UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

DISABILITY RIGHTS FLORIDA, Inc.,
a Florida non-profit corporation,

Plaintiff,

v. **Case No. 4:11-cv-00116-RS-CAS**

ELIZABETH DUDEK in her official capacity as Secretary of the Florida Agency for Health Care Administration, and **MICHAEL HANSEN** in his official capacity as Director of the Florida Agency for Persons with Disabilities,

Defendants.
_____/

DEFENDANTS' MOTION TO DISMISS DISABILITY RIGHTS FLORIDA, INC.'S AMENDED COMPLAINT FOR LACK OF STANDING

The Defendants, Elizabeth Dudek, in her official capacity as Secretary, Florida Agency for Health Care Administration ("AHCA") and Michael Hansen, in his official capacity as Director, Florida Agency for Persons with Disabilities ("APD"), by and through undersigned counsel, pursuant to Rule 12(b)(1), Fed. R. Civ. P., and this Court's Order dated May 15, 2012 [Doc. 135], hereby submit this Motion to Dismiss Disability Rights Florida, Inc. ("DRF")'s Amended Complaint, for lack of standing.

1. At the time the Amended Complaint [Doc. 30] was filed, Plaintiffs included eight individuals and DRF. DRF is Florida's designated advocacy agency

pursuant to the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. §15001, Pub. L. No. 106-402.

2. At this time, DRF is the only remaining plaintiff in this suit. One of the individual named plaintiffs voluntarily dismissed her claims, and another was terminated as a result of his death. [Doc. 76, 83.] The remaining six individual plaintiffs entered into settlement agreements on May 8, 2012, and have since been dismissed as parties. [Doc. 134, 136, 137.]

3. The Amended Complaint included class action allegations and the Plaintiffs filed their Motion for Class Certification on August 31, 2011. [Doc. 61.] This Court denied certification of the Plaintiffs' putative class and the Plaintiffs' subsequent Motion for Reconsideration of the class certification denial. [Doc. 80, 81, 91.]

4. Defendants presume that associational standing is the legal basis DRF will attempt to rely upon to justify its right to continue in this suit notwithstanding dismissal of all the individual plaintiffs.

5. Defendants do not make this presumption because they have had prior notice of DRF's intent to do so or because the the facts alleged in the Amended Complaint support associational standing (they do not), but because associational standing appears to be the only remaining basis for standing that DRF could possibly assert for continuing as a plaintiff in this case.

6. However, by continuing with this lawsuit based on associational standing after the individual plainiffs have been dismissed, DRF would be taking a second bite from the class certification apple. Indeed, the substantive allegations in the Amended

Complaint that pertain to DRF are almost entirely limited to the class action allegations that have already been adjudicated and denied by this Court. [Doc. 80, 81, 91.]

7. The incorporated memorandum of law will show that DRF lacks standing because it has not articulated any injury against itself. Nor has it satisfied the test for associational standing. Particularly, DRF has failed to demonstrate that its members would otherwise have standing to sue in their own right, and the claim asserted and the relief requested requires the participation of individuals. Medicaid services cannot be provided to hypothetical anonymities, and an order from the Court for the provision of services to such hypothetical anonymities would be meaningless. And even assuming *arguendo* that DRF did meet the criteria for associational standing, its claims are now moot and should be dismissed.[1]

8. For the above stated reasons, and those stated in the incorporated memorandum of law below, DRF's Amended Complaint should be dismissed.

MEMORANDUM OF LAW

I. DRF LACKS STANDING TO MAINTAIN THIS ACTION

A. Standing Generally

Federal courts are courts of limited jurisdiction and are "empowered to hear only those cases within the judicial power of the United States as defined by Article III of the Constitution or otherwise authorized by Congress." Taylor v. Appleton, 30 F.3d 1365,

[1] Moreover, without the claims of the individual named plaintiffs, DRF's Amended Complaint fails to state a claim upon which relief can be granted. Since this issue is not directly related to standing, it will be analyzed in Defendants' forthcoming Motion for Summary Judgment, pursuant to this Court's Order dated May 15, 2012 [Doc. 135].

1367 (11th Cir. 1994). Article III of the United States Constitution limits the jurisdiction of the federal courts to "cases" and "controversies." U.S. Const. art. III, § 2.

