United States District Court, District of Columbia.
The WASHINGTON LEGAL CLINIC FOR THE HOMELESS, et al., Plaintiffs,
v.
Sharon Pratt KELLY, in her Official Capacity as Mayor of the District of Columbia, Defendant.
Civ.A. No. 93-0691 (JHG).

April 15, 1994.

MEMORANDUM OPINION AND ORDER

JOYCE HENS GREEN, District Judge.
***1** Plaintiffs initiated a six-count complaint against defendant Mayor Sharon Pratt Kelly on April 5, 1993. Three months later, plaintiffs filed a motion for a preliminary injunction on Count One of their complaint. In their motion, plaintiffs requested that the Court, *inter alia*, enjoin Mayor Kelly from violating federal and District of Columbia laws and regulations governing the District of Columbia's emergency assistance program and order the District of Columbia to obey its regulations. Literally the evening before the preliminary injunction hearing, the defendant filed a supplemental memorandum stating that the case was moot because it had opted out of the family shelter component of its emergency assistance program that was the foundation of the preliminary injunction controversy. The preliminary injunction was denied on July 30th on the basis that the District of Columbia's decision to withdraw family shelter from the federal program rendered the issue moot. In that Memorandum Opinion, the Court premised its finding on the fact that "[i]t appears, although neither counsel made the record clear, that the District no longer operates an emergency family shelter program."

On July 29th, plaintiffs[FN1] filed an amended complaint containing seven counts, the last of which contends that the District of Columbia's failure to apply for federal funding violates District of Columbia law. Presently pending is the defendant's motion to dismiss.[FN2]For the reasons stated below, that motion is denied in part and granted in part.

BACKGROUND

The following allegations are drawn from plaintiffs' complaint: In a predecessor, related case,[FN3] these same parties entered a non-binding Memorandum of Understanding ("MOU") permitting individuals submitting applications for emergency shelter at the Office of Emergency Shelter and Support Services ("the OESSS") limited access to advocates. Pursuant to the MOU, that case was dismissed without prejudice. At the conclusion of the period specified in the MOU, because the parties were unable to reach another agreement granting the access demanded by plaintiffs, this case was filed.

As part of its participation in the federal Aid to Families with Dependent Children ("AFDC") program, the District of Columbia ("the District") has participated in a federal Emergency Assistance ("EA") program. Participation in the federal EA program is not mandatory. However, if a state (or the District of Columbia) chooses to participate, that entity must follow the guidelines set forth in the federal regulations. In order to participate, a state must submit a "state plan," which is defined as

a comprehensive statement submitted by the State agency describing the nature and scope of its program and giving assurance[s] that it will be administered in conformity with the specific requirements stipulated in the pertinent title of the Act, the regulations in Subtitle A and this chapter of this title, and other applicable official issuances....

45 C.F.R. § 201.2 (1992). The state plan must "[s]pecify the eligibility conditions imposed for the receipt of emergency assistance" and "[p]rovide that emergency assistance will be given forthwith."*Id.* § 233.120(a)."Each individual wishing to do so shall have the opportunity to apply for assistance under the plan without delay."*Id.* § 206.10(a)(1). Under the plan,
an applicant may be assisted, if he so desires, by an individual(s) of his choice (who need not be a lawyer) in the various aspects of the application process and the redetermination of eligibility and may be accompanied by such individual(s) in contacts with the agency and when so accompanied may also be represented by them.

Id. § 206.10(a)(1)(iii).

For the past eight years (until July 1993), the District of Columbia has accepted federal funding through the EA program. Part of the District's plan included an emergency shelter family program ("ESFP") which defined those eligible, and did not list availability of space as an eligibility criterion. *See*39 D.C. Reg. 470, 472-74 (1992). Through the EA program, the District of Columbia is entitled to receive reimbursement from the federal government of 50% of its expenditures under the plan. Since July 1993, the District has opted out of the family component to the EA program and has received no federal funding for emergency family shelter.

***2** Families seeking temporary or emergency housing apply at the OESSS intake office. The entire family must be present to apply and applicants wait in the OESSS waiting room before they are interviewed by intake workers. Apparently, it can take days before a family receives an interview or is given an individualized eligibility determination. Moreover, plaintiffs allege that the District denies homeless families shelter benefits without making individual eligibility determinations -- families are denied shelter on the basis that the program is full. Plaintiffs contend further that intake workers often discourage families from applying for emergency shelter. As a result of these perceived abuses, a coalition of homeless and housing organizations has implemented an outreach and monitoring program, under which it has homeless advocates visit the OESSS waiting room in order to provide verbal and written information to applicants regarding their rights in the application process. As a general matter, the homeless advocates have not been permitted to assist applicants in the OESSS waiting room.

