

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION**

JOANNA DYKES; LORETTA DAVIS,
by and through her next friend, Trish
Mlekodaj; **HEATHER YOUNG,** by and
through her next friend Robert Stark;
**MICHELLE CONGDEN; AMANDA
PIVINSKI; JOSHUA WOODWARD;** and
DISABILITY RIGHTS FLORIDA, Inc.,
a Florida non-profit corporation,

Plaintiffs,

v.

CASE NO.: 4:11-CV-116-RS-CAS

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

Defendants.

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**PLAINTIFFS' STATEMENT OF UNDISPUTED FACTS IN
SUPPORT OF THEIR MOTION FOR SUMMARY JUDGEMENT**

The Plaintiffs, Joanna Dykes (“Dykes”), Loretta Davis (“Davis”), Heather Young (“Young”), Michelle Congden (“Congden”), Amanda Piviniski (“Pivinski”), Joshua Woodward (“Woodward”), and Disability Rights Florida, Inc., d/b/a Disability Rights Florida (the “P&A”), by and through their undersigned attorneys, have moved for entry of summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, and in compliance with Northern District Local Rule 56.1, file this Statement of Undisputed Facts in support their motion as follows:

Document Sources Not Already Filed

- Ex. "A" - References to Dudek's Response to Plaintiffs' Request for Admissions are designated herein as "Ex. "A", ¶(¶) (no[s])."
- Ex. "B" - References to Hansen's Response to Plaintiffs' Request for Admissions are designated herein as "Ex. "B", ¶(¶) (no[s])."
- Ex. "C" - References to the Interagency Agreement are designated as "Ex. C, at (page no[s])."
- Ex. "D" - References to the deposition of Leigh Meadows, dated March 6, 2012, will be referred to as follows: "Meadows Depo., (page no.):(line no[s])."
- Ex. "E" - References to the deposition of Wendy Smith, dated February 24, 2012, will be referred to as follows: "Smith Depo., (page no.):(line no[s])."
- Ex. "F" - Letter from Dan Newman, Nursing Home Transition Coordinator
- Ex. "G" - Young's Support Plan – Short Form
- Ex. "H" - AHCA Analysis of Cost Savings
- Ex. "I" - References to Hansen's response to the Plaintiffs' Interrogatories are designated herein as "Ex. "I", ¶(¶) (no[s])."
- Ex. "J" - References to Dudek's Responses to Plaintiffs' Interrogatories are designated herein as "Ex. "J", ¶(¶) (no[s])."
- Ex. "K" - "References to the deposition of Tonya Kidd, dated March 5, 2012, will be referred to as follows: "Kidd Depo., (page no.):(line no[s])."
- Ex. "L" - References to the deposition of Jolie LaTourelle-Jones, dated January 19, 2012, will be referred to as follows: "LaTourelle-Jones Depo., (page no.):(line no[s])."
- Ex. "M" - References to the deposition of ThomasWallace, dated March 5, 2012, will be referred to as follows: "Wallace Depo., (page no.):(line no[s])."
- Ex. "N" - References to the deposition of Denise Arnold, dated January 17, 2012 (Volume I) and January 18, 2012 (Volume II), will be referred to as follows: "Arnold Depo., (Vol. No.), (page no.):(line no[s])."
- Ex. "O" - Waitlist by Residence Chart

- Ex. "P" - Public Records Disclosure from APD Clerk and accompanying chart
- Ex. "Q" - *Application for a §1915(c) Home and Community Based Waiver; Instructions, Technical Guide, and Review Criteria*
- Ex. "R" - Waiver Applications B-3 Tables
- Ex. "S" - References to the deposition of Charles Ball, dated January 17, 2012, will be referred to as follows: "Ball Depo., (page no.):(line no[s]).".
- Ex. "T" - APD's Quarterly Fiscal Reports
- Ex. "U" - ICF Vacancy Data from 2009 to 2012

STATEMENT OF UNDISPUTED FACTS

Plaintiffs

1. Dykes, Davis, and Young are all individuals diagnosed with a developmental disability as described in Florida Statute § 393.063. (Ex. "A", ¶ 1; Ex. "B", ¶ 1).
2. Pivinski, Woodward, and Congden are all persons with developmental disabilities. ((Ex. "A", ¶¶ 2, 3 & 4; Ex. "B", ¶¶ 2, 3, & 4).
3. At the time of filing this matter, Dykes and Davis received services in an Intermediate Care Facility for persons with Developmental Disabilities ("ICF/DD"). (Dkt. 30, ¶¶ 17 & 34).
4. Young is eligible to receive services in an ICF/DD. (Ex. "A", ¶ 5; Ex. "B", ¶ 5).
5. Due to their disability, Young, Congden, Woodward, and Pivinski are eligible for the DD Waiver as long as they can meet the income and assets limits for Medicaid. (Ex. "B", ¶¶ 9-12).
6. At the time of filing this matter, Dykes had been on the waitlist for the DD Waiver for three years; Young had been on the waitlist for the DD Waiver for

- over four years; Congden had been on the waitlist for the DD Waiver for thirteen years; Woodward had been on the waitlist for the DD Waiver for three years; Pivinski had been on the waitlist for the DD Waiver for seven years. (Dkt. No. 30, ¶¶ 17, 41, 49, 57, & 65).
7. The P&A has represented and continues to represent persons with developmental disabilities in individual actions, class actions and systemic relief initiatives affecting all such individuals. (Dkt. No. 30, ¶ 87).

