For Opinion See 136 F.3d 709

United States Court of Appeals,
Eleventh Circuit.
Lawton CHILES, in his official capacity as Governor of the State of Florida, et al., Appellants,
v.
John/Jane DOE, No.'s 1-13, et al., Appellees.
No. 96-5144.
April 9, 1997.

On Appeal from the United States District Court For the Southern District of Florida

Initial Brief of Appellants

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***ii** *TABLE OF CONTENTS*

Item

***v** *TABLE OF CITATIONS AND AUTHORITIES*

Cases

***1** *STATEMENT OF JURISDICTION*

This is a direct appeal from a final judgment, which ordered Florida to modify its State Medicaid Plan, entered against Appellants by the Southern District of Florida. This Court has jurisdiction under 28 U.S.C. §1291; and, to the extent the order granted injunctive relief, under §1292. The final judgment was rendered August 28, 1996. (R14-449) Notice of appeal was filed September 3, 1996. (R14-450)

STATEMENT OF THE ISSUES

Issue I: Whether the district court had subject matter jurisdiction over a private action to compel placement of developmentally disabled persons in intermediate care facilities"

Issue II: Whether the district court abused its discretion by requiring Florida to provide intermediate care facilities for all developmentally disabled persons within 90 days.

STATEMENT OF THE CASE

1. Course of Proceedings and Disposition in the Court Below

This Case

In March 1992, thirteen individuals who allegedly were mentally retarded or developmentally disabled, and eligible for placement in "intermediate care facilities" ***2** (ICF) funded through Florida's Medicaid State Plan, sued for prompt placement in such facilities. The named defendants were Florida's Governor; the Secretary of Florida's Department of Health and Rehabilitative Services (HRS, now the Dept. of Children & Family Services); and three other administrators within HRS. The Governor and two HRS administrators were sued in their official capacity only; the Secretary and one other HRS official were also sued in their individual capacities. (R1-1)

Essentially, the individual plaintiffs attacked Florida's practice of placing eligible individuals on a waiting list for placement in ICF, which resulted in waiting periods of several years. They claimed this practice violated their right under 42 U.S.C. §1396a(a)(8) [Medicaid Act], which requires "assistance" to be provided with "reasonable promptness." They also claimed Florida's practice violated their civil rights under the Fifth and

Fourteenth Amendments. (R1-1-24-27)

Discovery and non-dispositive legal matters ensued, including dismissal of the organizational plaintiffs and Governor Chiles (R7-171-8, 10); and final judgment, not appealed, in favor of those defendants named in their individual capacity. (R14-457) Defendants and plaintiffs moved for summary and cross-summary judgement, respectively, in December 1992 and February 1993. (R7-165 & 166; R7-200 & 201) The motions remained at issue for about three and a half years.

***3** The district court granted plaintiffs' motion, while denying defendants' motion, on July 22, 1996. (R14-439) Final judgment for plaintiffs was entered August 28, 1996. (R14-449) Notice of appeal was filed September 3, 1996. (R14-450)

The July 22, 1996, "Order on Motions for Summary Judgment" noted plaintiffs' motion for class certification was pending before the magistrate. (R14-439-3, footnote 2) During a hearing on August 28, 1996,[FN1] plaintiffs' counsel and the court had a brief exchange, the substance of which was that the motion for class certification was pending. The court acknowledged the magistrate's report recommended certification. (R15-458-24, lines 3-11) No verbal ruling was made; no separate order was entered. Although the magistrate's August 26, 1996 report recommended class certification be granted (R14-446-12), the final judgment declared: "[a]ny pending motions are dismissed as moot." (R14-449-1 & footnote 3) Consequently, Plaintiffs' motion for class certification was not granted.

> FN1. This hearing was a consolidated procedure which addressed the emergency motions for preliminary injunctions sought in this case and in *Cramer.* There was no hearing on the permanent, injunctive-type relief effectuated through the final judgment here.

***4** The final judgment required Appellants, within 60 days, to:
establish within the State's Medicaid Plan a reasonable waiting list time period, not to exceed ninety days, for individuals who are eligible for placement in ICF/DD institutional care facilities.

(R 14-449-1) On January 6, 1997, the district court denied defendants' motion for a stay of the final judgment. This Court granted an emergency stay as to everyone except the individual plaintiffs on January 29, 1997; and expedited this appeal.

Related Litigation

The final judgment held plaintiffs' "Emergency Motion for Preliminary Injunction" to be moot. (R 14-449-1, footnote 3) That motion sought to prevent Appellants from implementing statutory changes enacted by the 1996 session of the Florida Legislature. In part, the legislation replaced privately-owned ICFs with home and community based facilities; effective July 1, 1996. *See* §393.165 & .166, Fla. Stat. (Supp. 1966). [Appendix A hereto]

In June 1996, different plaintiffs who already had ICF placements brought another class action, *Cramer v. Chiles,* case no. *9*6-6619-CIV-FERGUSON (S.D. Fla.) That lawsuit sought a preliminary injunction against the 1996 legislation, to the extent it would funding for ICF services to the developmentally disabled and would proceed without an adequate transition plan for already-placed individuals. Later, the injunction was granted (Appendix B hereto); appeal was taken (11th Cir. case no. 96-***5** 5147). In *this* case, the final judgment (R14-449-1, footnote 3) invited Appellees to intervene in *Cramer.*

2. Statement of the Facts

The thirteen anonymous Appellees are mentally retarded or developmentally disabled. Eleven were accounted for in Appellants' June 1996, "Memorandum of Law Regarding Standing," (R13-423), which was filed about 5 weeks before the district court entered its "Order on Motions for Summary Judgment." One Appellee died in December 1993. (R13-423, Ex. A at ¶7). At least two lived in intermediate care facilities. (R13-423, Ex. A at ¶¶4, 12) One lived in an intermediate care facility (ICF) until discharge was obtained by his mother in early 1994. (R13-423, Ex. A at ¶5) Four lived at home, where they received a variety of services. (R13-423, Ex. A at ¶¶6, 8, 10, 11) Three lived in a cluster facility, group home or rehabilitation center. (R13-423, Ex. A at ¶¶9, 13, 14) Of these people, at least six chose residences other than ICF, or were deliberately not seeking placement in an ICF. (R13-423, Ex. A at ¶¶5, 6, 8, 11, 13, 14) The rest received a variety of services, including transportation, day training, respite, support coordination, therapy and nursing, and room and board. (R13-423, Ex. A at ¶¶5-14)

Three individuals (Does 6, 8, & 9) could not be identified by Appellants. There was no indication they were not receiving services, only that their chosen ***6** anonymity prevented Appellants from specifically accounting for those services before the trial court.