DISCUSSION

In viewing a motion to dismiss, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his [or her] claim which would entitle him [[[or her] to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The factual allegations of the complaint must be presumed true and liberally construed in favor of plaintiff. *Shear v. National Rifle Ass'n of Am.*, 606 F.2d 1251, 1253 (D.C. Cir. 1979). The plaintiff is entitled to all favorable inferences which may be drawn from those allegations. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

1. Count Seven

Because resolution of Count One turns on the Court's conclusion as to Count Seven, it is necessary to begin the discussion of the defendant's motion to dismiss with Count Seven of the Complaint.

Count Seven is based upon D.C. Code § 3-206.3(a), which states that:

The Mayor is authorized to operate an Emergency Shelter Family Program, which shall claim federal financial participation to the extent allowable by law for housing assistance and services to homeless families with minor children.

The language of the statute is clear. *If* the Mayor operates an ESFP, the Mayor *must* claim the maximum federal assistance possible. Thus, the Mayor may chose whether or not to operate such a program, but once she does decide to operate the program, she must request federal assistance.

Relying on the statute, plaintiffs claim that because the District of Columbia operates such a program, it is required by its own law to participate in the federal EA program. The Court agrees. Although this argument was raised at the preliminary injunction hearing, the preliminary injunction was denied, in large part, because it was not clear whether the District was still conducting an ESFP or whether services were being provided through another type of program. Now, however, the District does not contest its operation of an ESFP.[FN4]Rather, it disputes plaintiffs' interpretation of the above statute. The District of Columbia's arguments are unpersuasive.

***3** Statutory interpretation "begins with the language of the statute itself." *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 557-58 (1990). Where "the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms."'*United States v. Ron Pair Enters., Inc.*, 498 U.S. 235, 241 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)). In light of the

unambiguous language of § 3-206.3(a), the legislative history highlighted by defendants cannot prevail. *See* *United States Nat'l Bank v. Independent Ins. Agents of Am., Inc.*, 113 S. Ct. 2173, 2186 n. 11 (1993); *see also* *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98 (1991) (where the text of a statute "contains a phrase that is unambiguous -- that has a *clearly accepted* meaning in both legislative and judicial practice," the meaning cannot "be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process."). Because the EA program permits reimbursement as long as a state (or the District of Columbia) has submitted a state plan, the District of Columbia is required by its own statute to seek reimbursement through the EA program if it operates an ESFP.[FN5]Count Seven will not be dismissed.

2. Count One

A. *Mootness*

Even though the District no longer operates an EA plan, plaintiffs' allegations in Count One are not moot and the Court must reach the question of whether plaintiffs may invoke 42 U.S.C. § 1983 to redress alleged violations of federal law.

A case is moot when the issues presented are no longer "live." *Powell v. McCormack*, 395 U.S. 486, 496 (1968). An intervening event renders a case moot if that event has eradicated the effects of the alleged violation and there is no reasonable expectation that the alleged violation will recur. *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979); *Seller v. Bureau of Prisons*, 959 F.2d 307, 310 (D.C. Cir. 1992). However, in cases, such as the instant case, in which the defendant has voluntarily taken action that results in a cessation of the challenged conduct, a court may nonetheless decide the case. *See* *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953) ("voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case...."). A controversy remains because

[t]he defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion.

Id. (footnote omitted).

The case is only moot if the defendant can demonstrate that "there is no reasonable expectation that the wrong will be repeated."*Id.* (citation omitted). A profession by the defendant that it will no longer engage in the challenged activity is not sufficient to render a case moot. *Id.* at 633.In this case, because current law in the District of Columbia *requires* the District, if it operates an ESFP, to receive federal reimbursement to the fullest extent possible, the District's withdrawal from the federal EA program and its statement that it will no longer accept federal funding are insufficient to carry its heavy burden to show it will no longer engage in the challenged activity. Assuming *arguendo*, as the Court must do at this stage of proceedings, that the District of Columbia does continue to operate a ESFP signifies that in the future, this Court may require the District to participate in the EA program and submit a plan for approval. Because of D.C. Code § 3-206.3(a), there remains a "cognizable danger of recurrent violation." *See* *W.T. Grant Co.*, 345 U.S. at 633; *In re Ctr. for Auto Safety*, 793 F.2d 1346, 1353 (D.C. Cir. 1986).

