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 14, 1997.

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

Reply Brief of Appellants

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SUMMARY OF THE ARGUMENT

Issue I: Under *Seminole Tribe,* §1983 cannot be used to enforce any legislation grounded on the Spending Clause, regardless of whether rights are created under that legislation. The Eleventh Amendment bars this lawsuit.

Issue II: [Appellants rely on their initial brief.]

Issue III: Appellees' equal protection and due process claims were not ruled on below. Prudence, including the need to evaluate the evidence for the first time, dictates that this Court decline to reach these claims.

***2** *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*

No one belittles the plight of some of the Appellees. The fact remains that they offer only speculation as to whether any of them were actually harmed by waiting for placement in an intermediate care facility (ICF).

While Appellants did not dispute the occurrence and length of delays in placing developmentally disabled persons into ICFs, nothing establishes conclusively that the alleged regression of people not placed in ICFs--and the alleged “thriving” of those so placed--are causally connected. Absent this causal connection between placement delays and actual harm, Appellees facts were no more than a chronicle of coincidence. Appellees lacked standing. There was no case or controversy below; thus, the district court did not have subject matter jurisdiction.

***3** B. *The Requirement Of “Reasonable Promptness” Is Not Enforceable Through the Medicaid Act*

Nothing in the Medicaid Act, standing alone, even purports to give private individuals the ability to enforce provisions of a state's Medicaid plan. Appellees unwittingly concede as much, as their authority (answer brief, p. 24) is comprised largely of district court decisions in which various provisions of the Medicaid Act were enforced through §1983. *See e.g., Sobky v. Smoley,* 855 F.Supp. 1123, 1133 (E.D.Cal. 1994) ("Section 1396a(a)(1) [of the Medicaid Act] creates a federal right enforceable by plaintiffs *under Sec. 1983.* [e.s.]"). In the cases not mentioning §1983, it appears the ability of private individuals to enforce the Medicaid Act directly against a state was not raised.

If the Medicaid Act, standing alone, is directly enforceable against a state by a private individual, then the Medicaid Act is its own "remedial scheme." Section §1983 would not be available to enforce any rights under that Act. *See Seminole Tribe of Florida v. Florida,* 116 S.Ct. 1114, 1132 (U.S. 1996):
where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young.*

***4** Section 1983 is not available to enforce those provisions of the Medicaid Act relied on by Appellees; and, as explained more clearly below, not available to enforce any federal law grounded on the Spending Clause.

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

For clarity, Appellants reprise their main points. The first, and narrowest, point is that 42 U.S.C. §1396a(a)(8) simply does not benefit individual Medicaid *recipients;* rather, it creates, at most, a right in Medicaid *providers* to reasonably prompt payment for medical services rendered. (*See* initial brief, p. 17-20.) Next, if §1396a(a)(8) operates in favor of Medicaid recipients, it does not create any "right." Instead, it creates a Congressional preference rather than a binding obligation. (*See* initial brief, p. 24-26.) Also, no right is created because the phrase "reasonable promptness" is not sufficiently precise to allow judicial enforcement. (*See* initial brief, p. 28-31).

Suter v. Artist M., 503 U.S. 347, 112 S.Ct. 1360, 118 L.Ed.2d 1 (1992) dictates the conclusion that §1983 is not available to Appellees. That decision distinguished--as Appellees are unable to do--the *Wilder* case, which found the specific directives of the Boren Amendment created enforceable rights in Medicaid providers.

In *Wilder v. Virginia Hosp. Assn.,* 496 U.S. 498, 110 S.Ct. 2510, 2517, 110 L.Ed.2d 455 (1990), an association of hospitals challenged Virginia's formula for ***5** calculating reimbursement rates for Medicaid services. The association contended Virginia's formula did not result in rates that were "reasonable and adequate," as required by the 1980 "Boren Amendment":
[a state's Medicaid plan must] provide--
(A) for payment ... of the hospital services, ... through the use of rates ... *which the State finds, and makes assurances satisfactory to the Secretary, are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities* .... [e.s.]

Id., 110 S.Ct. at 2513-15, *quoting* 42 U.S.C. §1396a(a)(13)(A).