Earlier, when Appellants moved for summary judgment, not as much was known about the individual plaintiffs. (R7-165-2 footnote 2) Affidavits with Appellants' motion declared that John Doe 2b was moderately retarded, and was placed on an ICF waiting list in 1984 (R7-165, Ex. 1A at ¶¶3, 4). It also declared John Doe 12 was autistic, and placed on an ICF waiting list in 1990 when ICF services became available. (R7-165, Ex. 1B at ¶3) Both of these Appellees have indicated a desire not to live in an ICF. (R13-423, Ex. A at ¶ ¶6, 13)

Later, in their answer, Appellants were able to make conditional admissions as to Appellees Jane Doe 1, John Doe 2 and John Doe 2b, John Doe 11, and John Doe 12. (R7-193-3-6 at ¶¶9-11, 20, 21). Appellants admitted Jane Doe 1 was placed in an ICF in September 1992, after seeking placement for 8 years. (R7-193-3 at ¶ 9a) Appellants admitted John Doe 2[a] met the requirements for admissions to an ICF, and had waited for five years; but denied he was eligible for medical assistance. (R7-193 at ¶10d) Appellants admitted John Doe 2b had been on an ICF waiting list for 8 years. (R7-193 at ¶11e) Appellants admitted John Doe 11 had been on an ICF waiting list since 1989. (R7-193 at ¶20c) Appellants admitted John Doe 12 had been on an ICF waiting list since 1990. (R7-193 at ¶21d)

***7** Again, both Doe 2b and Doe 12 indicated a desire not to live in an ICF. (R13-423, Ex. A at ¶¶6, 13) Doe 1 was admitted to an ICF in September 1992. (R13-423, Ex. A at ¶4) Doe 2a lived at home and was neither on a waiting list or seeking ICF placement. (R13-423, Ex. A at ¶5) Doe 11 lived in a small, community-based ICF. (R14-423, Ex. A at ¶12) Doe 12 lived in a small group home; his parents were satisfied with such placement and were not seeking ICF placement. (R13-423, Ex. A at ¶13)

3. Statement of the Standard or Scope of Review

Issue I: The district court granted summary judgment for Appellees despite Appellants' Eleventh Amendment argument, and other arguments relating to whether Appellees had a cause of action. A lower court's determination of its subject matter jurisdiction presents a question of law which is reviewed *de novo. Sea Vessel, Inc. v. Reyes,* 23 F.3d 345, 347 (11th Cir. 1994).

Issue II: The district granted summary judgment for Appellees. That order, premised on undisputed material facts, is reviewed *de novo. U.S. v. Route 2, Box 472, 136 Acres More or Less,* 60 F.3d 1523, 1526 (11th Cir.

1995).

The final judgment for Appellees granted declaratory relief which interpreted a provision of the Medicaid Act. That interpretation is also reviewed *de novo. See Teper v. Miller,* 82 F.3d 989, 993 (11th 1996) ("We review the ultimate decision of ***8** whether to grant a preliminary injunction for abuse of discretion, but we review de novo determinations of law made by the district court en route."). The final judgment also granted injunctive relief, which is reviewed for abuse of discretion. *Teper; Simmons v. Conger,* 86 F.3d 1080, 1085 (11th Cir. 1996).

SUMMARY OF THE ARGUMENT

Issue I: The district court lacked subject matter jurisdiction, as Appellees did not show injury establishing a genuine case or controversy. Placement on a waiting list, of itself, is not cognizable injury, when the full range of Medicaid services is provided during the wait. If any individual Appellee suffered actual injury, such injury could not sustain classwide relief.

There is no private right of action to enforce the "reasonable promptness" requirement of the Medicaid Act, through either the Act itself or through §1983. The Eleventh Amendment bars this lawsuit.

Issue II: If not barred by lack of jurisdiction, the district court abused its discretion by ordering Florida to provide ICF placements within 90 days in every instance. There was not a sufficient factual basis for such "class" relief.

The relief ordered would require massive spending by the Florida Legislature on an ICF program which was considered outmoded. It would require Appellees to act contrary to the 1996 law shifting Florida's program from privately operated ICFs to home and community based facilities; were it not for the injunction entered by the same court in the *Cramer* case.

The district court appropriated to itself the power to determine what amount of time constituted "reasonable promptness," without regard to available resources. It disregarded then-recent state law changes, which shifted Florida's Medicaid program for the mentally retarded and developmentally disabled from private, subsidized institutions to home and community-based services. Essentially, the court resolved a highly political question in favor of Appellees, thereby accomplishing for them judicially what they have not been able to obtain politically. The final order must be reversed, with directions on remand to fashion appropriate relief for Appellees as individuals only.

***11** *ARGUMENT*

ISSUE I

THE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION OVER A PRIVATE ACTION TO COMPEL PLACEMENT OF DEVELOPMENTALLY DISABLED PERSONS IN INTERMEDIATE CARE FACILITIES

A. *There Was No Genuine Case Or Controversy, As The Individual Plaintiffs Were Not Harmed And Thus Lacked Standing*

Appellees chose to plead anonymously. Nevertheless, more was learned about each individual plaintiff as the case progressed. By the time the district court decided against Appellants, none of the individual plaintiffs

known to Appellants could show injury. At most, one or two individuals desiring placement had waited several years without being placed in intermediate care facilities (ICF). All received an array of services in the interim. *There is no record evidence that these services were insufficient, or less in quality than what the individual plaintiffs would have received had they been placed in an ICF.* Several of the plaintiffs had expressed desires to live elsewhere. (R13-423, Ex. A)

In short, most Appellees cannot show even legal "harm"; that is, any unjustified delay in placing them in an ICF. No Appellee can show actual harm; that ***12** is, denial of appropriate services. Thus, there was no genuine controversy between the parties; the district court lacked subject matter jurisdiction.

To have standing, a plaintiff must show injury in fact traceable to the defendants' actions, and that the court is able to supply an adequate remedy. *Church v. City of Huntsville,* 30 F.3d 1332, 1335 (11th Cir. 1994). Standing is an absolute prerequisite to the exercise of federal judicial power. It is a core constitutional requirement underlying the court's ability to exercise judicial power. *Wehunt v. Ledbetter,* 875 F.2d 1558, 1566-1567 (11th Cir. 1989).

Standing has evolved as a doctrine of constitutional limitation of the federal judicial power found in the case or controversy language of Article III, Section 2 of the United States Constitution. It may be raised at any time in the judicial process. *ANR Pipeline v. Corporation Commission of the State of Oklahoma,* 860 F.2d 1571, 1578 (10th Cir. 1988), *cert. den.* 109 S.Ct. 1967 (1989); and is a "mandatory jurisdictional consideration ... before federal courts may hear his case." *Jean v. Nelson,* 711 F.2d 1455, 1505 (1983), *modified en banc* 727 F.2d 957 (11th Cir. 1984), *affirmed* 472 U.S. 846, 105 S.Ct. 563, 86 L.Ed.2d 664 (1985)

The district court rejected, or refused to consider, the jurisdictional aspects of Appellants' standing argument. Appellees never supplied the facts necessary to show ***13** injury and the legal ability to maintain this action. Therefore, the district court was presumed to lack jurisdiction. *Casey v. Lewis,* 4 F.3d 1516, 1519 (9th Cir. 1993) .

The standing requirement is not a pleading technicality, but a jurisdictional requirement which must be satisfied at all stages of the litigation, right through to judgment. *Lewis v. Casey,* 116 S.Ct. 2173 (1996); *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 112 S.Ct. 2130, 2136, 112 L.Ed.2d 351 (1992); *Church,* 30 F.3d at 1340-1 (partial reversal of preliminary injunction when individual plaintiffs lacked standing to challenge enforcement of building and zoning code as to shelters for the homeless, and could not establish a case or controversy to such extent).

In an action for declaratory and injunctive relief, a plaintiff must meet three requirements to demonstrate standing:
he must demonstrate that he is likely to suffer future injury; second, that he is likely to suffer such injury at the hands of the defendant; and third, that the relief the plaintiff seeks will likely prevent such injury from occurring.

Cone Corp. v. Florida Department of Transportation, 921 F.2d 1190, 1203-1204 (11th Cir. 1991), *cert. den.* 111 S.Ct. (1991). Appellees did not meet, and the district court did not find they met, any of these requirements.

