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' SECOND MOTION FOR SUMMARY JUDGMENT

The Defendants, Elizabeth Dudek, in her official capacity as Secretary of the Agency for Health Care Administration ("AHCA"), and Michael Hansen, in his official capacity as Director of the Florida Agency for Persons with Disabilities ("APD"), by and through undersigned counsel, hereby file this Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, Local Rule 56.1, and this Court's Order dated May 15, 2012 [Doc. 135]. In support, Defendants state as follows:

1. At the time the Amended Complaint [Doc. 30] was filed, plaintiffs included eight individuals and Disability Rights Florida, Inc. ("DRF"). The individual

named plaintiffs were all on the waiting list for the Florida Medicaid Developmental Disabilities Waiver program.[1]

2. At this time, DRF is the only remaining plaintiff in this suit. All individual named plaintiffs have been dismissed as parties. [Doc. 134, 136, 137]. In spite of its lack of success in certifying a class, DRF continues to pursue this matter under the amorphous, quasi-class action theory of associational standing.

3. As set forth in Defendants' Motion to Dismiss Disability Rights Florida, Inc.'s Amended Complaint for Lack of Standing [Doc. 139], DRF lacks standing to pursue this matter without the participation of the individual named plaintiffs.

4. Even if DRF had standing and the claims raised in the Amended Complaint were not moot, the undisputed facts show that Defendants are entitled to judgment as a matter of law. For the reasons set forth in the incorporated memorandum of law below, summary judgment should be entered in favor of the Defendants.

MEMORANDUM OF LAW

I. INTRODUCTION

Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Rule 56(c), Fed. R.Civ.P. There must be more than a simple disputed fact involved, "the requirement is that there be no *genuine* issue of *material* fact." Anderson v. Liberty

[1] The Florida Medicaid Developmental Disabilities Waiver program is made up of five separate Medicaid waiver programs: Tier 1, Tier 2, Tier 3, Tier 4, and iBudget (together, the "D.D. Waiver").

Lobby, Inc., 477 U.S. 242, 247-8 (1986). The moving party has the responsibility to inform the court why it is seeking the motion and to show the court the portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, "which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

Once the moving party has accomplished this, "the nonmoving party must come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (quoting Fed.R.Civ.P. 56(e)). "A mere 'scintilla' of evidence supporting the opposing party's position will not suffice; there must be enough of a showing that the jury could reasonably find for that party." Walker v. Darby, 911 F. 2d 1573, 1577 (11th Cir. 1990); see also Anderson, 477 U.S. at 252 (1986).

II. WITH RESPECT TO COUNT ONE, JUDGMENT SHOULD BE ENTERED FOR DEFENDANTS AS A MATTER OF LAW

A. The pleadings as they now stand no longer state a claim upon which relief can be granted for violation of the "reasonable promptness" provision of the Medicaid Act.

In Count One, Plaintiff asserts that Defendants "have failed and continue to fail to provide adequate DD Waiver services with reasonable promptness." [Doc. 30, ¶ 165]. However, once the specific allegations in the Amended Complaint related to the former individual named plaintiffs are set aside, the remaining allegations are not sufficient to support a claim upon which relief can be granted.

The Medicaid Act requires that state Medicaid programs "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." 42 U.S.C. § 1396a(a)(8). In this provision, the focus is on "individuals." However, with the exception of the former individual named plaintiffs who have all been dismissed as parties, the Amended Complaint makes no reference to a single individual who has been denied the reasonably prompt provision of Medicaid services. Rather, the Amended Complaint makes only generalized allegations that are not tied to any concrete human beings. The factual allegations in a complaint need not be detailed, but they must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). Indeed, such allegations "must be enough to raise a right to relief above the speculative level." Id. It is difficult to imagine anything more formulatic and speculative than an allegation of a violation of a personal entitlement that fails to include any reference to an actual person. With the exception of the now-moot claims associated with the former individual named plaintiffs, the Amended Complaint fails to state a claim upon which relief can be granted with respect to Count One.

Because the Amended Complaint as it now stands fails to state a claim upon which relief can be granted, the only way to save DRF's case would be to amend the Complaint again. After the period for amendments as a matter of course have passed, as is the case here, amendments to pleadings are permitted "only with the opposing party's written consent or the court's leave." Rule 15(a)(2), Fed. R. Civ. P. While Plaintiff has not moved to file a Second Amended Complaint, such a motion, were it to be filed, should not be granted. An amendment to a pleading is not appropriate where it could

cause "undue prejudice to the defendants." Abramson v. Gonzalez, 949 F.2d 1567, 1581 (11th Cir. 1992).