Most useful is the *Wilder* Court's determination that a sufficiently specific, binding obligation was established by the Boren Amendment; which, unlike the statute at issue here, required states to adopt rates, administratively, which were reasonable and adequate. It required rulemaking by the states. Those rules, in turn, had to contain numerical amounts to be paid for specified medical services.

Nothing of the sort is involved here. “Medical assistance” means payment for services, not the services themselves. (*See* initial brief, p. 17.) Moreover, §1396a(a)(8) does not require rulemaking, and does not require provision of reasonable assurances--matters which were significant to the *Wilder* Court. *See id.,* 110 S.Ct. at 2516-18. Appellees fail to see this, and that *Wilder* is not controlling. ***6** Appellants' reading of *Suter* (initial brief, p. 29-30) is correct, and weighs heavily toward finding §1983 unavailable to Appellees.

The elaborate remedial scheme authorized by the Medicaid Act, as implemented through administrative rules of the Department of Health and Human services (HHS), precludes use of §1983. *See Seminole Tribe,* 116 S.Ct. at 1132 (when Congress has specified a remedial scheme, courts should hesitate before allowing a suit to proceed under the *Ex parte Young* exception).

That scheme is described in the initial brief (p. 19-20). Initially, Medicaid funds may be withheld upon a finding (after notice and hearing) of state non-compliance with the Medicaid Act. 42 U.S.C. §1396c Whatever detail may be lacking in the statute itself is more than amply supplied by the implementing regulations. These regulations, found at 42 CFR §430.0 through §430.256, span a broad array of topics; from review of state plans to conduct of administrative procedures and judicial review. At least 42 separate rules have been adopted to describe the process by which state plans are evaluated, action taken, and sanctions imposed by HHS. (*See* Appendix A hereto.) Thus, the agency charged with administering the reimbursement program reads the Medicaid statute as authorizing an elaborate administrative remedy. *See* 42 CFR §430.10-§430.38 (requirements for state adoption of Medicaid plan and amendments; submission to federal reviewing ***7** agency and action thereafter; judicial review). *See also* 42 CFR §430.35 (“Withholding of payment for failure to comply with Federal requirements.”); 42 CFR §430.38 (“Judicial review.”).

This regulatory mechanism provides a sufficient remedy to correct the ill of which Appellees complain. *See Suter,* 112 S.Ct. at 1369:

While these statutory provisions may not provide a comprehensive enforcement mechanism so as to manifest Congress' intent to foreclose remedies under § 1983, they do show that the absence of a remedy to private plaintiffs under §1983 does not make the “reasonable efforts” clause a dead letter.

The “may not” language notwithstanding, the Court ultimately concluded there was no private cause of action. Here, the enforcement mechanism set forth in HHS's rules also means the operative language as to crossover claims is not a dead letter absent a private remedy. Essentially, HHS would take action to require Florida to amend its plan and use of Medicaid dollars to pay crossover claims at the higher rate, and withhold Medicaid money if Florida did not do so.

In this way, it is the federal administrative agency with a nationwide perspective, not private individuals with narrow interests asserted through the courts, which would determine how a nationwide program is to be run. Through operation ***8** of *Seminole Tribe,* the law has become what was said by the four-justice dissent in *Wilder:*

But as this case illustrates, Medicaid providers bring § 1983 actions to avoid the process rather than to seek its implementation. The Court approves such challenges despite the fact that a plaintiff's success in such a suit results in the displacement of rates created in accordance with the statutory process by rates established pursuant to court order

Indeed, the theme of much of the Court's argument is that without judicial enforceability, the States cannot be trusted to implement § 1396a(a)(13)(A)' s command of creating rate systems that are reasonable and adequate.

Apart from its displacement of the statutory rate setting process noted previously, the Court's suggestion that the States would deliberately disregard the requirements of the statute ignores the Secretary's oversight incorporated into the statute and does less than justice to the States.