B. *42 U.S.C. § 1983*

***4** Plaintiffs allege that the District has violated, under color of state law, federal regulations governing the District's participation in the EA program under Title IV-A of the Social Security Act, codified at 42 U.S.C. § 602*et seq.* Thus, plaintiffs contend they can sue the District pursuant to 42 U.S.C. § 1983 for the alleged violation of federal law.

In *Maine v. Thibotot*, 448 U.S. 1 (1980), the Supreme Court recognized that § 1983 could be utilized to redress violations of federal statutory rights. A decade later, in *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990), the Supreme Court synthesized its earlier caselaw and provided a useful analytical framework within which to determine when a private right of action exists under § 1983. To summarize *Wilder*, a court must determine: (1) whether the provision in dispute was intended to benefit the plaintiff; (2) if so, whether the provision reflects merely a "congressional preference" for a certain kind of conduct or a "binding obligation" on a government unit; and, (3) whether the interest

asserted is nonetheless "too vague and amorphous" that it is "beyond the competence of the judiciary to enforce."*Id.* at 509 (citations omitted). If an individual can survive these three criteria, the right asserted is enforceable unless Congress has foreclosed such enforcement through a comprehensive enforcement mechanism.[FN6]*Id.* (citing *Wright v. Roanoke Redevelopment & Housing Auth.*, 479 U.S. 418, 423 (1987)).

The *Wilder* framework has become less easy to apply since the Supreme Court issued *Suter v. Artist M.*, 112 S. Ct. 1360 (1992). Understanding how that framework must now be applied requires a brief examination of *Wilder* and *Suter*.In *Wilder*, a health care provider initiated a § 1983 action challenging the methods by which Virginia reimbursed health care providers under the Medicaid Act. *Wilder*, 496 U.S. at 501. Under the Medicaid Act, the federal government provides financial assistance to states which furnish medical care to needy individuals. 42 U.S.C. § 1396. Although participation in the program is voluntary, if a state chooses to participate, it must submit to the Secretary of Health and Human Services, for approval, a plan for medical assistance. *Id.* § 1396(a). Among other things, the plan must contain a scheme for reimbursing health care providers. In the plan, the state must provide reimbursement rates and make findings and assurances that these rates are "reasonable and adequate" to satisfy the provider's costs. When determining the rates, the statute requires a state to consider three enumerated factors. *Id.* § 1396a(a)(13)(A). In *Wilder*, Virginia's state plan was approved by the Secretary and the plan did indeed contain a reimbursement plan as required by the statute. Nonetheless, the plaintiff sued the state on the ground that the rates it calculated were not reasonable and adequate.

Concluding that a § 1983 cause of action could be brought against the state by the health care provider, the Supreme Court held, as a preliminary matter, that health care providers were intended beneficiaries of the statutory provision. 496 U.S. at 510. Second, the Court concluded that a binding obligation was imposed on the states because the language of the provision was couched in mandatory terms, such as "must," and the provision of federal funds was expressly conditioned on compliance with the plan. *Id.* at 512.Moreover, the plan required the state to make findings and assurances to the Secretary that the rates were reasonable and adequate. *Id.* The Court rejected Virginia's argument that Congress left the determination that the state's rates were based on accurate findings to the Secretary, not to the courts, concluding that because the Secretary could reject a state plan, "a state is on notice that it cannot adopt any rates it chooses...."*Id.* at 513-14."[R]equiring a state to *find* that its rates are reasonable and adequate" obliges the state to adopt reasonable and adequate rates. *Id.*

***5** Like *Wilder*, *Suter* involved a federal statute which provided federal reimbursement to states opting to participate and submit a state plan for approval to the Secretary of Health and Human Services. The statutory provision in question listed sixteen items to be included in the state plan in order to gain approval. 112 S. Ct. at 1364. The statute required the plan to be in effect in the state and to provide that "reasonable efforts" be made, prior to placing a child in foster care, to eliminate the need to remove the child from the home. Invoking this provision, the plaintiffs filed a class action claiming, *inter alia*, that the state failed to make reasonable efforts to prevent removal of children from their homes.

