaid policies the State has in place for children. A.G. is no longer subject to those policies, and consequently, the Court can no longer fashion him meaningful relief. If Plaintiff A.G. wishes to challenge the manner in which the State administers its Medicaid program for adults, he is free to do so. But the Court lacks jurisdiction to hear his challenge to the State's Medicaid program for children.

Accordingly, after due consideration, it is

ORDERED AND ADJUDGED as follows:

1. Plaintiff's Objection To Report And Recommendation On Defendant's Suggestion For Mootness As To Plaintiff A.G. (DE 563) be and the same is hereby **OVERRULED;**

2. To the extent they are consistent with this Order, The State's Objections To The Report And Recommendation On The State's Motion To Dismiss A.G.'s Claim As Moot (DE 565) be and the same are hereby **SUSTAINED;**

3. To the extent that it recommends dismissal of Plaintiff A.G.'s claims in Counts 3 and 5 of the Second Amended Complaint (DE 62), the Report And Recommendation On The State's Motion To Dismiss

A.G.'s Claims As Moot (DE 557) filed herein by United States Magistrate Judge Patrick M. Hunt be and the same is hereby approved, adopted, and ratified by the Court;

4. To the extent that it recommends that Plaintiff A.G.'s claims in Counts 1, 2, and 4, of the Second Amended Complaint (DE 62) proceed, the Court declines to approve, adopt, and ratify the Report And Recommendation On The State's Motion To Dismiss A.G.'s Claims As Moot (DE 557);

5. The State's Motion To Dismiss A.G.'s Claims As Moot (DE 540) be and the same is hereby **GRANTED**; and

6. The above-styled cause be and the same is hereby **DISMISSED** without prejudice as to Plaintiff A.G. in that the Court lacks subject matter jurisdiction over the same.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 19th day of January, 2017.

WILLIAM J. ZLOCH
United States District Judge

Copies furnished:

All Counsel of Record

The Honorable Patrick M. Hunt
United States Magistrate Judge