110 S.Ct. at 2527 (Rehnquist, C.J.; O'Connor, Scalia, Kennedy, J.J., dissenting).

Given the extensive statutory requirements for Medicaid plans, the remedial scheme authorized by the Medicaid Act (as adopted by rule) is as elaborate and detailed as that found sufficient to preclude an action via *Ex parte Young,* in *Seminole Tribe. See id.,* 116 S.Ct. at 1132-3 (describing the administrative remedy set forth in the Indian Gaming Regulatory Act and concluding the "intricate procedures set forth in that provision show that Congress intended therein not only to define, but also significantly to limit, the duty imposed" by another statutory ***9** provision). Congress has acquiesced to the detailed administrative remedy established by HHS regulations. These regulations limit the relief available, just as the statute at issue in *Seminole Tribe* limited the duties imposed on the states. Appellees cannot be permitted to continue to use §1983, thereby assuming an enforcement role which statutorily belongs to HHS. *Contra, Rehabilitation Assn. of Virginia, Inc. v. Kozlowski,* 42 F.3d 1444, 1449 (4th Cir. 1994) (suit could be brought by Medicaid providers under §1983); *Maryland Psychiatric Soc., Inc. v. Wasserman,* 102 F.3d 717, 1996 WL 718221, 1-4 & note 1 (4th Cir. Dec. 16, 1996) (same, but concluding state not liable to pay crossover claims for that portion of fees for outpatient psychiatric services excluded from coverage under the Medicaid Act).

Similarly, there is no implied cause of action under §1983. Appellants rely on their earlier points. *See Suter,* 112 S.Ct. at 1370 ("As discussed above, we think that Congress did not intend to create a private remedy for enforcement of the "reasonable efforts" clause."), *applying Cort v. Ash,* 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975).

The Medicaid Act was adopted pursuant to Congress' power under the Spending Clause, a critical point which Appellees do not dispute. That Clause, which empowers Congress to "provide for the ... general welfare of the United States," does not empower Congress to override the Eleventh Amendment. This is the essence of ***10** *Seminole Tribe*--that only the Fourteenth Amendment empowers Congress to do so. Although the *Seminole Tribe* Court was confronted with a statute enacted under the (Indian) Commerce Clause, the rationale applies with equal force to statutes enacted under the Spending Clause.

The unavoidable extension of *Seminole Tribe* is that §1983 is available only to enforce rights historically associated with the Fourteenth Amendment. In effect, the *Seminole Tribe* decision returned--via a different route--the law to what was understood before the issuance of *Maine v. Thiboutot,* 448 U.S. 1, 100 S.Ct. 2502 (U.S. 1980). Assuming §1396a(a)(8) created an enforceable right in favor of Appellees, §1983 cannot be used to enforce that right, as the Medicaid Act is not grounded on the Fourteenth Amendment.

In *Carelli v. Howser,* 923 F.2d 1208, 1215 (6th Cir. 1991), the plaintiffs sought a "hurry-up" order from the federal court. They were attempting to accelerate enforcement of child support obligations, as required under Title IV-D of the Social Security Act. Rejecting their claim, the court said:
As this litigation does not involve "civil rights" in the traditional sense and alleges only a statutory as opposed to constitutional violations, it is only since the decision in *Thiboutot* that there is clearly an arguable basis for using section 1983 in these circumstances. In his dissent in *Thiboutot,* Justice Powell opined that the decision created "a major new intrusion into state sovereignty under our federal system." ***11**448 U.S. at 33, 100 S.Ct. at 2519. The question we must answer in this case is just how far such an intrusion should be carried. We conclude

that the nature of the relief sought by plaintiffs here would cause a federal court to carry out an oversight function beyond that intended by Congress, given the comprehensiveness of the remedial scheme provided in the statute.

Id. at 1212-13. Appellees, too, want the courts to assume an oversight role-- compelling Florida to get all eligible people into ICFs within 90 days; rather than promptly placing about half of those individuals.[FN2] Just as the *Carelli* plaintiffs were unsuccessful, so must Appellees be unsuccessful here.

> FN2. At page 46 of the answer brief, Appellees argue that "denial of Medicaid ICF/MR services to half of the eligible Medicaid recipients violates the equal protection clause." Thereby, Appellees concede that half such recipients are not being denied services.

Under §1983, the defendant is sued as an individual acting under the color of state law. This legal fiction exists because §1983 provides a cause of action for deprivation of civil rights by a "persons, not a state. 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).