Here, the Defendants would be severly prejudiced if DRF was permitted to amend its complaint. Defendants vigorously opposed certification of a plaintiff class. Having succeeded in these efforts, Defendants expended significant effort preparing to defend the claims of the *individual named plaintiffs* without any expectation that there was a quasi-class looming in the background. Once the individual named plaintiffs claims were settled, Defendants had every reason to expect that this case would be summarily brought to a conclusion. To now resurrect DRF's class action claims in the form of DRF's associational representation of its constituents would constitute undue prejudice to the Defendants. See McKenna v. United States, 21 F. App'x 591, 592 (9th Cir. 2001) (holding that magistrate judge did not abuse discretion in denying motion for leave to amend complaint because amendment of complaint on eve of trial would result in prejudice and undue delay); Ruotolo v. City of New York, 514 F.3d 184, 192 (2d Cir. 2008) ("Undue prejudice arises when an amendment [comes] on the eve of trial and would result in new problems of proof") (internal quotations omitted).

Because the Plaintiff did not, and cannot now, plead and prove the necessary elements of its claim in Count I, Defendants are entitled to the entry of summary final judgment in their favor as a matter of law.

B. Even if the pleadings did state a claim for "reasonable promptness," the undisputed facts show that, with respect to Count One, judgment should be entered for Defendants as a matter of law.

Only "eligible individuals" have an entitlement to the reasonably prompt provision of Medicaid services. 42 U.S.C. § 1396a(a)(8). In Florida, an "eligible individual" is "an individual whom the Department of Children and Family Services, or, for Supplemental Security Income, by the Social Security Administration, determines is eligible, pursuant to federal and state law, to receive medical assistance and related services for which the agency may make payments under the Medicaid program." § 409.901(19), Fla. Stat. Eligibility for the D.D. Waiver further requires "a diagnosis of Down syndrome or a developmental disability as defined in [§ 393.063, Fla. Stat.]." § 393.0661(3), Fla. Stat.

Because the D.D. Waiver is a home and community based waiver program pursuant to § 1396n(c) of the Medicaid Act, AHCA is permitted to limit the number of recipients served. 42 U.S.C. § 1396n(c)(4)(A), (9), (10); 42 C.F.R. § 441.303(c)(6). The limit on the number of individuals to be served constitutes a "constraint on eligibility." Boulet v. Cellucci, 107 F. Supp. 2d 61, 77 (D. Mass. 2000). Only those individuals who are "under the cap" are eligible and therefore entitled to the reasonably prompt provision of Medicaid services pursuant to § 1396a(a)(8). See id. ("eligible individuals under the cap are entitled to waiver services."). Only "[t]hose patients who are on the waiting list and for whom slots are available" are "eligible." Bryson v. Shumway, 308 F.3d 79, 88 (1st Cir. 2002). To the extent that the number of individuals on the waiting list is greater than the number of "available" slots on the D.D. Waiver, there are individuals on the

waiting list with no entitlement to reasonable promptness and thus no claim under Count One. See Susan J. v. Riley, 616 F. Supp. 2d 1219, 1241 (M.D. Ala. 2009) ("The many persons who are on the waiting list, who evidently meet the preliminary eligibility requirements, but who are not entitled to one of the few available Waiver slots are not entitled to the provision of medical assistance with reasonable promptness.").

With regard to the D.D. Waiver, the question of "available slots" is complex. Each of the individual waivers that make up the D.D. Waiver has a separate "unduplicated recipient" cap. See Affidavit of Leigh Meadows, dated June 26, 2012, ¶¶ 3-8 [Doc. 142-1]. In Tier 1 of the D.D. Waiver, the unduplicated recipient cap is 4,000. Id., ¶ 4. In Tier 2, the unduplicated recipient cap is 5,000. Id., ¶ 5. In Tier 3, the unduplicated recipient cap is 7,500. Id., ¶ 6. In Tier 4, the unduplicated recipient cap is 15,000. Id., ¶ 7.