Unlike *Wilder*, the Court in *Suter* did not permit the plaintiffs to sue the state pursuant to § 1983. In *Suter*, the Court noted that, although the words of the Act requiring reasonable efforts were mandatory, the focus is "exactly what is required of states by the Act."*Id.* at 1367.Because the statutory provision required only that the state have a plan approved by the Secretary to be eligible for reimbursement, the Court concluded that this was the only requirement placed on a participating state. *Id.* Distinguishing *Wilder*, the Court explained that "[w]e relied in part on the fact that the statute and regulations set forth in some detail the factors to be considered in determining the methods for calculating rates."*Id.* at 1368.Then, the Court noted that the phrase "reasonable efforts" was not explained further in the statute and there was no guidance as to how to measure reasonable efforts.*Id.* Because the only directive to the state was the phrase "reasonable efforts," and what would constitute reasonable efforts would vary depending on the circumstances, the details of compliance were left to the state. Discussing the statute's implementing regulations, the

Court commented that they "are not specific, and do not provide notice to the states that failure to do anything but submit a plan with the requisite features, to be approved by the Secretary, is a further condition on the receipt of funds from the Federal Government."*Id.* at 1369.

Although the Court in *Suter* did not expressly apply the framework adopted in *Wilder*, *Wilder* and its framework were not overruled by *Suter*.Thus, most courts examining private rights of action under § 1983 have taken the *Wilder* framework and added to it the teachings of *Suter*. *See, e.g.*, *Albiston v. Maine Comm'r of Human Services*, 7 F.3d 258, 263 (1st Cir. 1993); *Procopio v. Johnson*, 994 F.2d 325, 331 n. 9 (7th Cir. 1993); *Howe v. Ellenbecker*, 8 F.3d 1258, 1262 n.5 (8th Cir. 1993).*But see* *Lampkin v. District of Columbia*, No. 92-0910, 1992 WL 151813, at *5 (D.D.C. June 9, 1992). This Court agrees that the *Wilder* test still applies, albeit with the engraftment of *Suter*.Specifically, the second criteria in the three-part *Wilder* test -- whether the provision in question is a "binding obligation" or merely a "congressional preference" -- deserves heightened consideration.

***6** There is little dispute that these plaintiffs are the intended beneficiaries of the EA program. The thrust of defendant's argument is that the statute and regulations are not specific and do not provide notice to the District that failure to do anything but submit a plan with the requisite features is a further condition of federal funding. Thus, applying *Wilder* and *Suter*, whether plaintiffs may invoke § 1983 turns on whether the provisions plaintiffs invoke are binding obligations on the District and whether the interests they assert are within the competence of the judiciary to enforce.

In the instant case, plaintiffs allege that the defendant has violated federal regulations that: (1) "specify the eligibility requirements imposed," allow all those wishing to apply for benefits to do so without delay, *see*45 C.F.R. §§ 233.120(a), 206.10(a)(1), and comply with the requirements imposed, *see id.* §201.6(a); (2) allow an applicant to be "assisted if he so desires, by an individual(s) of his choice ... and ... be accompanied by such individual(s) in contacts with the agency...,"*see id.*§ 206.10(a)(1)(iii), and, (3)"provide that emergency assistance will be given forthwith, *see id.*§ 233.120(a)(5).

Factually, the structure of the statute and regulations involved in the instant case is almost exactly that involved in *Suter*.Both cases involve federal programs under which a state can opt to join. Of most importance is the fact that the statute and regulations in both cases merely list particular components that the state must include in its plan. Like in *Suter*, in this case, no statutory provision and no regulation require the state to do anything more than submit a state plan. As the First Circuit noted:

Suter instructs that, when a provision in a statute fails to impose a direct obligation on the States, instead placing the onus of compliance with the statute's substantive provisions on the federal government, no cause of action cognizable under section 1983 can flourish.

Stowell v. Ives, 976 F.2d 65, 70 (1st Cir. 1992). Here, aside from submission of a state plan with certain specified components, there is no direct and binding obligation imposed on the District of Columbia. Moreover, the regulations permit only the Secretary of Health and Human Services to decrease or terminate funding upon a determination that the state is failing to comply with the statute or regulations. The onus of compliance has unequivocally and firmly been placed upon the shoulders of the federal government. Except for submission of a plan with specified components, no other binding obligation is imposed upon the states. Thus, these plaintiffs may not invoke § 1983. Count One is dismissed.