When, as here, the defendants are sued in their official capacity, there is no functional difference between a suit brought under §1983; and a suit naming the ***12** defendants in their individual capacity, but acting under the color of state law. The critical and objectionable event is that Appellees are attempting to use §1983 to enforce Spending Clause legislation. In light of *Seminole Tribe,* Appellees cannot enforce the Medicaid Act by suing, in federal court, a state; state officials in their official capacity; or individuals acting under the color of state law. Their remedy is that provided by the Medicaid Act--to sue HHS in federal court, and compel that agency to find Florida out of compliance with the Medicaid Act and impose appropriate sanctions.

D. *The Eleventh Amendment Bars This Suit*

This suit operates against Florida as a state (*See* initial brief at p. 31-4) It is barred by the Eleventh Amendment for one of the reasons that §1983 is not available to Appellees.

Railing mightily against a non-issue, Appellees urge the cost of compliance, of itself, does not erect an Eleventh Amendment bar. (answer brief, p. 29-30). The real issue is whether the Eleventh Amendment allows a federal court to deprive a state legislature of choosing among lawful alternatives to come into compliance with the Medicaid Act.

The district court ordered Florida to maintain an outmoded system of service delivery (privately-owned, but subsidized, ICFs), rather than shift to a program based ***13** largely on home and community based "waiver" services. When it enacted the law shifting to such a program, the Florida Legislature found:
(g) That the most appropriate and cost-effective care for state-supported clients who reside in privately owned or operated residential facilities for individuals with developmental disabilities is provided through community-based, noninstitutional service delivery models that are financed through noninstitutional financing mechanisms.
(2) In accordance with the findings in subsection (1), it is the intent of the Legislature that, in order to both reduce the cost of serving individuals with developmental disabilities and provide appropriate alternative services to institutional care ....

§393.165, Florida Statutes (Supp. 1996).

Ironically, Appellees lament that Florida "is at the very bottom ... of funding for services for people with developmental disabilities." (answer brief, p. 18) Yet it is Appellees who seek to uphold a court order which prevents Florida from shifting to a system which holds promise of delivering more services for the same money. This, then, is the fatal flaw of the order below. Through it the district court assumed a policy making function properly left to the Florida Legislature. Rather than simply require Florida to conform to the Medicaid Act, the order decreed how such compliance was to be achieved.

In short, the order did more than require Florida to conform to the law, it told the state which (of several) lawful options it must choose. Such relief goes far ***14** beyond incidental costs of compliance with an otherwise proper order. It strips the Florida Legislature, which is certainly not an *individual* acting under the color of state law, of its discretion in budgeting and public policy matters. Seldom does a court order operate so clearly against a state, despite the fact that the nominal state defendants were individuals acting in their official capacity. This is exactly what the Eleventh Amendment was designed to prevent federal courts from doing.

Predictably, Appellees rely on *Ex parte Young* to oppose dismissal below. (R1-6) *Ex parte Young* established the doctrine that a state official may be sued by private individuals in federal court, to require that official to comport with federal law in the future. As the Supreme Court has said:
In *Edelman [v. Jordan* 415 U.S. 651, 94 S.Ct. 1347 39 L.Ed2d 662 (1974)] we reaffirmed the rule that ... a suit in federal court by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment. [cites omitted]

But we also pointed out that under the landmark decision in *Ex parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), a federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law, even though such an injunction may have an ancillary effect on the state treasury. [cites omitted] The distinction between that relief permissible under the doctrine of *Ex parte Young* and that found barred in *Edelman* was the difference between prospective relief on one hand and retrospective relief on the other.

***15** *Quern v. Jordan,* 440 U.S. 332, 337, 99 S.Ct. 1139, 1143 (1979).

This pronouncement has been greatly constrained by *Seminole Tribe.* There, the nature of relief was greatly diminished as a device to evade a state's immunity from suit:
The Eleventh Amendment does not exist solely in order to "preven[t] federal court judgments that must be paid out of a State's treasury," *Hess v. Port Authority Trans-Hudson Corporation,* 513 U.S. ____, ____, 115 S.Ct. 394, 404, 130 L.Ed.2d 245 (1994); it also serves to avoid "the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties," *Puerto Rico Aqueduct and Sewer Authority,* 506 U.S., at 146, 113 S.Ct., at 689.

Seminole Tribe, 116 S.Ct. at 1124.