First, it is not clear that any Appellees were injured or will be injured by waiting. All who were eligible for medical assistance and other services received ***14** them while on a waiting list. Being on a list only preserved future options; it did not necessarily indicate a desire to exercise them. Second, any injury did not occur at the hands of the defendants, whose placement options are constrained by the policy and funding decisions made by the Legis-

lature. The Florida Legislature simply chose to fund ICFs at a level less than Appellees desired; and, as of 1996, through an increasingly home and community based waiver program with which Appellees disagree. Third, placement in an ICF within 90 days does not guarantee better results than placement elsewhere. Appellees' speculation to the contrary is not sufficient to confer standing. *See City of Los Angeles v. Lyons,* 461 U.S. 95, 108, 103 S.Ct. 1660, 1665, 75 L.Ed.2d 675 (1983) (the "odds" that injury will occur in future not sufficient to show standing for equitable relief).

Appellees take the position that, merely because they are in the Medicaid system, they have standing to attack its faults. This is not so. To have standing as a named plaintiff in a class action, a plaintiff must plead and then prove he is personally injured because of the systemic defect for which he seeks relief. *Lewis v. Casey,* 116 S.Ct. 2173 (1996); *Doe v. Sullivan County,* 956 F.2d 545, 550 (6th Cir.), *cert. denied* 113 S.Ct. 187, 121 L.Ed.2d 131 (1992) (offensive conditions do not violate constitutional rights absent proof that they proximately caused an injury).

***15** The district court's orders are devoid of any findings that a plaintiff had been harmed or was in imminent danger of harm through Appellants' actions. In the order granting plaintiffs' cross-motion for summary judgment, the trial court apparently concluded that it was enough to find that individuals with developmental disabilities generally had to endure waiting lists for ICF placements:

At oral argument on this issue, Defendants conceded that Florida's HCFA State approved plan does provide for placement in ICF/MR facilities. Fla. Stat. s. 409.904. Further, Defendants have not disputed the facts alleging the state's failure to conform with the provisions set forth in that statute, which the Court construes as an admission of unreasonable delays in placing developmentally disabled persons into ICF/MR facilities.

(R14-439-2) To make matters worse, the district court entered class-wide relief while dismissing the motion for class certification as moot. In so doing, it exceeded its Article III jurisdiction.

In *Lewis v. Casey,* the district court ordered sweeping relief in an inmate class action challenging the Arizona prison system's alleged failure to provide adequate access to the courts; the circuit court affirmed. The Supreme Court reversed because the order was overly broad and because it failed to make specific findings of actual injury to a named plaintiff:

After the trial, the court found actual injury on the part of only one named plaintiff, Bartholic; and the cause of that injury -- the inadequacy which the suit empowered the court to remedy -- ***16** was failure of the prison to provide the special services that Bartholic would have needed, in light of his illiteracy, to avoid dismissal of his case. At the outset, therefore, we can eliminate from the proper scope of this injunction provisions directed at special services or special facilities required by non-English-speakers, by prisoners in lockdown, and by the inmate population at large. If inadequacies of this character exist, they have not been found to have harmed any plaintiff in this lawsuit, and hence were not the proper object of this District Court's remediation.

116 S.Ct. at 2183. Continuing, the Court declared that a finding of injury to a named plaintiff does not justify system-wide relief unless the case is a class action and the plaintiff establishes that the harm is pervasive throughout the system:

It is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution.

The actual-injury requirement would hardly serve the purpose we have described above -- of preventing courts

from undertaking tasks assigned to the political branches -- if once a plaintiff demonstrated harm from one particular inadequacy in government administration, the court were authorized to remedy all inadequacies in that administration.

Id. 116 S.Ct. at 2179, 2183.

Since the trial court found only two plaintiffs had proved an actual injury, the *Lewis* Court said, "[t]he constitutional violation has not been shown to be system ***17** wide, and granting a remedy beyond what was necessary to provide [the two plaintiffs] was therefore improper." *Id.* at 2184. Similarly, the district court's final judgment here--imposing class wide injunctive relief while never certifying a class and in the absence of facts justifying such relief-- was outside the court's jurisdiction.

B. *The Requirement Of "Reasonable Promptness" Is Not Enforceable Through the Medicaid Act*

The Medicaid Act as well as the regulations promulgated thereunder show that the provisions of 42 U.S.C. §1396a(a)(8) do not create an enforceable right under §1983 for an alleged failure by the state to *place* an individual in an ICF. Appellants had no obligation to place individuals in facilities; but were obligated only to reimburse the ICF providers with reasonable promptness:
a state plan shall provide that...*medical assistance* shall be furnished with *reasonable promptness* to all eligible individuals." (e.s.)

42 U.S.C. §1396a(a)(8). Section 1396d(a) of the Medicaid Act carefully defines medical assistance as:
payment of part or all of the cost of the following care and services ... for individuals, and, with respect to physicians' or dentists' services, at the option of the state, to individuals (e.s.)

See ***18***Briarcliff Haven, Inc. v. Department of Human Resources of Georgia,* 403 F.Supp. 1355, 1361 (N.D. Ga. 1975):
Medical assistance is defined at 42 U.S.C. §1396d as payment of part or all of the cost of specified care and services. The Supreme Court has consistently held that Congress was aware of the limitations on state resources when the statute was enacted, and the Court has emphasized that the states have always been free to establish the level of benefits that they desire to pay under similar social welfare programs.

Medicaid is a cooperative federal/state program authorizing federal grants to the states. The grants pay for medical assistance reimbursement to providers of services for individuals who meet eligibility requirements. 42 U.S.C. §1396. The program is analogous to a health insurance program since payments are made directly to qualified health care providers who have furnished the covered services. However, there is no threshold requirement that a state participate in Medicaid, or its optional services. *Preterm v. Dukakis,* 591 F.2d 121 (1st Cir. 1979). As the Supreme Court said in *Harris v. McRae,* 448 U.S. 297, 301, 100 S.Ct. 2671, 2680, 65 L.Ed.2d 784 (1980):
[t]he Medicaid program was created for the purpose of providing federal financial assistance to States that choose to *reimburse* certain costs of medical treatment for needy persons. (e.s.)

Medicaid is a vendor payment program for reimbursement of providers. It is not a creation of individual rights, such as the right to be placed in an ICF. To the contrary, ***19** the intent of 42 U.S.C. §1396a(a)(8) is only that providers of services be reimbursed with reasonable promptness.

Florida has chosen to participate in the ICF/MR program, a program which is only a small part of numerous

state plan requirements submitted by the state for approval from the United States Secretary of Health and Human Services in order to receive Federal Financial Participation. States that elect to participate in the Medicaid program are eligible to receive matching funds from the federal government if the state establishes a "state plan" which comports with the statutory and regulatory requirements under the Medicaid Act. *Charleston Memorial Hosp. v. Conrad,* 693 F.2d 324, 326 (4th Cir. 1982); 42 U.S.C. §1396a(a)(1)-(44); 42 C.F.R. §447. *State plans do not promise to provide specific services;* they promise to provide adequate payment to providers for services rendered. 42 U.S.C. §1396a(13)(a).

The Federal Health Care Financing Agency (HCFA) has adopted regulations interpreting "medical assistance" to create a duty upon a state to reimburse providers, not a duty to provide placements. HCFA's extensive regulations require each state to produce a state plan which consists in part of an agreement between the state Medicaid agency and each provider of services. 42 C.F.R. §431.107(b). The state Medicaid agency is not to provide services, but is instead required to reimburse the provider at specified rates for services actually rendered. 42 C.F.R. §§442.10-30.