The unduplicated recipient cap is "the number of unduplicated beneficiaries to which [the State] intends to provide waiver services in each year of its program." 42 C.F.R § 441.303(c)(6). The unduplicated recipient cap "will constitute a limit on the size of the waiver program unless the State requests and the Secretary approves a greater number of waiver participants in a waiver amendment." Id. On its face, then, the unduplicated recipient cap is a ceiling beyond which a state may not go, not a floor below which the the program must not fall.

That the unduplicated recipient cap is not a floor is further evidenced in the federal Medicaid regulation governing the replacement of waiver recipients. This regulation provides that the state's "estimate of the number of individuals who may

receive home and community-based services [**i.e., the unduplicated recipient cap**] must include those who will replace recipients who leave the program for any reason." 42 C.F.R. § 441.305(a). In other words, individuals who leave the waiver and those who replace them on the waiver – two categories of recipients that by definition cannot be served at the same time – are included in the *same* unduplicated recipient cap number. The unduplicated recipient cap number thus cannot constitute a floor because the regulations governing Medicaid contemplate that not all of the recipients in this number will be served at the same time. The unduplicated recipient cap is therefore not identical with the concept of "available slots" as envisioned by the Bryson and Susan J. courts.

Furthermore, irrespective of the significance of unduplicated waiver caps, the analysis for "available slots" in the D.D. Waiver includes another important factor. The applications for the four waivers collectively constituting the D.D. Waiver – all of which have been approved by the federal Centers for Medicare and Medicaid Services ("CMS") – tie entry onto the D.D. Waiver to either the availability of funds (iBudget and Tiers 1 through 3) or a determination that the individual is in Crisis (Tier 4). [Doc. 123-9, 123-10]. With regard to the iBudget and Tier 1 through 3, the waiver applications, which have all been approved by CMS, state in Appendix B-3-f:

> When the level of funding appropriated by the Florida Legislature provides funding for additional vacancies on the waiver, individuals shall be added to the waiver in the following order unless otherwise specified in the Appropriations Act for the current fiscal year.
>
> 1. Individuals determined by assessment using the Crisis Identification Tool to be in crisis shall have first priority for services.

> 2. Individuals with valid Court Orders or diversions from programs for persons adjudged incompetent to stand trial.
>
> 3. Children on the wait list who are from the child welfare system with an open case in the Department of Children and Family Services' statewide automated child welfare information system.
>
> 4. All other individuals shall be considered for enrollment on the waiver in the date order in which they are listed on the statewide waitlist, beginning with the earliest dates.

[Doc. 123-10]. Because this language was approved by CMS, it constitutes an agreement between CMS and AHCA as to how individuals are to obtain entry on to the D.D. Waiver. Indeed, when AHCA included this language in its applications to CMS, AHCA's staff understood the language to mean that eligibility would only extend to those individuals for whom there was sufficient funding to serve them on the D.D. Waiver. See Affidavit of Leigh Meadows, dated June 26, 2012, ¶ 10 [Doc. 142-1]. The current level of funding of the D.D. Waiver cannot support new enrollees who are not either in crisis or foster children turning eighteen years old. See Affidavit of Marta Hardy, dated June 25, 2012, ¶ 1 [Doc. 142-2]. As such, there are no "additional vacancies" on the D.D. Waiver. See Affidavit of Marta Hardy, dated May 1, 2012 [Doc. 123-5]. Because there are currently no vacancies on the D.D. Waiver – except for individuals determined to be in crisis, foster children turning eighteen years old, and persons ordered onto the waiver by a court – there are no individuals *eligible* for D.D. Waiver services in iBudget or Tiers 1 through 3 who are not currently being served.

With regard to Tier 4, the waiver application approved by CMS limits entry on the waiver to "the Crisis determination process due to limitation of funds." [Doc. 123-10,

at 7]. When AHCA included this language in its waiver application for Tier 4, AHCA's staff understood the language to mean that eligibility would only extend to those individuals for whom a crisis determination has been made. See Affidavit of Leigh Meadows, dated June 26, 2012, ¶ 12 [Doc. 142-1]. Thus, only individuals who have been determined to be in crisis are *eligible* for Tier 4 of the D.D. Waiver. APD has "never failed to either provide services to, or assist with acquiring services for, a person determined to be in crisis as defined by the Florida Administrative Code, Rule 65G-1.047." Affidavit of Denise Arnold, dated May 1, 2012 [Doc. 123-4]. Therefore, no person eligible for Tier 4 has ever been denied services.