The order below does exactly what was forbidden by *Seminole Tribe.* It forces Florida, as a state, to defend its Medicaid Plan and its budgeting process from suits by private individuals. Herein lies the crux: by ordering Appellants to amend the state's Medicaid Plan so that waiting periods for ICFs were reduced to 90 days in all instances, the district court committed Florida to maintaining delivery of Medicaid services in a manner directly contradicting the 1996 legislation. The court effectively required annual appropriations by the state Legislature, indefinitely, for delivery of services through ICFs. The coercive effect of the court's order does not operate

against Appellants individually, with a mere ancillary effect on the state treasury. It ***16** unavoidably operates against the Florida Legislature as a whole, and makes a longterm budgeting decision on behalf of the Legislature.

Nothing in *Quern v. Jordan, Edelman, Ex parte Young* or any other decision holds that all prospective relief, simply by being prospective, is untouched by the Eleventh Amendment. *See Edelman,* 94 S.Ct. 1357:
We do not read Ex parte Young or subsequent holdings of this Court to indicate that any form of relief may be awarded against a state officer, no matter how closely it may in practice resemble a money judgment payable out of the state treasury, so long as the relief may be labeled 'equitable' in nature.

In *Edelman* it was not the label ("equitable") which controlled. It was the coercive nature of the relief beyond what was necessary to correct future violations of the law. Here, the fact that relief was prospective does not control. Florida had several lawful options to bring itself into compliance with the Medicaid Act. It could, most obviously, follow the order below; shift to a home and community based waiver program; or withdraw from the entire Medicaid program. By choosing the first of those options on behalf of the Florida Legislature, the district court's order was coercive beyond the amount needed to comply with federal law in the future. Such relief goes too far to be allowed under the Eleventh Amendment. *See Milliken v. Bradley,* 97 S.Ct. 2749, 2758, 433 U.S. 267, 281-2 (1977):
***17** The well-settled principle that the nature and scope of the remedy are to be determined by the violation means simply that federal-court decrees must directly address and relate to the constitutional violation itself. Because of this inherent limitation upon federal judicial authority, federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation ....

Here, any unlawful conducted resulted from Florida's policy of placing persons eligible for ICFs on waiting lists for indefinite periods of time. Such policy does not violate the U.S. Constitution, or flow from a violation of the Constitution. The district court exceeded its power by granting the relief it did, and thereby violated the Eleventh Amendment.

The flaw in the order below is not so much its considerable cost, but that it effectively makes a budgeting decision of unlimited duration, and precludes other lawful alternatives. None of the cases following *Ex parte Young* countenanced such. The Eleventh Amendment barred this lawsuit. At the least, it barred the district court from assuming the role of policy-maker, and thereby depriving the Florida Legislature of several lawful means to comply with the Medicaid Act.

***18** *ISSUE II*

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

The answer brief, which treats this issue as part VI, needs little reply. Appellants stand by their point (initial brief, p. 3-4) that class certification was not granted, illustrating the district court's abuse of discretion in granting classwide relief. However, even if the putative class is deemed certified, all of Appellants' objections to the order below stand.

ISSUE III

APPELLEES' DUE PROCESS AND EQUAL PROTECTION CLAIMS ARE NOT SUPPORTED BY THE RECORD, AND NOT FAIRLY PRESENTED TO THIS COURT

Failing to recount any facts, Appellees contend Florida has a policy of randomly selecting half the eligible people for prompt placement in ICFs, while denying prompt placement to the other half. Appellees' failure is twice damaging, as it shows this issue has not been fairly presented, as well as not supported by the record. Equally ***19** important, there was no ruling below. Prudence dictates this Court not rule on these issues for the first time.

The complaint alleged a large number of people eligible for ICF placement were not receiving placements (R1-1-4, ¶10). Appellants denied this, admitting only that there were a large number of eligible persons who would be placed:
if they choose to be placed [and] ... if they are accepted by a provider

(R7-193-2, ¶6). This response places into dispute whether failure or delay in placing eligible people results at least in part from their own choice, not state action; instead of any "selection" process employed by Appellants.