***20** Medical assistance is reimbursement to a provider (or in certain situations directly to an individual for physician and dental services) for services rendered. 42 U.S.C. §1396d(a); 42 C.F.R. §447.25. But any payments made, including direct payments, must be supported by providers' bills for services, since all payments are intended to be reimbursement for services already performed. 42 C.F.R. §447.30(d)(2). The state plan must require a timely processing of claims for payment. 42 C.F.R. §445.45(1)i.

Specific remedies are provided for a state's noncompliance. Similarly, an ICF must, in order to receive reimbursement, comply with conditions of participation; including a continuous active treatment program for each client for whom reimbursement is sought. 42 C.F.R. §483.410 - .480.

HCFA regulations do not create a right to placement in an ICF. The regulations interpret 42 U.S.C. §1396 as a contract/subcontract relationship requiring a state agency to fulfill its duties by reimbursing private ICF providers, when those providers also comply with conditions of participation. Together, the federal statutes and HCFA regulations implement the Medicaid Act as a reimbursement mechanism, not a device creating substantive rights to specific services.

***21** C. *The Requirement of "Reasonable Promptness" is Not Enforceable Through the Civil Rights Act*

Because of the complexity and nature of the services that states provide under the Medicaid program, one of the most crucial terms of the bargain between the states and Congress concerning the states' participation in and acceptance of federal funds under the program, is the mechanism by which the bargain's terms will be enforced. It is unreasonable to assume that states knowingly consented to participate in a program that would subject them to suit by private individuals for alleged failure to provide optional Medicaid services. *See Edelman v. Jordan,* 415 U.S. 651, 673 (1974) ("The mere fact that a state participates in a program through which the Federal Government provides assistance for the operation by the state of a system of public aid is not sufficient to establish consent on the part of the state to be sued in the federal courts.").

The statutes and regulations upon which the states based their consent to participate in the program are silent as to the possibility that the states and their officials could be required, through private rights of action, to assume a burden that could so undermine fiscal integrity. The statutes and regulations at issue in this lawsuit only provide for administrative enforcement. They do nothing to alert the states to the private enforcement term through §1983.

***22** Congress enacted the Medicaid Act under the Spending Clause (Art. I, §8, cl. 1) of the U.S. Constitution. It enacted 42 U.S.C. §1983 pursuant to §5 of the Fourteenth Amendment. *See Mitchum v. Foster,* 407 U.S. 225, 238 (1972). Before *Maine v. Thiboutot,* 448 U.S. 1 (1980) issued, §1983 was generally interpreted as creating a cause of action only with respect to violations of constitutional and statutory rights created by federal laws passed pursuant to the post-Civil War Amendments. In *Thiboutot,* the Court held §1983 created a cause of action with respect to a violation of any federal law that conferred rights upon individuals. The same year, however, the Supreme Court recognized:

legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." *There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.* By insisting that Congress speak with a clear voice, we enable the States *t*o exercise their choice knowingly, cognizant of the consequences of their participation. [e.s.]

Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17, 101 S.Ct. 1531, 1540, 67 L.Ed.2d 694(1981) [citations omitted].

***23** Later, the Court reiterated:

The spending power is of course not unlimited, but is instead subject to several general restrictions articulated in our cases. The first of these limitations is derived from the language of the Constitution itself: the exercise of the spending power must be in pursuit of the "general welfare." *See Helvering v. Davis,* 301 U.S. 619, 640-641 (1937); *United States v. Butler,* [297 U.S. 1 at] 65 [1936] In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress. *Helvering v. Davis,* [301 U.S.] at 640, 645 Second, we have required that if Congress desires to condition the States' receipt of federal funds, it "must do so unambiguously, ... enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation." Third, our cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated to the federal interest in the particular national projects or programs. Finally, we have noted that other constitutional provisions may provide an independent bar to the conditional grant of federal funds. [citations omitted]

South Dakota v. Dole, 483 U.S. 203, 207-8, 107 S.Ct. 2793, 2796, 97 L.Ed.2d 171 (1987).

Pennhurst and *South Dakota v. Dole* make it clear. While the courts may imply a private cause of action under §1983 with respect to rights secured by statutes enacted pursuant to Congress' enumerated powers or the Fourteenth Amendment, they may not imply a private cause of action with respect to rights that Congress could create only pursuant to the Spending Clause. If Congress is to impose conditions, such as vulnerability to suits under §1983, upon the states' receipt of ***24** federal funds; Congress must unambiguously disclose such conditions so that the states can explicitly agree to them.

There was no such disclosure in the Medicaid Act and its later amendments. Florida's participation in the optional Medicaid program at issue cannot rise to acceptance of liability under §1983.

In *Wilder v. Virginia Hosp. Ass'n,* 496 U.S. 498, 110 S.Ct. 2510, 2517, 110 L.Ed.2d 455 (1990), the Supreme Court provided a three part test for determining whether a statute enacted pursuant to the Spending Clause, such as the Medicaid Act, rises to the level of an actionable "right" under § 1983. To pass this test, a statute must be

intended to benefit the plaintiffs; reflect a binding obligation, not congressional preference; and not be too vague and amorphous to be judicially enforced. *Id., 110 S.Ct.* at 2517-19.

This Court need turn no further than its recent opinion in *Maynard v. Williams,* 72 F.3d 848 (11th Cir. 1996). There, the district court preliminarily enjoined Florida from discontinuing child care services to an AFDC recipient who was participating in the JOBS program; an, additional service within the larger AFDC program. *Id.* at 851. This Court reversed, concluding:
Congress did not intend for 42 U.S.C. Sec. 602(g) to impose a binding obligation upon the states to provide child care to these volunteers on an unlimited basis. Accordingly, we must find ***25** that no private right of action exists under Sec. 1983 to allow a voluntary participant in a JOBS program to enforce the child care provision of Sec. 602(g).

Id. at 855.

The same is true here. Assuming §42 U.S.C. §1396a(a)(8) requires reasonably prompt services instead of reasonably prompt reimbursement; it still does not impose a "binding obligation" to provide unlimited ICFs, much less within 90 days of eligibility. Simply, there is no right which could be enforced through §1983.

Restated, even if it is assumed the plaintiffs were intended beneficiaries of §1396a(a)(8), the term "reasonable promptness" does not create a binding obligation; nor does it provide the judiciary with standards capable of enforcement. It is much more akin to a congressional preference than a specific right. *See Maynard,* 72 F.3d at 853 (concluding the statutory language establishing the JOBS program created a mandatory obligation upon participating states only when an AFDC recipient was required to obtain job training; voluntary trainees could be provided child care only to the extent of state resources).

Below, Appellees relied on a mistaken reading of *Wilder.* The *Wilder* Court found that health care providers (not individuals) could enforce certain Medicaid Act provisions via §1983 actions against the states, to obtain prospective injunctive relief. *Id.* at 2525. In so holding, it focused upon recent legislative history: Congress ***26** amended the Medicaid Act in 1975 to require that states waive their Eleventh Amendment immunity from suit in federal court for violations of the Act. The 1975 amendment required the Secretary of the Department of Health and Human Services to withhold 10 percent of federal Medicaid funds from any state that had not executed a waiver of immunity by a certain date.

The waiver provision generated a great deal of state opposition, and Congress repealed it during the following session. However, Congress also stated the repeal should not be construed to constrain the rights of health care providers to seek prospective injunctive relief in a federal or state judicial forum. *Id.* at 2521-22. The *Wilder* Court therefore, based its decision upon its finding that "Congress and the States both understood the Act to grant health care providers enforceable rights both before and after repeal of the ill-fated waiver requirement." *Id.* at 2522.