To summarize, only "eligible" individuals are entitled to the reasonably prompt provision of Medicaid services. For Medicaid waiver programs, eligibility is contingent upon the existence of available slots in the waiver. Vacancies on the D.D. Waiver are tied to the availability of funds and there are no available funds to support new enrollments outside of those categories described above. There are therefore no vacancies on the D.D. Waiver and thus no eligible individuals who are not already being served. Accordingly, summary final judgment should be entered in favor of Defendants as to Count One.

III. WITH RESPECT TO COUNT TWO, JUDGMENT SHOULD BE ENTERED FOR DEFENDANTS AS A MATTER OF LAW

A. The pleadings as they now stand no longer state a claim upon which relief can be granted for violation of § 1396n(c)(2)(C) of the Medicaid Act.

In Count Two of the Amended Complaint, Plaintiff alleges that Defendants "engage in a pattern and practice that forces plaintiffs to forgo any Medicaid services and

to languish on the waitlist" which, according to DRF, "violates statutory freedom of choice requirement under the Social Security Act, § 1915(c)(2), as amended, 42 U.S.C. § 1396n(c)(2)." [Doc. 30, ¶¶ 180-181]. Plaintiff finds the supposed violation of "statutory freedom of choice" in: (i) Defendants' alleged "allocat[ion of] scarce resources to institutions and institutional-like settings to the detriment of community services in the DD Waivers"; and, (ii) Defendants' alleged "fail[ure] to remove barriers in their rules, policies, and implementation of their programs for the putative class to exercise their freedom of choice to receive services in the community." [Doc. 30, ¶¶ 183, 186].

At the outset, it should be noted that DRF attempts to make much more of the so-called "statutory freedom of choice requirement" than can be supported by the text of 42 U.S.C. § 1396n(c)(2) itself. Indeed, as this Court has noted "Plaintiffs' so called 'freedom of choice requirement' is not nearly as expansive as their naming of the requirement might suggest." [Doc. 60, at 5]. The Medicaid Act requires that states obtaining a waiver under § 1396n(c) provide CMS assurances that:

> individuals who are determined to be likely to require the level of care provided in a hospital, nursing facility, or intermediate care facility for the mentally retarded ***are informed*** of the feasible alternatives, if available under the waiver, at the choice of such individuals, to the provision of inpatient hospital services, nursing facility services, or services in an intermediate care facility for the mentally retarded.

42 U.S.C. § 1396n(c)(2)(C) (emphasis added). As this Court has also noted, "this section creates an obligation to inform, not an obligation to provide." [Doc. 60, at 5].

Regardless of Plaintiff's misapplication of the scope of § 1396n(c)(2)(C), the pleadings as they now stand fail to state a claim for a violation of the provision. As is the case with the reasonable promptness claim, once the specific allegations related to the

individual named plaintiffs are set aside, the Amended Complaint cannot support a claim for a violation of § 1396n(c)(2)(C).

As set forth above, the text of § 1396n(c)(2)(C) refers to "individuals." However, with the exception of the now dismissed former individual named plaintiffs – whose claims are now moot – the Amended Complaint does not identify a single individual who has not been informed of feasible alternatives. Even if all the factual allegations supporting Count Two were correct, they are meaningless if they are not tied to an actual person. These "formulaic recitation[s]" utterly fail "to raise a right to relief above the speculative level." Twombly, 550 U.S. at 555.

Again, the only way to save DRF's claim in Count Two would be for DRF to file a Second Amended Complaint. This should not be permitted as it would unduly prejudice Defendants. Accordingly, Defendants are properly entitled to the entry of summary final judgment in their favor as to Count Two.

B. Even if the pleadings did state a claim for a violation of § 1396n(c)(2)(C), the undisputed facts show that, with respect to Count Two, judgment should be entered for Defendants as a matter of law.