Defendants

8. Dudek is the Secretary for the Agency for Health Care Administration (“AHCA”). (Dkt. No. 30, ¶ 91).
9. Hansen is the Director of the Agency for Persons with Disabilities (“APD”). (Dkt. No. 30, ¶ 92).
10. The grant of rulemaking authority pursuant to Chapter 393 of the Florida Statutes, is granted to both Defendants; however, AHCA retains final authority on any administrative rules, policies, procedures, regulations, or handbooks pertaining to the DD Waivers. (Ex. “C”, at 5).
11. Defendants are jointly responsible for the operation of the DD Waivers according to 42 C.F.R. § 440.180 and 42 C.F.R. § 441, subpart G. (Ex. “C”, at 4).
12. Both Defendants have agreed to provide “proposed manuals, policies, budgetary requests, and legislative or public reports to each other for review and comment, prior to their release to third parties.” (Ex. “C”, at 5).

13. Both Defendants have agreed to “hold regularly scheduled meetings throughout the year to discuss and address issues pertaining to the operation, management, and administration of the developmental disabilities waivers.” (Ex. “C”, at 5).
14. APD agreed to provide AHCA with monthly reports of newly enrolled waiver recipients by district, recipient’s name, Medicaid Identification number and by age as well as number of waiver recipients disenrolled from the waiver also with corresponding demographic data (Ex. “C”, at 8)
15. APD agreed to maintain up to date waiver program wait lists that accurately reflect wait list changes due to enrollments. (Ex. “C”, at 8).
16. AHCA retained final authority over the waiver application, renewal and amendment process but nonetheless agreed to “provide APD with all proposed amendments to the waiver for review and comment prior to submission to Centers for Medicare and Medicaid Services (CMS).” (Ex. “C”, at 5).

Management of ICF/DD and Nursing Facility admissions and continued stays

17. APD is responsible for Medicaid admissions to ICF/DDs. (Meadows Depo., 78:14-15; 80:18-24).
18. Pursuant to the Defendants’ Interagency Agreement, regarding ICF/DD admissions and continued residency, APD agreed to:
 - a. Maintain vacancy and waiting lists for placement of clients in ICF/DDs. When clients select an ICF/DD for placement, APD will complete necessary assessments and be responsible for making arrangements with the ICF/DD for admission.

- b. Conduct utilization and continued stay reviews for all residents of public and private ICF/DD facilities. When review is completed, APD will send a copy of the utilization review and continued stay review documents to the APD Area office and respective ICF/DD facility. For new admissions to a facility, a copy of the review is sent to the facility and to the adult payments worker at DCF to process. (Ex. "C", at 12).
19. Both agencies have taken responsibility to "assure that individuals have freedom of choice between home and community-based services or institutional services." (Ex. "C", at 4).
20. Federal law requires that the State screen individuals with mental illness and developmental disabilities prior to admission in a nursing facility to ensure that the nursing facility level of care is required and if other specialized disability-related services should be provided. (Preadmission Screening and Resident Review or "PASRR") 42 U.S.C. § 1396r; 42 C.F.R. § 483.100
21. An APD staff member sits on a work group with AHCA staff to make sure they are following the PASRR policy. (Smith Depo., 23:7-12).
22. As a nursing home recipient, APD should have conducted a PASRR II for Young. (Smith Depo., 26:11-21).
23. Young was denied acceptance to the Nursing Home Transition Program because she did "not have a residence available in the community." Further, she specifically was denied because her "request for assistance (funding a residential

group home for a person with a developmental disability) is not an ADA Medicaid Waiver sponsored service.” (Ex. “F”).

24. APD conducted a recent Support Plan – Short Version, dated October 10, 2011, demonstrating Young’s need for waiver enrollment and supported living with coaching, personal care, and companion as requested services. APD then denied those requests stating “You have been placed on the wait list for the waiver at present, APD does not have adequate funds to provide the services you have requested. Services will be provided upon availability of funds. Eligibility determined 9-25-06.” (Ex. “G”).
25. Placement in an institutional setting precludes crisis enrollment to the DD Waiver for Dykes, Davis and Young. The causal connection for them is clear, “they will never fall into the [the crisis category].” (Dkt. No. 80, at 9).
26. Only Dykes and Davis were transitioned from their Intermediate Care Facilities (“ICF/DD”) to the DD Waiver on February 3, 2012 and December 19, 2011, respectively. (Ex. “H”).