Wilder, therefore, is consistent with the principle that states can be subject to private suits as a condition of accepting federal funds under a Spending Clause program only when the condition is unambiguously communicated to the states at the outset. Here, the condition was not unambiguously communicated to the states.

Congress is capable of unambiguously informing a state that it will be subject to private causes of action if it participates in a federal program. *See Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 238-240, 105 S.Ct., 87 L.Ed.2d 171 (1985) ***27** (Eleventh Amendment prohibits suits unless Congress, pursuant to a valid exercise

of power, unequivocally expresses its intent to abrogate states' immunity to suit). No less clarity should be required here than is required under the Eleventh Amendment for purposes of subjecting the state to suit in federal court.

Private individuals do not have an implied right to bring §1983 actions to enforce the provisions of the Medicaid Act. To find otherwise is to ignore the fiscal limitations within which states must make hard choices among competing needs. Given these limitations, an expansion of private causes of action poses a very real threat of seriously overburdening state treasuries. In addition, such a reading of the Medicaid Act would thrust the federal district courts into administering state social welfare programs. Florida did not, and could not, anticipate or agree to this scenario, when it chose to participate in the Medicaid program at issue.

Appellees based their action for injunctive relief on "an unmet treatment need." This is not a proper basis for relief under §1983. To be entitled to relief under §1983, a plaintiff must prove a deprivation of, "rights, privileges, or immunities secured by the Constitution." Here, the plaintiffs had to show that reasonably prompt ICF placement is required by the Constitution or a federal statute, and that the requirement rises to the level of an enforceable private "right" under § 1983.

***28** In contrast, §42 U.S.C. 1396a(a)(8) says only:
A state plan for medical assistance must provide that all individuals wishing to make application for medical assistance under the plan shall have opportunity to do so, and that such *assistance shall be furnished with reasonable promptness* to all eligible individuals. (e.s.)

As noted earlier, "medical assistance" does not mean any particular treatment or service. It means the reimbursement for treatment and services. *See* 42 U.S.C. § 1396d(a) ("The term 'medical assistance' means payment of part or all of the cost of [listed] services."); *Briarcliff Haven.* Appellees cannot bootstrap a provider's right to prompt reimbursement into an individual right for a specific service, however promptly provided. They did not, and cannot, point to a single statute or regulation which interprets or applies "reasonable promptness" to require an ICF placement awaiting every individual who might qualify for admission.[FN2]

> FN2. Appellees' reliance below on 42 C.F.R. §435.911 was also misplaced. That regulation, on its face, addresses the time period for making eligibility decisions, not placements in an ICF:
> (a) The agency must establish time standards for determining eligibility and inform the applicant of what they are. These standards may not exceed--
>
> (1) Ninety days for applicants who apply for Medicaid on the basis of disability; ....

***29** In *Suter v. Artist M.,* 503 U.S. 347, 112 S.Ct. 1360, 118 L.Ed.2d 1 (1992), the Supreme Court provided further guidance on the third factor--the vagueness prong. It held that a mandatory provision in the Adoption Assistance and Child Welfare Act requiring "reasonable efforts" to maintain an abused or neglected child in the parental home, or to return the child from foster care was too vague to create an enforceable §1983 right. *Id.,* 112 S.Ct. at 1367-70.

To reach this conclusion, the Supreme Curt looked for objective "measures" of compliance in the legislation implementing regulations, "in light of the entire legislative enactment." *Suter,* 112 S.Ct. at 1367; *Arkansas Medical Soc., Inc., v. Reynolds,* 6 F.3d 519, 525 (8th Cir. 1993). It concluded that if the language of the statute could "plausibly [be] read to impose only a generalized duty on the State, to be enforced not by private individuals,

but by the Secretary," then there was no private right of action. *Id.,* 112 S.Ct. at 1370.

Since the statute and corresponding regulations in *Suter* contained insufficient detail, the Court held the statute was only "a directive whose meaning will obviously vary with the circumstances of each individual case." *Suter,* 112 S.Ct at 1370. The inherent ambiguity in the statute and regulations provided insufficient guidance to create an enforceable right. The court concluded: "[h]ow the State was to comply ***30** with [the] directive, and with the other provisions of the Act, was, within broad limits, left up to the State." *Id.*

The same is true here. Section 1396a(a)(8) does not specify what services, or level of services compared to need, a state must provide. The time necessary to provide a service could vary with the resources committed, yet still be reasonably prompt under the circumstances. Finally, even if §1396a(a)(8) is read as a mandatory directive, rather than an aspiration, a right under §1983 is not created. *See Suter,* 112 S.Ct. at 1367 ("[t]hat statutory language is mandatory in its terms is surely not enough to confer a right enforceable under § 1983").

Anticipating Appellees' response, Appellants note that *Suter* has been modestly constrained by a later statutory enactment, which provides:
In an action brought to enforce a provision of this chapter, such provision is not to be deemed unenforceable because of its inclusion in a section of this chapter requiring a State plan or specifying the required contents of a State plan. This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds applied in *Suter v. Artist M.,* 112 S.Ct. 1360 (1992), but not applied in prior Supreme Court decisions ....

42 U.S.C. §1320a-2.

Section 1320a-2 has no bearing on this case, just as it had no bearing on this Court's later decision in *Maynard. See id.,* 72 F.3d at 852 (relying on *Suter* for ***31** proposition that "each statute must be interpreted by its own terms"). Appellants do not base their argument on the inclusion of ICF for the developmentally disabled in Florida's Medicaid plan. Their argument is based on the fact that "reasonable promptness" is akin to a congressional preference, and too vague a standard to be judicially enforced. Such grounds, as reasons for not finding a cause of action under §1983, arise from the *Wilder* decision; which issued in 1990. Since *Wilder* predates *Suter,* its principles are expressly exempt from the operation of §1320a-2.

To sum, the reasonable promptness standard in §1396a(a)(8) fails under all three *Wilder* criteria. First, the statute benefits no individual, but creates an aspirational performance goal for state Medicaid programs. Second, it is not "binding," as it expressly allows promptness that is reasonable, and thus variable under different circumstances. Third, and most damaging to Appellees, the statute is too vague to be judicially enforced.

Here, the district court failed to perform the statute-specific analysis mandated by earlier U.S. Supreme Court decisions and refined by *Suter.* Section §1936(a)(8) is too vague to create a cause of action which can be enforced through §1983.

D. *The Eleventh Amendment Bars This Suit*

The Eleventh Amendment deprived the district court of subject matter jurisdiction of this case. Preliminarily, and most important to this analysis, the ***32** lawsuit below operated against Florida as a state. All defendants were state officials sued in their official capacity. Two who were also sued individually obtained summary and final judgments in their favor, in orders which were not appealed. (R14-457) Official capacity lawsuits are the

equivalent of suits against the governmental entity in which the person holds office. *Kentucky v. Graham,* 473 U.S. 159, 87 L.Ed.2d 114, 105 S.Ct. 3099 (1985).

Most important, the suit attacked an alleged statewide practice of placing developmentally disabled people on waiting lists, until a place could be found at an ICF. Appellees sought to end this practice. The district court obliged. It ordered Florida to amend its Medicaid plan in a manner perpetuating privately-subsidized ICF--despite recent legislation to the contrary--at a level allowing all placements to occur within 90 days of eligibility. Seldom does a suit and the relief granted operate so clearly against a state, despite the fact that the nominal defendants were individuals.

