**IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA**

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| RICHARD ANDERSON, et al., | ) | |
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| Plaintiffs, | ) | |
| | ) | |
| vs. | ) | NO. CIV-17-1236-HE |
| | ) | |
| ED LAKE, et al., | ) | |
| | ) | |
| Defendants. | ) | |

**ORDER**

Plaintiffs filed this putative class action asserting claims against the State of Oklahoma based on alleged violations of Title II of the Americans with Disabilities Act ("ADA") and Section 504 of the Rehabilitation Act. The claims are based on notices sent in October 2017, to recipients of the Medicaid ADvantage Waiver and the Medicaid In-Home Supports Waiver for Adults programs indicating that, due to budget failures, their waivers allowing for community-based services would be terminated as of December 1, 2017. This case was filed on December 6, 2017.

Oklahoma subsequently took steps to avoid the termination of waiver services. Plaintiff's amended complaint alleges Governor Fallin signed a stopgap budget measure providing additional funding for the programs through February 2018. The parties' submissions indicate additional funding measures have since been enacted which provide supplemental funding sufficient to maintain the programs through the end of the FY 2018 fiscal year. In light of those developments as to funding, defendants have moved to dismiss

pursuant to Fed.R.Civ.P. 12(b)(1), arguing that plaintiffs' claims are now moot and that no live controversy remains for resolution by the court.

Plaintiffs' claims stem from the ADA and Rehabilitation Act's integration requirement, which requires that a public entity must "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). Thus, subject to various conditions and limitations, "States are required to provide community-based treatment for persons with . . . 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 . . . disabilities." Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 607 (1999).

In response to the motion, plaintiffs argue that a continuing violation of the integration requirement exists because defendants acted to terminate the waiver programs without providing for alternative services, because the threat of waiver termination continues, and because plaintiffs are at risk of future institutional placement if waiver services are terminated and alternative services are not provided.

"The Constitution's case-or-controversy limitation on federal judicial authority, Art. III, § 2, underpins both . . . standing and . . . mootness jurisprudence." Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 180 (2000). The standard "for determining whether a case has been mooted by the defendant's voluntary conduct is stringent." *Id.* at 189. Ordinarily, it must be "'absolutely clear that the allegedly

wrongful behavior could not reasonably be expected to recur" and the party asserting mootness bears a "'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again." *Id.* (quoting United States v. Concentrated Phosphate Export Assn., 393 U.S. 199, 203 (1968)). "In practice, however, Laidlaw's heavy burden frequently has not prevented governmental officials from discontinuing challenged practices and mooting a case." Rio Grande Silvery Minnow v. Bureau of Reclamation, 601 F.3d 1096, 1116 (10th Cir. 2010). "Likewise, the withdrawal or alteration of administrative policies can moot an attack on those policies. . . . A case ceases to be a live controversy if the possibility of recurrence of the challenged conduct is only a speculative contingency." *Id.* at 1117 (quotations and citations omitted).

The court concludes that the provision of funding for maintenance of the programs for the remainder of the fiscal year renders plaintiffs' claims moot. The harm which plaintiffs sought to avoid — the termination of waiver services — has now been avoided for that period, and it would be pure speculation to presume to know what funding decisions may be made by Oklahoma in future years. The result is there is no current case or controversy subject to judicial resolution.

Plaintiffs' complaint of the lack of an alternative plan should funding fail in the future does not change the calculus. The presence or absence of an alternative plan does not impact the plaintiffs unless the speculative event — non-funding — occurs.

Plaintiffs also argue a controversy remains because "Defendants have not provided any assurance that their actions in maintaining the waiver programs, or in the provision of alternative community-based services, are permanent." Doc. #15, p. 8. For this reason,

plaintiffs argue the state's conduct is capable of repetition yet evading review, necessitating the declaratory and injunctive relief they seek. The problem with that argument is that, where the claimed discrimination is inextricably tied to the level of future state appropriations, there is no such thing as a "permanent" fix. It is doubtful that the Legislature could assure some future funding level for these programs even if it wanted to.[1] Further, acceptance of such a justification for continuing jurisdiction in this court would put it in the position of being some sort of ongoing supervisor of the state budget process, a result that is inconsistent with the federalism and other constitutional principles which guide and limit the resolution of challenges like those asserted here by plaintiffs.[2]

Should the State of Oklahoma fail to provide funding for community-based services in future fiscal years, or fail to provide for appropriate alternatives if those services are cut, a live case or controversy may then exist. At present, one does not. Defendants' Motion to Dismiss [Doc. #14] is therefore **GRANTED**. This case is **DISMISSED** without prejudice.

**IT IS SO ORDERED**.

Dated this 26th day of March, 2018.

JOE HEATON
CHIEF U.S. DISTRICT JUDGE

[1] *See Application of Okla. Capitol Improvement Auth., 958 P.2d 759, 771 (Okla. 1998) (noting that legislative attempts to bind future legislatures are unconstitutional).*

[2] *See Olmstead, 527 U.S. 581, at 612-3 (Kennedy concurrence).*