As noted, the provision of the Medicaid Act at issue in Count Two creates an obligation to inform, not provide services. The language of § 1396n(c)(2)(C) limits the obligation even further. State Medicaid programs are only required to inform regarding "feasible alternatives, if available under the waiver." 42 U.S.C. § 1396n(c)(2)(C). As there are currently no vacancies on the D.D. Waiver, there are no alternatives currently "available." See Affidavit of Marta Hardy, dated May 1, 2012 [Doc. 123-5]. To put it another way, as there is insufficient funding to enroll recipients currently living in the

community to the D.D. Waiver at this time, enrollment on the D.D. Waiver is not "feasible." See Affidavit of Marta Hardy, dated June 25, 2012 [Doc. 142-2]. As there are no feasible alternatives available under the waiver, the Defendants have no duty to inform anyone of anything under § 1396n(c)(2)(C).

Even if § 1396n(c)(2)(C) did impose enforceable obligations in this case, the Defendants are already meeting those obligations. In March 2012, APD began conducting face-to-face meetings with each individual and his or her guardian who is currently living in an ICF/DD facility and is on the waiting list for D.D. Waiver. See Affidavit of Terri McGarrity, ¶ 3, dated June 25, 2012 [Doc. 142-4]. These meetings outline the options available to the individual in the community and describe the services provided by the D.D. Waiver. Id. The individual or guardian is asked to complete a Documentation of Choice form to indicate if the individual is interested in moving to community based services at this time and this form is filed in the individual's central record. Id.

The Eleventh Amendment limits the Court's power in this matter to prospective relief to halt an ongoing violation of federal law. Green v. Mansour, 474 U.S. 64, 68 (1985). A federal court is prohibited from granting retrospective relief for a state's past violations of federal law and is prohibited from issuing declaratory judgments on whether a state's past conduct violated federal law. Id. Since Defendants are currently providing the information that would be required by § 1396n(c)(2)(C), any allegations that Defendants failed to do so in the past are immaterial to this case.

Because § 1396n(c)(2)(C) does not impose any obligations upon Defendants that Defendants are not already meeting, judgment should be entered for Defendants as a matter of law with respect to Count Two.

IV. WITH RESPECT TO COUNT THREE, JUDGEMENT SHOULD BE ENTERED FOR DEFENDANTS AS A MATTER OF LAW

A. The pleadings as they now stand no longer state a claim upon which relief can be granted for violation of the Americans with Disabilities Act or Section 504 of the Rehabilitation Act.

In Count Three of the Amended Complaint, DRF alleges that Defendants violate Title II of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq*. ("ADA"), and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 ("Section 504"). Specifically, DRF claims that Defendants' "failure to provide DD Waiver services to named plaintiffs and class members in the community places them in jeopardy of receiving services in an institution, rather than in the most integrated setting appropriate to their needs, in violation of the integration mandate of the ADA and 504 of Rehabilitation Act." [Doc. 30, ¶ 215].

The ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. The ADA is implemented in regulations promulgated by the Department of Justice. 28 C.F.R. Pt. 35. These regulations provide that "[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d).

Section 504 contains a prohibition of discrimination similar to that of the ADA. Likewise, the regulations implementing Section 504 are similar to those implementing the ADA. See 45 C.F.R. Part 84. For the purposes of this Motion for Summary Judgment, Section 504 and the ADA can be analyzed interchangeably. See Cash v. Smith, 231 F.3d 1301, 1305, n.2 (11th Cir. 2000).[2]

The ADA allegations in the Amended Complaint are ambiguous. For example, Plaintiff's state that "unnecessarily allocating…funds for institutional long-term care…violates the ADA." [Doc. 30, ¶ 209]. This is a patent fabrication as the ADA says nothing about how funds must be allocated. However, taking all of the allegations in Count Three together, it becomes clear that DRF is essentially arguing that Defendants violate the ADA by *unjustifiably institutionalizing* persons with disabilities. See Amended Complaint [Doc. 30], ¶ 210 (alleging that "defendants have unnecessarily institutionalized plaintiffs and class members"), ¶ 211 (alleging that Defendants "perpetuat[e] the unnecessary segregation of those in institutions"), ¶ 215 (alleging that Defendants place "plaintiffs and class members…in jeopardy of receiving services in an institution, rather than in the most integrated setting appropriate to their needs"). Though the case is not mentioned by name in the Amended Complaint, it is nonetheless clear that the allegations in Count Three are claims of discrimination in the form of unjustifiable

[2] There are in fact important differences between the ADA and Section 504. For example, the scope of the ADA is broader than that of Section 504. Defendants reserve the right to argue the significance of this and other distinctions between the ADA and Section 504 if this litigation progresses. However, the arguments in this Motion for Summary Judgment focus on the broader ADA and thus necessarily encompass the narrower Section 504.

institutionalization as defined in the Supreme Court case Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581 (1999).