It matters not that Florida receives federal Medicaid money. In a very recent decision, the U.S. Supreme Court held that Eleventh Amendment immunity is not divested when a state agency is indemnified against the cost of litigation and judgments by the federal government. *Regents of the Univ. of Cal. v. John Doe,* case no. 95-1694 (U.S. Feb. 19, 1997). *See* ***33***Yorktown Medical Laboratory. Inc. v. Perales,* 948 F.2d 84, 88 (2d Cir. 1991) ("State participation in a federal program, however, does not in itself constitute waiver; rather waiver will be found only if stated in express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction."), *quoting Florida Dep't of Health and Rehabilitative Servs. v. Florida Nursing Home Ass'n,* 450 U.S. 147, 150, 101 S.Ct. 1032, 1034, 67 L.Ed.2d 132 (1981) (per curiam)[internal quote omitted].

Regents v. John Doe involved a breach of contract claim, arising from the Livermore National Laboratory's refusal to hire the plaintiff; who could not get security clearance. The Laboratory was operated by the University of California through a contract with the federal government. The district court dismissed on Eleventh Amendment grounds; the Ninth Circuit reversed.

Reversing the Ninth Circuit, the Supreme Court concluded:
with respect to the underlying Eleventh Amendment question, it is the entity's potential legal liability, rather than its liability in the first instance, that is relevant

Id. Here, Florida is liable for carrying out the district court's final judgment, which does not direct any specific individual to do anything. Instead, it requires substantive lawmaking--either legislation or administrative rules--to amend Florida's Medicaid plan. The order also requires expenditure of enough money to provide placements ***34** in ICF within 90 days, regardless of other circumstances. All relief operates directly against Florida, which is the real party in interest.

Were these facts not enough, the relief obtained in this case runs afoul of the U.S. Supreme Court's decision in *Pennhurst State School & Hospital v. Halderman,* 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984); which provides the legal framework for an Eleventh Amendment bar here. In *Pennhurst,* the Court identified three factors indicating an action nominally against public officials was actually against the state:
"The general rule is that a suit is against the sovereign if [1] 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' or [2] if the effect of the judgment would be 'to restrain the Government from acting, or [3] to compel it to act.' " *Dugan v. Rank,* 372 U.S. 609, 620, 83 S.Ct. 999, 1006, 10 L.Ed.2d 15 (1963) (citations omitted).

Id. 104 S.Ct. at 908, footnote 11. Appellees sought and obtained an order requiring Florida's executive branch officials to amend the state's Medicaid plan, commit greater resources to the developmentally disabled, and to contravene statutory changes by the 1996 Legislature. Seldom does the Eleventh Amendment so appropriately

apply.

Another good example is provided by *Jordano v. Steffens,* 787 F.Supp. 886, 893-894 (D. Minn. 1992). There, the court dismissed a developmentally disabled ***35** plaintiff's complaint and denied a motion for a preliminary injunction demanding the development of a community-based waiver slot and additional funding. Noting that any order to increase Medicaid funding would have to be paid by the state (*id.* at 893, n. 11), the court concluded the plaintiffs' demand for enforcement of the state's Medicaid plan was barred by the Eleventh Amendment under *Pennhurst. Id.* at 894. Here, Appellees are actually seeking to apply Florida's Medicaid Plan in light of their interpretation of §1396a(a)(8). Only by bootstrapping can they avoid the exact circumstances of *Jordano.*

The Eleventh Amendment bars, with additional force, relief that would "insert the federal courts into the management of the state's fiscal affairs" and that would "bind a state to specific expenditures for specific purposes." *MSA Realty Corp. v. State of Illinois,* 990 F.2d 288, 295 (7th Cir. 1993) (Eleventh Amendment barred an official capacity action against state official in which the plaintiffs demanded an order requiring officials to lower a state sales tax increment used for local government debt service); *Mello v. Woodhouse,* 755 F.Supp. 923 (D. Nev. 1991) (Eleventh Amendment barred an action in which the judgment would force the state to perform a contract). *See Seminole Tribe of Florida v. State of Florida,* 11 F.3d 1016, 1028-1029 (11th Cir. 1994), *affirmed* 116 S.Ct. 1114 (1996) (action to require the Florida ***36** Governor to negotiate an Indian gaming agreement was a suit against the state, as it forced the state itself to negotiate).

When it affirmed this Court's decision in *Seminole Tribe,* the Supreme Court made it clear that only the Fourteenth Amendment--not the Spending Clause-- empowered Congress to override the states' Eleventh Amendment immunity. To do so, Congress must: (1) unequivocally express its intent to abrogate that immunity; and (2) act pursuant to a valid exercise of power under the Fourteenth Amendment. *Id.* 116 S.Ct. at 1123. In the Social Security Act, and hence the Medicaid program, Congress has not expressed any intent to overrule the Eleventh Amendment. As recently observed by the Tenth Circuit:

Congress has not abrogated the states' sovereign immunity with respect to claims for withheld SSI benefits in any provision of the Social Security Act. *See Edelman,* 415 U.S. at 674, 94 S.Ct. at 1361 (no provision of Social Security Act provides for waiver of state's Eleventh Amendment immunity); *Granados v. Reivitz,* 776 F.2d 180, 183 (7th Cir.1985) ("Nor were we able to find in the Social Security Act any indication of congressional intent to waive the state's immunity to suit in federal court.").

Johns v. Stewart, 57 F.3d 1544 (10th Cir. 1995). By its very nature, the Social Security Act has its genesis in the Spending Clause, not the Fourteenth Amendment.

The application of *Seminole Tribe* has far reaching implications for the prospects of private right causes of action against states in federal courts. The central ***37** issue is whether Congress intended that the Medicaid Act could be enforced through the Fourteenth Amendment.

Again, the Medicaid Act is silent on the Fourteenth Amendment. However, the *Pennhurst* Court fashioned a rule of statutory construction to determine when Congress has invoked its authority under the Fourteenth Amendment absent explicit reference to the Amendment itself. The Court began with this reasoning:

Because such legislation imposes congressional policy on a State involuntarily, and because it often intrudes on traditional state authority, we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment.

Id., 451 U.S. at 16. Congress need not recite any particular talismanic terms like "Section 5" or "Fourteenth

Amendment." *E.E.O.C. v. Wyoming,* 460 U.S. 226, 243 at n. 18, 103 S.Ct. 1054, 1081 at n. 18 (1983). However, Congress must express, somewhere in the legislative history, an intent to impose obligations on the state pursuant to its power to enforce the Fourteenth Amendment. *Pennhurst,* 451 U.S. at 18-19. A generic statutory reference to "rights" is inadequate evidence of such congressional intent. *Id.* Where congressional intent is ambiguous or missing, courts should find that Congress did not enact legislation to enforce Fourteenth Amendment guarantees. *Id.*

***38** Applying these principles, the *Pennhurst* Court held that Congress enacted the Developmentally Disabled Assistance and Bill of Rights Act under its spending authority rather than the Fourteenth Amendment. *Id.* The same result obtains here. Nothing in the Medicaid Act, or §1396a(a)(8) specifically, invokes or intimates the Fourteenth Amendment. Under *Pennhurst* and *Seminole Tribe,* this Court must conclude Congress did not exercise its Fourteenth Amendment power, thereby overriding Eleventh Amendment immunity.

