UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

JACQUELINE JONES,

Plaintiff,

vs. CASE NO. 3:09-cv-1170-J-34JRK

ELIZABETH DUDEK[1], in her official Capacity as the Interim Secretary of Florida Agency for Health Care Administration

DR. ANA VIAMONTE ROS, in her official capacity as Surgeon General, Florida Department of Health

Defendants.
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DEFENDANTS' RESPONSE AND MEMORANDUM OF LAW IN OPPOSITION TO THE UNITED STATES' MOTION TO INTERVENE

The Defendants, ELIZABETH DUDEK, in her official capacity as the Interim Secretary of the Florida Agency for Health Care Administration (AHCA), and DR. ANA VIAMONTE ROS, in her official capacity as Surgeon General, Florida Department of Health, by and through the undersigned counsel, hereby submit this response in opposition to the

United States' Motion to Intervene. The Court should deny this motion because the original case is moot, the interests of the United States are adequately represented, and the United States seeks to improperly change defendants. As further support therefore, Defendants submit the following Memorandum of Law, which is attached hereto and is incorporated herein by reference.

MEMORANDUM OF LAW

I. The Original Case is Moot

This lawsuit was filed by Jacqueline Jones in December, 2009. On February 1, 2010, Jacqueline Jones was enrolled in the Florida Medicaid Traumatic Brain Injury / Spinal Cord Injury Waiver Program (TBI / SCI Waiver). At that time, this case became moot as Plaintiff Jones then received all the relief she sought in her Amended Complaint. On January 6, 2010, Plaintiff filed her Motion for Class Certification, which is still pending.

Where the named plaintiff's case is mooted before a motion for class certification has been filed, the motion for class certification should be denied because there is no underlying case or controversy under Article III of

[1] Pursuant to Rule 25, Fed. R. Civ. P., Elizabeth Dudek is automatically substituted as named Defendant

the U.S. Constitution. See Sosna v. Iowa, 419 U.S. 393, 403, 95 S. Ct. 553, 559, 42 L. Ed. 2d 532 (1975) ("A litigant must be a member of the class which he or she seeks to represent at the time the class action is certified by the district court"). Some courts would permit a class action to proceed even where the named plaintiff's case becomes moot prior to class certification, so long as the plaintiff's case was not moot at the time the motion for class certification was filed. See e.g., Cavallo v. Utica-Watertown Health Ins. Co., Inc., 191 F.R.D. 342 (N.D.N.Y. 2000). However, the Eleventh Circuit follows the law in Sosna, and a class action is moot where the putative class representative's case is no longer live at the time of class certification. See Tucker v. Phyfer, 819 F.2d 1030, 1033 (11th Cir. Ala. 1987) ("In a class action, the claim of the named plaintiff, who seeks to represent the class, must be live both at the time he brings suit and when the district court determines whether to certify the putative class. If the plaintiff's claim is not live, the court lacks a justiciable controversy and must dismiss the claim as moot").

Because the underlying action was moot at the time the United States filed its Motion to Intervene, the motion should be denied. The United

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as the successor in office of Thomas W. Arnold.

States claims to have a substantial legal interest in the subject matter of the action, but given that the action is moot, there is no action to have a substantial legal interest in. Intervention by the United States would only serve to "breathe life into a non-existent suit." Schulz v. Lotter, 528 F. Supp. 675, 677 (E.D. Wis. 1981) (quoting McKay v. Heyison, 614 F.2d 899, 906 (3rd Cir. 1980)).

II. The Interests of the United States are Adequately Represented by the Existing Parties.

The United States claims that its interests are not adequately represented by existing parties. However, in its motion, the United States made no attempt whatsoever to distinguish its interests from those of the existing Plaintiff. Indeed, in two other actions brought by plaintiffs who have previously sought to become named plaintiffs in the instant action, the United States has filed Statements of Interest that demonstrate its interests coincide with the existing plaintiff exactly. See Haddad v. Arnold, No. 10-414 (M.D. Fla.), ECF No. 10; Cruz v. Dudek, No. 10-23048 (S.D. Fla.), ECF No. 40. In neither of these documents does the Department of Justice distinguish its views or positions from those of the private plaintiffs. Rather, the Department simply reiterates the arguments of these plaintiffs.