Budgeting and Planning

27. The Legislature, on July 1, 2011, granted Defendants the latitude to transfer funds from ICF/DDs to “the Developmental Disabilities Home and Community based waiver, Tier 1 through 3; Family Supported Living Waiver (Tier 4); and the Developmental Disabilities Individual Budget Waiver; to transition the greatest number of appropriated eligible beneficiaries from ICF/DD to community based alternatives in order to maximize the reduction in Medicaid ICF/DD occupancy.

- Priority for the use of these funds will be given to the planning and services areas with the greatest potential for transition success.” Ch. 2011-69, § 206, at 55, Laws of Fla.; *see also* Ch. 2012-118, § 251, at 62, Laws of Fla. (similar proviso language).
28. The proviso language does not allow for a line item transfer from the Budget entity for nursing homes to the DD Waiver. (Ex. “I”, ¶ 15) (Ex. “J”, ¶ 11, Attachment D).
 29. As of the time of answering interrogatories on October 24, 2011, no persons had been transitioned from ICF/DDs to the DD Waiver. (Ex. “J”, ¶ 11).
 30. AHCA has not done any projections as to the amount that would be needed to transition all of the people that are on the waitlist residing in ICF/DDs. (Kidd Depo., 24:1-10).
 31. As of January 19, 2012, there was no formal policy or procedure for utilizing the proviso language to transition persons from ICF/DDs to the DD Waiver (LaTourelle-Jones Depo., 81:21-25; 82:1-2).
 32. The Defendants did not put together a tentative plan to utilize the proviso language until February 21, 2012. (Kidd Depo., 9:10-19).
 33. The monies to transition Dykes and Davis were not effectuated until February 22, 2012. (Kidd Depo., 22:19-25; 23:1-3).
 34. For Dykes and Davis, the amount transferred pursuant to the proviso was about \$120,000.00 combined. (Kidd Depo., 23:22-25).

35. Dykes' per diem rate in the previous ICF/DD setting was \$373.10 per day. The annual cost of her care at the ICF/DD at that rate would have been \$136,181.50 if billed at 365 days per year. Dykes was transitioned to the community on February 3, 2012. For the 149 days remaining in the fiscal year, the savings realized (the cost of care in the ICF/DD less the cost of care in the community) was \$29,054. Annualized, the savings realized is \$71,172.55. (Ex. "H").
36. Davis' per diem rate in the previous ICF/DD setting was \$351.83 per day. The annual cost of her care at the ICF/DD at that rate would have been \$128,417.95 if billed at 365 days per year. Davis was transitioned to the community on December 19, 2011. For the 195 days remaining in the fiscal year, the savings realized (the cost of care in the ICF/DD less the cost of care in the community) was \$32,362. Annualized, the savings realized is \$60,575. (Ex. "H").
37. The average cost of a person on the DD waiver is approximately \$31,000. (Dkt. No. 62, ¶ 137).
38. The savings from transition from the ICF/DD to the DD Waiver will remain in the ICF/DD budget category. Likewise, Any savings from the Nursing Home Transition Program will remain in the Medicaid Nursing home budget category. (Ex. "J", ¶¶ 12 & 13).
39. As of March 6, 2012, the APD had neither sent letters to waitlisted individuals in ICF/DDs nor conducted interviews with them about their desire to effectuate their request for Wavier services through the use of the Proviso language (Meadows Depo., 83:23-25; 84:5-10).

40. AHCA does not provide choice counseling on community options to waitlisted individuals in nursing facilities or ICF/DDs. (Ex. "J", ¶ 20).
41. APD's plan to move people from the waitlist to the DD Waiver is through the crisis enrollment process. (Ex. "I", ¶ 15).
42. APD's only plan to prevent the institutionalization of waitlisted individuals who are ineligible for the crisis enrollment is to utilize general revenue funding to temporarily alleviate a crisis situation. (Ex. "I", ¶ 5).
43. AHCA receives applications for Certificates of Need for providers wishing to create new or transition existing ICF/DD beds. (Ex. "J", ¶ 23).
44. The last Certificate of Need approved by AHCA was in April 2006 and primarily relocated existing beds to three different providers while adding two new beds. (Ex. "J", ¶ 24).
45. In June 2009, the Florida Association of Rehabilitation Facilities showed 52 vacant beds for ICF/DD placements. (Ex. "U")
(http://www.floridaarf.org/vendorimages/farf/2009_june_icfdd.pdf).
46. In March 2012, the Florida Association of Rehabilitation Facilities showed 52 vacant beds for ICF/DD placements. (Ex. "U")
(http://www.floridaarf.org/vendorimages/farf/2012_march_icfdd.pdf).
47. Despite constant vacancies, the funding for private ICF/DDs has risen from 2009 to present. (Wallace Depo., 30:17-23).