Florida has not waived its Eleventh Amendment immunity. Although §768.28, Florida Statutes, established a limited waiver of sovereign immunity from tort actions brought in *state* court, it did not enact a parallel waiver of immunity from private suit in federal court. *See, e.g., Schopler v. Bliss,* 903 F.2d 1373, 1378-79 (11th Cir. 1990). Consequently, Appellees cannot reasonably maintain Eleventh Amendment immunity was waived by Florida's participation in Medicaid. As the Florida Legislature has adamantly declared:
No provision of this section, or of any other section of the Florida Statutes ... shall be construed to waive the immunity of the state or any of its agencies from suit in federal court, as such immunity is guaranteed by the Eleventh Amendment to the Constitution of the United States, unless such waiver is explicitly and definitely stated to be a waiver of the immunity of the state and its agencies from suit in federal court.

§768.28(17), Florida Statutes (1995).

***39** Neither §1396a(a)(8) nor the larger Medicaid Act created a private cause of action by individuals seeking specific services. The language of §1396a(a)(8)--if it was intended to benefit plaintiffs below--does not create a binding obligation, and is too vague to be enforced judicially. Therefore, there also is no cause of action under § 1983. The Eleventh Amendment applies to bar this lawsuit.

***40** *ISSUE II*

THE DISTRICT COURT ABUSED ITS DISCRETION BY REQUIRING FLORIDA TO PROVIDE INTERMEDIATE CARE FACILITIES FOR ALL DEVELOPMENTALLY DISABLED PERSONS WITHIN 90 DAYS.

A. *Florida's Optional Medicaid Program for the Developmentally Disabled*

1. *Before the 1996 Legislation*

The Medicaid Act, 42 U.S.C. §1396 et seq., establishes a cooperative federal-state program designed to furnish people with public assistance who are unable to meet the cost of necessary medical services. § 1396. However, it is unlike other major federal entitlement programs, such as Social Security, Supplemental Security Income and Medicare. Medicaid is not a federally-administered program with a uniform set of statutorily defined benefits but is a state administered, federally assisted program.

States are free to tailor their Medicaid programs by selecting what services will be provided. There are 10 cat-

egories of services which a state must agree to cover in its state plan in order to receive federal financial participation. Among them are patient and outpatient hospital services, physicians services, and nursing facilities services for adults. Beyond these mandatory services are approximately 33 other optional programs. Among those is ICF/MR or DD (Intermediate Care Facilities for the ***41** Mentally Retarded or Developmentally Disabled). The ICF/DD program is authorized by 42 U.S.C. §1396d(a)(15). Pursuant to §409.906(14), Florida Statutes (1995), Florida has chosen to have this program.

States are also authorized to impose quantitative and durational limits on services paid for under their Medicaid state plans. 42 C.F.R. §440.230(b). Some states restrict the number of times per month that a Medicaid recipient may receive physical therapy on an outpatient basis. Other states pay for home health services only for a specified number of days following acute hospitalization.

This and other aspects of the statutory discretion delegated to the states are specifically recognized in the enactment clause of the Medicaid Act, which was adopted:
[f]or the purpose of enabling each State, as far as practicable under the conditions in such State, to furnish ... medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services. [e.s.]

42 U.S.C. §1396 *See Briarcliff,* 403 F.Supp. at 1361:
The Supreme Court has consistently held that Congress was aware of the limitations on state resources when the statute was enacted, and the Court has emphasized that the states have always been free to establish the level of benefits that they desire to pay under similar social welfare programs.

***42** In 1981, Congress offered states the option of providing services and supports to Medicaid recipients with long term care needs in home and community-based settings by creating the Home and Community-Based waiver authority. *See* Senate Report No. 97-139 and House Conference Report No. 97-208, *1981 U.S. Congressional Code & Administrative News* at page 396. Florida first obtained approval for its home and community-based waiver services program in 1982 for day treatment services. In 1992, the Health Care Financing Administration (HCFA) approved a major change to Florida's program. This change adopted the philosophy of avoiding institutional care, by providing support and services to individuals with disabilities in their own homes or home-like settings.

More recently, Florida has emphasized the use of the home and community based waiver as its principal vehicle for expanding and improving long-term care services to individuals with developmental disabilities. Nevertheless, current federal law and regulations contain *no* requirements governing the number and distribution of ICF/DD'S that a state must maintain.

2. *The 1996 Legislative Changes*

In 1996, the Florida Legislature passed law which eliminated the ICF program for privately owned and operated providers while expanding the home and community based waiver services program. *See* §§ 393.165 &.166, Florida Statutes (Supp. 1996; ***43** effective July 1, 1996). Transitional provisions aside, the new law required the [Florida] Agency for Health Care Administration (AHCA) to shift the ICF/DD program from privately owned and subsidized facilities to community based services:
privately owned or operated facilities authorized to receive reimbursement through the Medicaid Intermediate Care Facility for the Developmentally Disabled program on June 30, 1996, shall no longer be reimbursed through that program but may continue to serve clients through noninstitutional service arrangements....

[I]ndividuals who reside in state-owned-and-operated intermediate care facilities for the developmentally disabled shall continue to receive services financed through the Medicaid Intermediate Care Facility for the Developmentally Disabled program. (e.s.)

§ 393.165(2). Florida Statutes (Supp. 1996) [full text attached as App. A]. Indirectly, the 1996 law required AHCA to submit an amendment of Florida's Medicaid plan to the federal Health Care Financing Administration (HCFA) for approval. This amendment would implement the Legislature's directive to rely more on home and community based services than on private ICF. These events have not yet occurred, as they were blocked by the preliminary injunction entered by the same judge in *Cramer*. (Appendix B hereto).

During the hearing on August 28, 1996, the district court acknowledged that §393.165(2), Florida Statutes, undermined Appellees' claim. (R15-458-23, lines 8-23) Nevertheless, the final judgment ignored the 1996 law. It required Appellants to act ***44** contrary to that law, and to perpetuate the private ICF system the 1996 Legislature sought to replace with community based services. Seldom does a federal court fashion relief so unwarranted and so intrusive upon legislative and administrative decisions of a state government. Seldom is an abuse of discretion so palpable.

B. *The "Reasonable Promptness" Requirement of 42 U.S.C. §1396a(a)(8) Does Not Require Provision of Services Within 90 Days in All Instances*

In part I of this brief, Appellants urged that there is no private cause of action to enforce the reasonable promptness requirement of 42 U.S.C. §1396a(a)(8), either through the Medicaid Act itself or the Civil Rights Act. Appellants rely on that argument here.

For much the same reason, the district court abused its discretion by requiring Florida to place all people in ICFs within 90 days of determining their eligibility. The district court appropriated to itself the power to determine what amount of time constituted "reasonable promptness" under the Medicaid Act, and imposed that time limit regardless of Florida's resources or recent legislation to the contrary. By so doing, the district court abused it discretion.

***45** C. *The Record Does Not Factually Support Summary Judgment and Broad Injunctive Relief For Appellees*

1. *Record Insufficiency*

At the summary judgment stage, Appellees could not merely rely on their complaint to establish their standing to secure relief. They were required to "set forth by affidavit or other evidence specific facts" showing actual injury. *Lewis v. Casey,* 116 S.Ct. at 2183. Appellees' affidavits and other evidence utterly failed to establish actual harm, or that Appellees indeed suffered and would continue to suffer harm.

Factually, the record can be distilled to very little. Thirteen individuals, mentally retarded or developmentally disabled, typically waited several years to be placed in an ICF. All but two or three of these individuals, who pled anonymously, were accounted for by the time the district court ruled. The remainder (one deceased and one voluntarily dismissed) received a tremendous array and amount of home-based or other services; including, in three instances, actual placement in an ICF.