In Olmstead, the Supreme Court addressed the question "whether the proscription of discrimination" found in the ADA "may require placement of persons with mental disabilities in community settings rather than in institutions." Id. at 587. The Court held that the answer was "a qualified yes." Id. "Such action is in order when the State's treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities." Id. These criteria constitute the elements of an ADA claim under Olmstead. [Doc. 60, at 6].

The pleadings as they now stand no longer state a claim upon which relief can be granted for Count Three. Once the allegations related to the former individual named plaintiffs are set aside, what remains does not add up to a violation of the ADA. As with the Medicaid Act claims, the ADA is framed around discrimination to individuals. See 42 U.S.C. § 12132. However, with the exception of the former individual named plaintiffs, the Amended Complaint does not reference a single individual who has experienced discrimination. Not one actual person who has been institutionalized, segregated, or placed at risk of institutionalization or segregation is identified or even alluded to. It goes without saying that, lacking a specific individual, the other elements under Olmstead cannot be established. The State's treatment professionals obviously cannot make a determination as to whether community placement is appropriate for a

hypothetical anonymities. A theoretical person cannot have an opinion about his or her conjectural transfer to a less restrictive setting. Indeed, the Amended Complaint does not contain even a cursory attempt to make allegations satisfying the elements set forth in Olmstead. Consequently, Plaintiff has not, and cannot now, plead and prove the necessary elements of its claim in Count Three without impermissibly prejudicing Defendants through the filing of an amended pleading and relitigation of this suit from the intial pleadings stage. Defendants are, therefore, entitled to the entry of summary final judgment in their favor as to Count Three.

B. Even if the pleadings did state a claim under the ADA, the undisputed facts show that, with respect to Count Three, judgment should be entered for Defendants as a matter of law.

When the elements of Olmstead are met for an individual, APD will enroll the individual on the D.D. Waiver. For an individual who is currently institutionalized in an Intermediate Care Facility for the Developmentally Disabled ("ICF/DD"), the Defendants have authority to transfer funds from the ICF/DD line item to the D.D. Waiver budget in order to serve the individual on the D.D. Waiver. See Laws of Florida Chapter 2011-69, Specific Appropriation 206; Laws of Florida Chapter 2012-118, Specific Appropriation 222. There is thus no financial barrier to transitioning individuals from an ICF/DD to the D.D. Waiver. See Affidavit of Terri McGarrity, dated June 25, 2012, ¶ 2 [Doc. 142-4].

The Defendants are currently operating an ICF/DD transition program in order to identify and assess individuals who wish to transition. See Id. APD, in consultation with AHCA, has developed a plan to identify and transition all eligible individuals residing in ICF/DDs to the D.D. Waiver by June 30, 2013. See Affidavit of Vicki Draughon, dated

May 1, 2012 [Doc. 123-3]. Importantly, APD has discovered through contact with ICF/DD residents who are on the wait list for the D.D. Waiver that many do not wish to leave the ICF/DD. See Affidavit of Terri McGarrity, dated June 25, 2012, ¶ 6 [Doc. 142-4]. Of the 247 individuals who have been contacted, 157 have declined enrollment onto the D.D. Waiver. Id. Thus, the mere fact that an individual is residing in an ICF/DD and is on the waiting list for the D.D. Waiver cannot be taken as evidence of unjustified institutionalization.

Individuals who currently reside in the community have no claim under the ADA for unjustifiable institutionalization unless they are *at risk* of institutionalization. To have a claim for unjustified institutionalization, an individual must, at the very least, "stand imperiled with segregation." Fisher v. Oklahoma Health Care Auth., 335 F.3d 1175, 1182 (10th Cir. 2003).