3. Count Two

Count Two is captioned "Violation of District of Columbia Law and Municipal Regulations"[FN7] and contends, *inter alia*, that the District has refused to evaluate eligible applicants' need for social and health services and has not provided written or oral notice of denials of shelter in direct violation of District of Columbia regulations. Because, however, D.C. Code § 3-606(d) and § 1-1510 provide that the District of Columbia Court of Appeals has "exclusive" authority to review adverse emergency shelter decisions, Count Two of the complaint must be dismissed. This Court cannot resolve purely local matters expressly reserved for a different court.

4. Counts Three and Five

***7** Both Counts Three and Five involve alleged violations of plaintiffs' First Amendment rights.[FN8]The parties agree that whether plaintiffs' rights have been unconstitutionally abridged turns on whether the OESSS waiting room can be considered a public forum and even if not, whether the restrictions on speech imposed are reasonable.[FN9]The parties disagree whether these issues may be resolved at this stage of the proceedings.

Because public forum issues generally require factual development, plaintiffs' First Amendment claims will not be dismissed. *See* *Stewart v. District of Columbia Armory Bd.*, 863 F.2d 1013, 1016-19 (D.C. Cir. 1988) (dismissal of First Amendment public forum claim inappropriate due to necessity of factual development).

5. Counts Four and Six

Counts Four and Six involve due process and equal protection challenges to the distribution of District of Columbia benefits. Plaintiffs allege that the District distributes its benefits in an arbitrary and capricious manner.[FN10]

To determine whether plaintiffs' due process rights have been violated, it is first necessary to determine whether they had a protected liberty or property interest. *See* *Atkins v. Parker*, 472 U.S. 115, 128 (1985); *Tarpeh-Doe v. United States*, 904 F.2d 719, 722-23 (D.C. Cir. 1990), *cert. denied*, 498 U.S. 1083 (1991). Although the Supreme Court has not yet ruled whether an applicant, as opposed to a recipient, of public benefits can present a due process claim, others courts have held that applicants can present constitutional claims. *See* *Ressler v. Pierce*, 692 F.2d 1212, 1214 (9th Cir. 1982); *Kelly v. Railroad Retirement Bd.*, 625 F.2d 486, 489-90 (3d Cir. 1980).*But see* *Hill v. Group Three Housing Development Corp.*, 799 F.2d 385, 391 (8th Cir. 1986); *Eidson v. Pierce*, 745 F.2d 453, 461 (7th Cir. 1984). However, clearly not all applicants for all public benefits can make a due process claim. The statutes and regulations concerning the benefit in issue must give the individual "a legitimate claim of entitlement" to the benefit, *see* *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), or the statutes and regulations must restrict the exercise of discretion, placing "*substantive* limits on official discretion." *See* *Tarpeh-Doe*, 904 F.2d at 722. According to the amended complaint, plaintiffs are entitled to receive benefits if they meet the requirements established under District of Columbia law and regulations. Moreover, as stated *supra*, if the District operates an ESFP, it must accept federal funding and must abide by a plan. Therefore, construing liberally plaintiffs' factual allegations, plaintiffs have stated a claim upon which relief may be granted.

Plaintiffs have also stated an equal protection claim sufficient to withstand the defendant's motion to dismiss. Equal protection is not violated if the challenged classification is rationally related to a legitimate government purpose. *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 457-58 (1988). Plaintiffs contend that the District lacks a rational system to distribute emergency shelter benefits, resulting in unequal treatment of eligible beneficiaries. Accepting as true plaintiffs' allegations, as the Court must at this stage of proceedings, eligible families are treated dissimilarly. Whether there is actually disparate treatment and if so, whether that disparate treatment is rationally related to a legitimate government interest still remain to be determined.

CONCLUSION

***8** For the reasons stated above, it is hereby

ORDERED that the Family Plaintiffs' Motion for Class Certification is granted. Franzin Melton and Tammy Montague are class representatives for "Homeless families seeking eligibility determinations after November 1, 1991, under the District of Columbia state plan for Emergency Assistance which provides for emergency shelter."; it is

FURTHER ORDERED that Defendant Mayor Kelly's Motion to Dismiss[FN11] Plaintiff's First Amended Complaint is denied as to Counts Three, Four, Five, Six and Seven. That motion is granted as to Counts One and Two. Counts One and Two are dismissed from this case; and, it is

FURTHER ORDERED that there shall be a status conference on May 13, 1994 at 9:45 a.m. to discuss the future progress of this case.