The "irreducible constitutional minimum of standing contains three elements": (1) the plaintiff must have suffered an "injury in fact" which is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical;" (2) there must be a causal connection between the injury and the conduct complained of; and (3) it must be likely that the injury will be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992) (internal citations omitted). When a federal court determines that there is no case or controversy before it, "the only function remaining to the court is that of announcing the fact and dismissing the cause." Ex parte McCardle, 74 U.S. 506, 514 (1868).

B. Associational Standing

An organization can have standing in one of two ways. First, an organization can have standing if it has suffered an injury against itself. See Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982) (fair housing organization had standing to sue in its own right where it had suffered "concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources"). Second, an organization may have standing to sue on behalf of its members when: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977). The first

means of obtaining organizational standing is absent here, as DRF has not alleged any injury to itself.[2] Thus, at issue is whether DRF has standing to sue on behalf of its members.

As a preliminary matter, this Court should note that the Amended Complaint contains no indication of DRF's intention to pursue this case as an associational standing action. What the Amended Complaint clearly does contain are *class action* allegations. See Amended Complaint [Doc. 130, e.g., ¶¶ 100-106]. But class actions and associational standing cases are not identical. See Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. Brock, 477 U.S. 274, 289 (1986) (noting that "special features . . . distinguish suits by associations on behalf of their members from class actions"). While DRF brought this case as a putative class action, it is now apparently attempting to make an end-run around the Court's denial of class certification by transforming the case into an associational standing action.

If DRF intended to litigate this matter on behalf of its constitutents as an associational standing case, it might be asked why DRF wasted the Court's and Defendants' time by litigating the question of class certification. The apparent answer is that, having failed to certify the class, DRF did not want to let go of its classwide claims and thus now seeks to "shoehorn an unknown number of supposed, but unknown, victims into their cause of action by the mechanism of associational standing." Concerned

[2] DRF has averred that the Amended Complaint contains allegations "of systemic failures that effect [sic] the Plaintiff, Disability Rights Florida, and its constituents." [Doc. 130.] However, in actuality all of the allegations in question refer to purported grievances of individuals with disabilities; there is not a single allegation that refers to any harm suffered by DRF itself.

Parents To Save Dreher Park Ctr. v. City of W. Palm Beach, 884 F. Supp. 487, 489 (S.D. Fla. 1994).

1. DRF Has Not Demonstrated That Its Members Would Otherwise Have Standing to Sue in Their Own Right.

DRF lacks standing to bring this suit on behalf of its members because it cannot meet the necessary prequisites for associational standing. Specifically, DRF fails to meet the first and third prongs of the test set forth in Hunt. 432 U.S. at 343.

With respect to the first prong, DRF has failed to identify any members on behalf of whom DRF is bringing suit who have suffered a "concrete and particularized" injury which is "actual or imminent." Lujan, 504 U.S. at 560. While the Amended Complaint identifies injuries potentially sufficient to confer standing, these are all injuries that relate to the individual named plaintiffs, each of whom brought suit on his or her own behalf and each of whom have since been dismissed as parties in this matter. Since the individual named plaintiffs were suing on their own behalf, DRF clearly was not suing *on their behalf*. Beyond those relating to the individual named plaintiffs, the allegations in the Amended Complaint are uniformly conjectural and speculative.

As the Supreme Court has held, "the entire doctrine of 'representational standing,' of which the notion of 'associational standing' is only one strand, rests on the premise that in certain circumstances, particular relationships . . . are sufficient to rebut the background presumption . . . that litigants may not assert the rights of ***absent*** third parties." United Food & Commercial Workers Union Local 751 v. Brown Group, Inc., 517 U.S. 544, 557 (1996) (emphasis added). The individual named plaintiffs in this case were not *absent* and, therefore, associational standing cannot rest on DRF's relationship

to them. See Access 4 All, Inc. v. Trump Int'l Hotel & Tower Condo., 458 F. Supp. 2d 160, 175 (S.D.N.Y. 2006) (Where "the relevant third parties [were] not absent," and the organization had "produced no evidence of injury to other disabled persons or . . . members. . . . prudential considerations merit[ed] removing [the organization] from th[e] action.")