The Department of Justice indicates that the Plaintiff "will not be able to make all the arguments that the United States will make if allowed to intervene." To the contrary, Plaintiff is represented by eminently competent counsel who is more than capable of making every relevant argument on Plaintiff's behalf (and, because Plaintiff's interests are identical to those of the Department of Justice, these include all argument that the Department of Justice would make). Plaintiff's attorney, Stephen F. Gold, has litigated over 50 cases under the Americans With Disabilities Act and Section 504, and dozens of other cases on behalf of persons with disabilities under other statutes. See, e.g., Fisher v. Oklahoma Health Care Authority, 335 F.3d 1175 (10th Cir. 2003); Helen L. v. DiDario, 46 F.3d 325 (3d Cir. 1995), cert denied, 116 S.Ct. 64 (1995); sub nom. Secretary of DPW of Pa. v. Idell S.; Nelson v. Thornburgh, 567 F. Supp. 369 (E.D. Pa. 1983), aff'd, 732 F.2d 146 (3d Cir. 1984), cert denied, 105 S.Ct. 955 (1985); American Disabled For Accessible Pub. Transp. (ADAPT) v. Skinner, 676 F. Supp. 635 (E.D. Pa. 1988), 867 F.2d 1471 (3d Cir. 1989), 881 F.2d 1184 (3d Cir. 1989) (en banc) (federal regulation which permitted transportation authorities to cap funds expended on disabled persons violated minimum service criteria; required U.S. DOT to promulgate new regulations –

Concurrence opinion cited with approval by Congress in legislative history of ADA); Sabree v. Richman, 367 F.3d 180 (3d Cir. 2004). Importantly, Mr. Gold has litigated all the above-listed cases without the aid of the Department of Justice as an intervening party.[2] In fact, in the ADAPT v. Skinner case, Mr. Gold prevailed *against* the Department of Justice, which represented the Secretary of Transportation.

III. The United States Seeks To Improperly Change Defendants

The Amended Complaint was brought by Plaintiff Jones against Thomas Arnold, in his official capacity as Secretary of the Florida Agency for Health Care Administration and Dr. Ana Viamonte Ros, in her official capacity as Secretary[3] of the Florida Department of Health. The United States' Complaint in Intervention lists only one defendant: the State of Florida. This is an attempt to utterly transform the case. The Plaintiff brought suit against certain defined defendants, and now the Department of Justice is attempting to pull the rug out from under the Plaintiff's feet by changing the parties to this action. Furthermore, replacing Defendants with the State of Florida would be unfair to this new defendant. While the

[2] In the Helen L. case, the Department of Justice filed an amicus brief.
[3] The case style has been amended to reflect the Surgeon General's correct title.

Secretary of AHCA and the Surgeon General have had an opportunity to, for example, oppose Plaintiff's Motion for Class Certification, the State of Florida, as an independent party, has had no such opportunity. Finally, the Court has no personal jurisdiction over the State of Florida.

CONCLUSION

For the reasons set forth above, the United States' Motion to Intervene should be denied.

Respectfully submitted this 7th day of October, 2010.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by Notice of Electronic Filing, and was electronically filed with the Clerk of the Court via the CM/ECF system, which generates a notice of filing, to the following: Stephen F. Gold, Esq., 1709 Benjamin Franklin Parkway, Second Floor, Philadelphia, PA 19103, Jay M. Howanitz, Esq., SPOHRER & DODD, P.L., 701 West Adams Street, Suite 2, Jacksonville, Florida 32204, and Anne S. Raish, Trial Attorney, Disability Rights Section, Civil Rights Division, U. S. Department of Justice, 950 Pennsylvania Avenue, N.W. – NYA, Washington, D.C. 20530, this 7th day of October, 2010.

/s/ Andrew T. Sheeran
ANDREW T. SHEERAN
ATTORNEY