Defendants do not require individuals at risk of institutionalization to languish on the waiting list without service. Rather, APD has a crisis prioritization rule designed to capture those individuals who stand imperiled with segregation and prioritize their enrollment on the D.D. Waiver. § 393.065(5), Fla. Stat.; Fla. Admin. Code R. 65G-11.002. An individual is considered to be in the first priority crisis category if he or she is "currently homeless, living in a homeless shelter, or living with relatives in an unsafe environment." Fla. Admin. Code R. 65G-1.047(4). Indicia relevant to whether an individual is in the first priority crisis category include, among other things, whether "[w]ithout immediate provision of waiver services, the health and safety of the applicant are at risk;" whether the individual "temporarily is staying with friends or relatives but

residence is not expected to last more than several weeks;" and whether the individual "requires services of greater intensity." Id.

An individual is considered to be in the second priority crisis category if he or she "exhibits behaviors that, without provision of immediate waiver services, may create a life-threatening situation for the applicant or others, or that may result in bodily harm to the applicant or others requiring emergency medical care from a physician." Fla. Admin. Code R. 65G-1.047(5). Indicia relevant to whether an individual is in the second priority crisis category include, among other things, whether "[w]ithout immediate waiver services, the health and safety of the applicant or others in the household is at risk;" whether "[n]o other supports are available to address the applicant's behaviors;" and whether the applicant "requires services of greater intensity." Id.

An individual is considered to be in the third priority crisis category if his or her "current caregiver is in extreme duress and is no longer able to provide for the applicant's health and safety because of illness, injury, or advanced age" and the individual "needs immediate waiver services to remain living with the caregiver or to relocate to an alternative living arrangement." Fla. Admin. Code R. 65G-1.047(6). Indicia relevant to whether an individual is in the third priority crisis category are similar to those for the first and second priority crisis categories.

Taking all the criteria for crisis categorization into account, it is impossible to conceive of an individual who is at risk of institutionalization but would not qualify for crisis. Indeed, if the individual does not qualify for crisis categorization, it would effectively mean that the individual is *not*: "in an unsafe environment," exhibiting

behaviors that "may result in bodily harm to the applicant or others requiring emergency medical care from a physician," and is not in "need[of] immediate waiver services to remain living with the caregiver or to relocate to an alternative living arrangement." Fla. Admin. Code R. 65G-1.047. An individual who meets none of these criteria are not in substantial risk of institutionalization. Therefore, the crisis categorization criteria are, at least, coextensive with a true risk of institutionalization.

As explained above, APD has "never failed to either provide services to, or assist with acquiring services for, a person determined to be in crisis as defined by the Florida Administrative Code, Rule 65G-1.047." Affidavit of Denise Arnold, dated May 1, 2012 [Doc. 123-4]. Therefore, no person at substantial risk of institutionalization has been denied services on the D.D. Waiver.

Because Defendants are not unjustifiably institutionalizating individuals on the waiting list for the D.D. Waiver, judgment should be entered for Defendants as a matter of law with respect to Count Three.

V. WITH RESPECT TO COUNT FOUR, JUDGMENT SHOULD BE ENTERED FOR DEFENDANTS AS A MATTER OF LAW

In Count Four of the Amended Complaint, Plaintiff claims that Defendants have failed to provide notice of waiting list prioritization in contravention of the Medicaid Act, CMS implementing regulations, and the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. However, without exception, every allegation regarding failures to provide notice are related to the former individual named plaintiffs, all of whose claims are now moot. Without the allegations related to the now-dismissed plaintiffs, the Amended Complaint does not state any claims related to notice or due

process violations. Because Defendants would be unduly prejudiced by permitting Plaintiff to file a Second Amended Complaint at this late stage in the proceedings, Plaintiff cannot plead and prove the essential elements of its claim in Count Four.

Moreover, as this Court has previously noted with regard to Count Four, "this claim turns on whether there are available slots." [Doc. 60, at 6]. As demonstrated above, there are no available slots in the D.D. Waiver.[3] Even if DRF's Amended Complaint did state a claim upon which relief can be granted, the undisputed facts demonstrate that Defendants are not in violation of the law as Plaintiff alleges in this claim.

For the foregoing reasons, summary final judgment should properly be entered for Defendants as a matter of law with respect to Count Four.

VI. CONCLUSION

For the foregoing reasons, Defendants request that summary judgment be entered in their favor on all counts.

Respectfully submitted this 26th day of June, 2012.

AGENCY FOR HEALTH CARE ADMINISTRATION

BY: /s/ Stuart F. Williams
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[3] See Part II. B. above [pages 6-10].

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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 26th day of June 2012.

/s/ Andrew T. Sheeran

Andrew T. Sheeran