Not one individual plaintiff has ever claimed, or could claim, that placement in an ICF alone would have alleviated his or her condition. Plaintiffs claim of harm really is a "quality of life" complaint. At most, some of the

lesser-afflicted individuals have speculated that placement in an ICF would have presented more opportunities for social interaction, education, and rehabilitation. Such speculation, in the absence of ***46** record evidence, simply is not enough to sustain broad injunctive relief. *See Merrett v. Moore,* 58 F.3d 1547, 1552 & n. 10 (11th Cir. 1995), *rehearing den.,* 77 F.3d 1304 (1996), *cert. den.,* 117 S.Ct. 58 (1996) (when record of motorists' wait in line for vehicular roadblock did not indicate many or most drivers believed they could *not* leave, there was insufficient evidence for relief sought, including an injunction against similar roadblocks in the future). Assuming some of the plaintiffs were harmed does not sustain the drastic remedy imposed, which would force placements in ICFs regardless of the cost or location of such facilities.

2. *Injunction Overbroad*

As detailed in the statement of the case, this lawsuit was not certified as a class action. Nevertheless, the court entered class-wide relief:

ORDERED and ADJUDGED that Defendants shall, within 60 days of the date of this Order, establish within the State's Medicaid Plan a reasonable waiting list time period, not to exceed ninety days, for individuals who are eligible for placement in ICF/DD institutional care facilities.

(R 14-449-1) Apparently, the court granted sweeping relief on the mistaken assumption that eligibility for services alone created a right to immediate placement in an ICF, regardless of whether any real harm was caused by delay. However, the record is legally insufficient to sustain the relief granted. *See Lewis v. Casey,* 116 ***47** S.Ct. at 2183 ("The remedy must of course be limited to the inadequacy that produced the injury-in-fact that the plaintiff has established.").

Appellants do not concede any plaintiffs suffered legally cognizable injury. Assuming such does not sustain the judgment below. A finding of injury to a few named plaintiffs does not justify system-wide relief unless the case is a class action and the plaintiff establishes that the harm is pervasive throughout the system. *Lewis,* 116 S.Ct. at 2179, 2184 at n. 7. As the *Lewis* Court declared:

It is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution.

The actual-injury requirement would hardly serve the purpose we have described above -- of preventing courts from undertaking tasks assigned to the political branches -- if once a plaintiff demonstrated harm from one particular inadequacy in government administration, the court were authorized to remedy all inadequacies in that administration.

Id. at 2179, 2183.

Here, there was no showing of statewide or "system" wide injury. At most, two or three individuals desirous of placement in ICF waited several years without being placed, but received other services in the interim. As in *Lewis,* in which only two plaintiffs proved actual injury, there simply were no facts justifying the relief granted. ***48** *See id.* at 2184:

The constitutional violation has not been shown to be system wide, and granting a remedy beyond what was necessary to provide [the two plaintiffs] was therefore improper.

Here, there was no showing of a system wide constitutional violation. Even if there had been such showing, the

relief granted was improper, The final judgment was not limited to the inadequacy--lengthy waiting time for placement in ICFs--that produced the alleged injury. It required the Executive Branch to continue an ICF program that was considered inefficient, and would have been significantly changed absent the *Cramer* injunction. It ignored tremendous budgeting implications.

Instead, the district court should have given Florida a chance to fix any proven violation of federal law. *See Taylor v. Freeman,* 34 F.3d 266, 274 (4th Cir. 1994) ("intrusive and far-reaching federal judicial intervention in the details of prison management is justifiable only where state officials have been afforded the opportunity to correct constitutional infirmities and have abdicated their responsibility to do so").

Not having been given the opportunity to correct the waiting list problem, Florida officials cannot be said to have abandoned any responsibility to do so. The district court should have, for example, ordered and end lengthy waiting periods generally, without dictating how the problem was to be corrected. Such relief would ***49** not have forced state officials to ignore the 1996 law, and would have comported with an earlier teaching of this Court:

While one of the most important duties of federal courts is to protect the constitutional and statutory rights [of plaintiffs], interference in the processes of another branch of government should be as narrow and short-lived as fulfilling that constitutional duty allows.

Ensley Branch NAACP v. Siebels, 31 F.3d 1548, 1574 (11th Cir. 1994). *See also Spallone v. U.S.,* 492 U.S. 265, 280, 110 S.Ct. 625, 632 (1990).(federal courts should use the least possible power" adequate tp protect federal rights); *Missouri v. Jenkins,* 115 S.Ct. 2038, 2049 (1995)(remedial relief must directly address and relate to the constitutional violation itself); *Mackin v. City of Boston,* 969 F.2d 1273 (1st Cir. 1992), *cert. den.* 113 S.Ct. 1043 (1993) (intrusions by a federal court into the affairs of local government should be kept to a minimum).

The same rationale which compels judicial restraint in granting injunctive relief, also compels the conclusion that the relief sought and granted was essentially a political remedy which the district court should have avoided. As the Seventh Circuit observed:

[T]he underlying problem [foster care] is not lack of professional competence but lack of resources, *a problem of political will unlikely to be soluble by judicial means...* The allocation of the nation's -- even a single state's -- resources is not a realistic assignment for the federal courts. Any standard of foster care ***50** that the courts declare in the name of the Constitution is likely to be a minimum one that will do little for the plight of the unwanted, abandoned, neglected or abused child. [e.s.]

K.H. v. Morgan, 914 F.2d 846, 853-854 (7th Cir. 1990).

The order below effectively required Appellants to fund and administer--within a mere 60 days--additional ICFs, whether public or private; and was manifestly against the stated public policy of providing the most cost effective, efficient, and humane delivery of services to the mentally retarded and developmentally disabled. Given the 1996 legislation and the very short time allowed to amend the Medicaid plan, the district court's foray into the political arena was shortsighted and probably impossible to attain.

For all these reasons, the district court should have abstained from entering the political arena. To order specific relief for those Appellees who could show harm may have been proper. To grant the relief ordered far exceeded the court's authority, thereby constituting an abuse of discretion.

Finally, Appellees are not without proper forums--the Florida and U.S. Legislatures. As the Third Circuit has

observed in an attack on Delaware's AFDC payments:
Under the statutory scheme, AFDC recipients and activists must avail themselves of the political process, not the judicial process, to use these figures to effect the changes they seek.

***51** *Everett v. Schramm,* 772 F.2d 1114, 1122 (3d Cir. 1985) Appellees are ultimately no different from the "activists" in *Everrett.* To obtain and keep the relief they sought, they must prevail in the legislative arena, not the judicial.

CONCLUSION

The district court's orders granting summary judgment and final judgement in favor of Appellees must be reversed, with directions to dismiss due to lack of a private cause of action under 42 U.S.C. §1983; and, thus, due to the bar created by the Eleventh Amendment.

If §1396a(a)(8) is interpreted to require reasonably prompt provision of ICFs to individuals, rather than prompt reimbursement to providers, and such requirement rises to a right enforceable under §1983; then the individual Appellees must still show actual harm through waiting for placement in ICFs. Since there is no record evidence of actual harm, the district court should be instructed to conduct an evidentiary hearing, if necessary, to determine whether any of the individual plaintiffs have been injured. Upon a showing of injury, the district court must determine only whether further relief is needed in light of the services which have been provided during the pendency of this litigation. The district court could not fashion a classwide remedy.

Appendix not available

Lawton CHILES, in his official capacity as Governor of the State of Florida, et al., Appellants, v. John/Jane DOE, No.'s 1-13, et al., Appellees.
1997 WL 33493418 (C.A.11) (Appellate Brief)

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