IT IS SO ORDERED.

FN1. There are four classes of plaintiffs: The Washington Legal Clinic for the Homeless; The Father McKenna Center of St. Aloysius Church; Frank Trinity, Lisa Goode, Patricia Kennedy, Diann Hammer, and Sunny Kim ("the Advocates"); and, Franzin Melton, Angelina Easter, Tomikio Hall, Koya Harleston, Debra King, and Tammy Montague ("the Family Plaintiffs").

FN2. Also pending is the Family Plaintiffs' unopposed motion for class certification pursuant to Federal Rule of Civil Procedure 23. The proposed class consists of:

> Homeless families seeking eligibility determinations after November 1, 1991, under the District of Columbia state plan for Emergency Assistance which provides for emergency shelter.
>
> Franzin Melton and Tammy Montague are the proposed class representatives. Because the proposed class meets the requirements of Rule 23(a) --numerosity, commonality of questions of law and fact, typicality of claims or defenses between the proposed representatives and the class, and adequacy of representation by the proposed representatives -- and in light of the lack of opposition to the Family Plaintiffs' Motion for Class Certification, the above described class is certified pursuant to Rule 23(b)(2).

FN3.CA No. 92-1894.

FN4. On a motion to dismiss the Court must accept as true all of plaintiffs' factual allegations. At a later date in this litigation, the District may, if appropriate, contest the existence of an ESFP.

FN5.Section 3-206.3(a) does not conflict with § 3-602. A plain reading of § 3-206.3(a) does not require the District of Columbia to provide overnight shelter for all families. It permits the Mayor to operate a program, but provides no limitations on that program. Nor does the federal EA program require mandatory overnight shelter. The District can choose to operate a limited emergency family shelter program, strictly limiting the circumstances under which a family may be entitled to shelter. For example, one of the eligibility criteria for acceptance in an ESFP could be as the District's space and resources allow. Such a program would comply both with § 3-206.3(a), the federal EA program, and not be inconsistent with § 3-602 (or any other District of Columbia law cited for this Court's review).

FN6. In the instant case, Congress has not foreclosed enforcement of the provision through the use of § 1983.

FN7. Plaintiffs' opposition to defendant's motion to dismiss contends this Court can review the matters complained of because

> this lawsuit challenges defendant's failure to follow *Constitutional requirements*, and local and federal rules for administering the EA program which result in defendant's deprivation of plaintiffs' rights.
>
> Plaintiffs' Opposition to Defendant's Motion to Dismiss the First Amended Complaint, at 51 (emphasis added). They add that constitutional claims do not always require exhaustion of administrative remedies. *Id.* Count Two contains no constitutional component. Thus, plaintiffs cannot now amend their amended complaint to add a constitutional claim to Count Two. Moreover, plaintiffs have already challenged the constitutionality of the District's action in Counts Three through Six.

FN8. The Court will not extend *Younger v. Harris*, 401 U.S. 37 (1971) (assuming *arguendo Younger* applies to the District of Columbia), to the constitutional arguments presented by plaintiffs. As this Circuit has noted:

> The need or wisdom of extending *Younger* to all constitutional claims that *might* be adjudicated in state as well as federal courts ... is far more problematical. This extension would make federal courts cinderellas to their sister state courts in adjudicating federal constitutional rights, their native area of competence and jurisdiction. And it would prevent plaintiffs from exercising their traditional choice of bringing constitutional claims in either forum....
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> *Family Div. Trial Lawyers of the Superior Court v. Moultrie*, 725 F.2d 695, 702 (D.C. Cir. 1984).
>
> Nor will the Court accept defendant's contentions that the issues are moot and that these plaintiffs do not have standing to raise constitutional challenges. First, the fact that the District is willing to abide by the concessions it made in the earlier operating MOU cannot render plaintiffs' First Amendment claims moot -- the MOU is no longer in effect. Second, plaintiffs allege personal injury, fairly traceable to the defendant's actions, which is likely to be redressed by the requested relief should that relief be awarded. *See Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992). Standing also exists.

FN9. Whether plaintiffs have been unconstitutionally deprived of access to the courts cannot be resolved on this motion to dismiss.

FN10. Because no suspect class or fundamental right is at stake, heightened scrutiny need not be applied.

FN11. So that there is no confusion, any other motions to dismiss earlier filed are denied as moot.

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