Admittedly, some courts have held that associational standing can rest solely on the association's relationship with other named plaintiffs. See Colorado Cross-Disability Coal. v. Abercrombie & Fitch Co., 09-CV-02757-WYD-KMT, 2011 WL 2173713 (D. Colo. June 2, 2011) (citing Roe No. 2 v. Ogden, 253 F.3d 1225, 1230 (10th Cir. 2001) for the proposition that the first prong of the Hunt test was satisfied when the single named plaintiff was a member of the associational plaintiff's organization). In Colorado Cross-Disability Coalition, the district court for the District of Colorado explained that "Hunt requires an organization to identify members who would be able to assert standing on their own behalf, but the Hunt Court never stated that these members could not *also* be individual named plaintiffs in the suit." Id. (emphasis in original). The reasoning in this non-binding, unreported decision is flawed and should not be followed. While the Hunt Court did not explicitly state that the individual members could not also be named plaintiffs, this was clearly implied in its test which asks whether the members would "otherwise" have standing. Hunt, 432 U.S. at 343. Regardless, as noted above, any doubt arising from the Hunt opinion that associational standing only relates to absent third parties is eradicated by the Supreme Court's subsequent decision in United Food,

which made explicit the application of associational standing where the relevant third parties are *absent*.[3]

Given that DRF cannot rely upon the standing of the now-dismissed individual named plaintiffs, DRF could only have assocational standing if its Amended Complaint identified concrete and particularized injuries to *other* members of DRF that are actual or imminent. The Amended Complaint makes no such identification. If there is any question as to where to look for such allegations, DRF itself identifies the portions of the Amended Complaint it believes contain "factual allegations of the kinds of systemic failures that effect [sic] the Plaintiff, Disability Rights Florida, and its constituents." [Doc. 130, ¶ 3.][4]

Many of these so-called "factual allegations" are not allegations at all but are, in fact, purported statements of the law. Of those that are factual allegations, none identify an injury to other members of DRF that is sufficient to confer standing. Indeed, none of the cited paragraphs identifies or even alludes to *an actual person* who has suffered concrete and particularized injuries, aside from the named plaintiffs who are no longer party to this action. Rather, these allegations refer to supposed systemic failures that were clearly intended as support to DRF's failed attempt to certify a class. Because DRF's Amended Complaint does not identify injuries-in-fact incurred by absent third

[3] Even if, *arguendo*, this Court were to follow the cases holding that associational standing could be based on the standing of other named plaintiffs, DRF's standing here would be limited to its representation of the individual named plaintiffs and its claims would now be moot. This argument is taken up in Part II (pages 11-15) below.

[4] The relevant paragraphs of the Amended Complaint identified by DRF are ¶¶ 84-90, 127-129, 132, 138, 140, 142-151, 153-160, 165-170, 174-175, 180-181, 186, 188, 191-193, 196, 202, 208-215, 218, 225-228.

parties whom DRF would purport to represent, DRF cannot meet the first prong of the Hunt test for associational standing.

2. The Claims Asserted and Relief Requested Require the Participation of Individual Members in this Lawsuit.

DRF cannot meet the third prong of the test for associational standing, which requires that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Hunt, 432 U.S. at 343. Both the claims asserted and the relief requested in the Amended Complaint are personal and would require the participation of the relevant individuals. With regard to the claims asserted in Count One, which alleges that Defendants have failed to provide necessary Medicaid services with reasonable promptness, this Court could not determine that there has been a failure to provide services until it was demonstrated that there are *individual persons* who are eligible for such services, need such services, and have not received them. Such proof would require individual participation. Likewise, the requested relief corresponding to Count One – an order from Court to provide services with reasonable promptness – would require individual participation. Medicaid services cannot be provided to hypothetical anonymities, and an order from the Court for the provision of services to such would be meaningless. The same reasoning applies to the claims asserted and relief requested in Count Two, which relates to the provision of information regarding available services.

Count Three of the Amended Complaint alleges that the Defendants have violated Title II of the Americans with Disabilities Act ('ADA") and Section 504 of the Rehabilitation Act by failing to provide services in the "most integrated setting

appropriate." These allegations and the corresponding requested relief – an order from the Court requiring Defendants to provide services in the Florida Medicaid Developmental Disabilities waiver ("D.D. Waiver") programs – require the participation of individual plaintiffs. As this Court has previously held with regard to Title II of the ADA, "any finding of an ADA violation requires proof as to each individual claimant. In addition, the relief afforded to each claimant would require an individualized assessment of what measures the City must take in order to comply with the ADA on a case-by-case basis." Concerned Parents, 884 F. Supp. at 488-89. Indeed, the criteria set forth by the Supreme Court for determining whether an individual has been unjustifiably institutionalized in violation of the ADA are decidedly specific to the individual at issue and the immediately factual circumstances. See Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 607, 119 S. Ct. 2176, 2190, 144 L. Ed. 2d 540 (1999) (holding that "under Title II of the ADA, States are required to provide community-based treatment for persons with mental disabilities when the State's treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities."); see also Minor I Doe ex rel. Parent I Doe v. Sch. Bd. for Santa Rosa County, Fla., 264 F.R.D. 670, 688 (N.D. Fla. 2010) (noting that "associational standing fails where the nature of the claim or relief sought is not common to all members of the association or shared in equal degree, such that both the fact and extent of injury would require individualized proof." (internal quotations omitted)).