No other facts relevant to this issue were alleged in the complaint. Based on this flimsiest of allegations, Appellees claimed that Florida officials "have created drastically different classes" thereby violating equal protection and due process. (R1-1-34, ¶67 & 68)

Appellees' cross-motion for summary judgment fairs no better. Relying on various sources, it claimed roughly 3,900 of 8,000 individuals were not receiving services. (R7-200, ¶5 & 6) However, this "large unmet need" was expressly attributed to lack of money rather than any process of selection or classification system used by Appellants (R7-200, ¶11, 12, 20-24) Similarly, Appellees later alleged ICF services were omitted from habilitation plans "solely because of *lack of availability* of those ***20** services" [e.s.] (R7-200, ¶31) "Lack of availability, for whatever reason, has nothing to do with state action allegedly violative of equal protection and due process.

In their response, Appellants acknowledged the lack of funding, while attributing it to other circumstances, and described Florida's extraordinary efforts to secure additional facilities. (R8-250, ¶4-6) Appellants also noted that lack of facilities was a nationwide problem, involving 36 states and 60,000 people ... awaiting residential services." (R8-250-5, n. 5) Appellants attributed Florida's shortfall in service availability to a federal agency's "unwillingness to increase Florida's waiver cap." (R8-250-9)

In their answer brief, Appellees again fail to reference record facts which would support an equal protection claim. Following their unsubstantiated observation that half of the individuals are left to "languish or die" (as opposed to receiving services at home, for example), Appellees cite to pages 76-79 and 138 of their self-numbered appendix. (answer brief, p. 3, last ¶) Turning to that appendix, it becomes obvious that the facts are not as Appellees would have them. Pages 76-9 are an affidavit by Kathy Whitaker, who is not an employee of Appellants. Moreover, the affidavit (dated May 31, 1996) was submitted in support of Appellees' motion for a preliminary injunction against the 1996 legislation.[FN3] Although part of the record, its consideration ***21** in support of Appellees' then-three-years-old cross motion for summary judgment is troublesome. *See Fitzpatrick v. City of Atlanta,* 2 F.3d 1112, 1127, n. 9 (11th Cir. 1993) ("However, appellate review of summary judgment rulings is conducted on the basis of the record presented to the district court and we ordinarily decline to take into account evidence referred to for the first time on appeal.").

FN3. Appellants opposed the preliminary injunction, and expressly contended the statement of facts in

the motion for preliminary injunction were "inaccurate and misleading." (R13-424-2 through 13)

At paragraph 6, the Whitaker affidavit relies on speculation that 2,200 individuals will lose their ICF placements as a result of the *1996 legislation.* This speculation is not competent evidence of anything, and has nothing to do with Appellants' equal protection and due process claims.

Appellees also cite to page 138 of their appendix. That page is from the deposition of Charles Kimber, Deputy Secretary for Human Services of HRS. Kimber acknowledged that HRS was meeting the needs of 55 or 60% of the developmentally disabled population who registered with HRS. He denied knowledge as to whether a number of people declined to register upon being told there was a waiting list.

None of this has anything to do with the allegation of deliberate or systemic exclusion of eligible people from services. At most, it raises an modest inference that ***22** lack of funding by the Legislature prevents HRS from securing enough facilities to provide services as promptly as Appellees wish. Of course, it is quite damning that Appellees sought an injunction against legislation designed to shift to a more efficient program for delivering services. Nevertheless, there are no *undisputed* facts to support Appellees' equal protection and due process claims.

This absence of undisputed and competent facts may explain why the district court did not rule on such claims. There is simply no mention of equal protection or due process in the district court's order, which granted Appellees' cross-motion based *solely* on the Medicaid Act and its implementing regulations. (R14-439)

If this Court were to address equal protection and due process, it would be evaluating the evidence for the first time. It would be doing so without the benefit of a ruling by the district court; which, apparently, did not attach sufficient credence to such claims as to give them separate consideration. Prudence dictates this Court not do so. *See Daughtrey v. Honeywell, Inc.,* 3 F.3d 1488, 1496 (11th Cir. 1993) (declining to "evaluate the evidence for the first time on appeal" when employer urged judgment of district court be upheld on alternative ground which the district court did not rule upon); *U.S. v. Dayton,* 981 F.2d 1200, 1201 (11th Cir. 1993) (when government, on appeal, raised separate issue as to merits of motion alleged to be ***23** untimely, the court "decline[d] to rule on the merits of the motion which the district court has not yet considered").

CONCLUSION

The district court's orders granting summary judgment and final judgment in favor of Appellees must be reversed.

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 33493419 (C.A.11) (Appellate Brief)

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