In certain cases, courts have limited the applicability of the third prong of the Hunt test to cases seeking relief in damages. See, e.g., Wein v. Am. Huts, Inc., 313 F. Supp. 2d 1356, 1360 (S.D. Fla. 2004) (holding that the third prong of Hunt barred an action for damages, but not an action for prospective declaratory or injunctive relief). Courts base this reasoning on dicta from the Supreme Court's opinion in Warth v. Seldin, 422 U.S. 490, 515 (1975), in it postulated that "[i]f in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured." The Warth Court further noted that "in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind." Id.

Courts such, as in Wein,have taken the above-stated language from Warth, later cited in Hunt, to mean that the third prong of Hunt always bars associtional standing in actions for damages and always permits associational standing in actions for prospective declaratory or injunctive relief. The first assumption is reasonable. The second is untenable.

The Supreme Court has interpreted Hunt's holding to mean that individual participation "is not ***normally*** necessary when an association seeks prospective or injunctive relief for its members." United Food, 517 U.S. at 546 (emphasis added). But Hunt does not and cannot mean that individual participation is *never* necessary for claims seeking injunctive or declaratory relief. Claims under Title II of the ADA, even those seeking only injunctive or declaratory relief, are precisely the kinds of claims that cannot

satisfy the third prong of the Hunt test. See Missouri Prot. & Advocacy Services, Inc. v. Carnahan, 499 F.3d 803, 810 (8th Cir. 2007) (association in case brought under Title II of the ADA could not meet the third prong of the Hunt test "because the specific claim asserted and the relief requested require participation in the lawsuit by individual persons with specific claims"); see also Concerned Parents, 884 F. Supp. at 488-89.

Indeed, claims for unjustifiable institutionalization under the ADA and Olmstead, such as those in Count Three of the Amended Complaint, are entirely dependent upon the facts as they relate to an individual in question. A hypothetical person cannot be institutionalized, much less unjustifiably so. Moreover, the corresponding requested relief – the provision of services in "the most integrated setting appropriate" – cannot be granted to an unknown or unseen person(s).

Because DRF cannot meet the criteria for associational standing set forth in Hunt, DRF lacks standing to pursue this matter and the Amended Complaint should be dismissed.

II. EVEN IF DRF HAD ASSOCIATIONAL STANDING, ITS CLAIMS ARE NOW MOOT.

As noted above, some courts in other jurisdictions have held that the first prong of the Hunt test can be met based solely on the association's relationship to other named plaintiffs (i.e., members who are not "absent"). See Colorado Cross-Disability Coal., *supra*. The better reasoning is found in the cases that have found the opposite. See Access 4 All v. Trump, 458 F. Supp. 2d 160, *supra*.

However, even if this Court were to find that DRF met the first prong of the Hunt test based solely on its relationship to the (non-absent) individual named plaintiffs,

DRF's standing should be *limited* to its representation of the individual named plaintiffs because DRF has not identified any other members who would have standing to sue in their own right. See Equal Rights Ctr. v. Hilton Hotels Corp., CIV. A. 07-1528 (JR), 2009 WL 6067336 (D.D.C. Mar. 25, 2009) (holding that organization had standing to assert claims of members who were also named plaintiffs, but that allegations regarding absent members were "simply too vague to establish that these members would have standing to sue in their own right" and that the organization's "associational standing [was] limited to the specific claims" of the other named plaintiffs).

Like the organization in Equal Rights Center, DRF's Amended Complaint utterly fails to establish that any absent members would have standing to sue in their own right. Indeed, DRF fails to even establish concretely the *existence* of a single individual member beyond the individual named plaintiffs. Thus, also like the organization in Equal Rights Center, any associational standing in this matter should at most be limited to DRF's representation of the individual named plaintiffs.

With DRF's standing limited to its representation of the individual named plaintiffs its claims are moot and should be dismissed. The individual named plaintiffs' claims have all been settled or terminated and they have all been dismissed as parties [Doc. 76, 83, 134, 136, 137]; as such, the individual named plaintiffs' claims are now moot. See Cameron-Grant v. Maxim Healthcare Servs., Inc., 347 F.3d 1240, 1244 (11th Cir. 2003) ("The general rule is that settlement of a plaintiff's claims moots an action") (citing Lake Coal Co. v. Roberts & Schaefer Co., 106 S.Ct. 553, 554 (1985); Hammond Clock Co. v. Schiff, 293 U.S. 529, 530 (1934)). The doctrine of mootness is closely

related to that of standing. See Sims v. State of Fla., Dept. of Highway Safety & Motor Vehicles, 862 F.2d 1449, 1459 (11th Cir. 1989) ("Where a party challenges standing, the court inquires whether the plaintiff is entitled to relief. Where mootness is at issue, the court determines whether judicial activity remains necessary"); see also Liner v. Jafco, Inc., 375 U.S. 301, 306, n.3 (1964) (federal courts' "lack of jurisdiction to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy"). "Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." Powell v. McCormack, 395 U.S. 486, 496, 89 S. Ct. 1944, 1951, 23 L. Ed. 2d 491 (1969). Once a case is moot, it "is nonjusticiable and Article III courts lack jurisdiction to entertain it." Troiano v. Supervisor of Elections in Palm Beach County, Fla., 382 F.3d 1276, 1281 (11th Cir. 2004). This Court, therefore, lacks Article III subject-matter jurisdiction to decide DRF's claims.

The courts have recognized an exception to mootness for injuries that are "capable of repetition, yet evading review." S. Pac. Terminal Co. v. Interstate Commerce Comm'n, 219 U.S. 498, 515 (1911). The Eleventh Circuit has previously held that "in the absence of a class action, the exception to mootness for issues capable for repetition yet evading review is limited to cases in which: (1) the challenged action is too short in duration to be fully litigated prior to its cessation or termination, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." Florida Farmworkers Council, Inc. v. Marshall, 710 F.2d 721, 731 (11th Cir.

1983). Because this case is decidedly not a class action the criteria set forth in Florida Farmworkers are applicable here. [Doc. 80 and 91.]

There is nothing about the *individual plaintiffs'* claims that is "capable of repetition, yet evading review." DRF cannot reasonably claim that the challenged action is too short in duration to be fully litigated prior to its cessation or termination when the entire basis of the individual plaintiffs' claims was that the time they were spending on the wait list for the D.D. Waiver was *too long*. [Doc. 30 (Amended Complaint), ¶¶ 3-5, 11-14, 17, 21, 24-25, 29-30, 33, 37, 40-43, 45, 48-49, 55, 57, 61, 65-66, 71, 75, 81-82.] For DRF to allege that the time spent on the wait list for the D.D. Waiver is so short that it evades review would nullify the claims set forth in the Amended Complaint. Therefore, the "capable of repetition, yet evading review" exception to mootness is not applicable here.

Another exception to mootness is the voluntary-cessation doctrine. See City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 (1982) ("It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice"). Ordinarily, "a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 190 (2000). The analysis is different, however, when a government actor voluntarily ceases a challenged practice. In such cases there is "a rebuttable presumption that the objectionable behavior will *not* recur." Bankshot Billiards, Inc. v. City of Ocala, 634

F.3d 1340, 1351 (11th Cir. 2011) (quoting Troiano, at 1283) (emphasis in original). Indeed, the Eleventh Circuit "has consistently held that a challenge to government policy that has been unambiguously terminated will be moot in the absence of some reasonable basis to believe that the policy will reinstated if the suit is terminated." Id.

Here, there is no reasonable basis to expect that the disputes between the *individual plaintiffs* and the Defendants will be revived by any action on the part of the Defendants. The voluntary cessation exception to mootness thus does not apply.

III. CONCLUSION

For the foregoing reasons, DRF's Amended Complaint should be dismissed for lack of standing. In the alternative, this matter should be dismissed as moot.

Respectfully submitted this 5th day of June, 2012.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by the Notice of Electronic Filing, and was electronically filed with the Clerk of the Court via the CM/ECF system, which generates a notice of the filing to all attorneys of record, on this the 5th day of June 2012.

/s/ Andrew T. Sheeran

Andrew T. Sheeran