48. Despite the constant vacancies, the private ICF/DDs have been allowed to “buy back” rates greater than FY2008 levels through Quality Assessment Fees. (Ex. “J”, ¶ 27).

The DD Waiver and its Waitlist

49. Currently, there are over 20,000 individuals on the waitlist for the DD Waiver program. (Arnold Depo., I, 25:16-18).

50. As recently as July 2010, as many as 49.4% of those individuals waiting for DD Waiver services had been waiting more than four years. Of those, 37.2% had been waiting longer than five years. (Dkt. No. 62, ¶¶ 142 & 143).

51. As of March 5, 2012, there are 233 individuals on the waitlist residing in ICF/DDs. (Kidd Depo., 24:1 - 25:1).

52. The number of waitlisted persons residing in ICF/DDs increased from 165 in 2009 to 199 by February 2011. (Ex. “O”).

53. As of September 2010, there were at least 115 persons with developmental disabilities on the waitlist residing in Nursing Facilities. (Ex. “P”).

54. Defendants have adopted Fla. Admin. Code R. 65G-11.002 to define the waitlist categories, pursuant to Section 393.065(5) of the Florida Statutes.

55. The first category is for those determined by the agency to be in “crisis” As defined in Fla. Admin. Code R. 65G-1.047. Fla. Admin. Code. 65G-11.002(3).

56. The legislature authorized the Defendants to define the definition of “crisis” by rule. §§ 393.065(7) & (5)(a), Fla. Stat.

57. Those in crisis have the designation of being homeless, without a caregiver or a danger to themselves or others. (Ex. “I”, ¶ 3).
58. The Defendants accept new enrollees to the waiver only through this “crisis” category. (Arnold Depo., I, 116:25 - 117:3) (Ex. “I”, ¶ 3).
59. Persons in other waitlist categories are not enrolled onto the waiver and the agency has no plans to begin enrollment from the other waitlist categories. (Ex. “I”, ¶ 15) (Arnold Depo., I, 116:25 - 117: 3).
60. In a state’s application for a waiver to the federal Centers for Medicaid and Medicare services (“CMS”), the state must identify the “unduplicated number of individuals that the state intends to serve each year the waiver is in effect. It is up to the state to determine this number, based on the resources that the state has available to underwrite the costs of waiver services. As state resources permit, this number may be modified by amendment while the waiver is in effect.”
(Application for a §1915(c) Home and Community Based Waiver; Instructions, Technical Guide, and Review Criteria (Ex. “Q”, a 2).
61. Appendix B of the waiver application “is designed to answer the question: ‘Who receives waiver services?’ In this Appendix, a state specifies:[...] (c) the number of individuals who will be served in the waiver and how this number will be managed during the period that the waiver is in effect; [...] (g) how individuals are afforded freedom of choice in selecting between institutional and home and community-based services[.]” (Ex. “Q”, at 18).

62. The explanation for Appendix B-3 of the waiver application directs States to explain: “How many individuals will be served each year during the period that the waiver is in effect and how that number is managed.” (Appendix B-3) (Ex. “Q”, at 79).
63. The number provided by the State in Appendix B-3 of the waiver is the number of individuals the state intends to receive services through the waiver for each waiver year. (Meadows Depo., 25:25; 27:1-3 & 7-18).
64. Appendix J-2-a of the waiver tables reflects the unduplicated number of participants. (Ex. “J”, ¶ 6, Attachment E).
65. CMS gives explicit guidelines on what this number means and how it is to be applied to waiver applicants seeking enrollment: “Until the maximum number of unduplicated participants in the approved waiver is reached, a state may not deny entry to the waiver of otherwise eligible individuals unless the state elects to establish a point-in-time enrollment limit, adopts a phase-in or phase-out schedule, or reserves capacity for specified purposes (see following items). As a consequence, the number of persons who will be served should be based on a careful appraisal of the resources that the state has available to underwrite the costs of waiver services.” (Ex. “Q”, at 82).
66. Florida has not elected to establish a point-in-time enrollment limit, a phase-in or phase-out schedule, or reserved capacity for specified purposes. (Ex. “A”, ¶ 32; Ex. “B”, ¶ 32).

67. The B-3 Tables of the five waiver applications indicates the state sought and received approval for at least 31,500 waiver recipients. (Ex. "R").
68. The Defendants have not sought an amendment to reduce the number of unduplicated recipients. (Meadows Depo., 42:7-10).
69. For the past five years, only those persons deemed to be in "crisis" have been enrolled and receiving services through the DD Waiver. (Dkt. No. 62, ¶ 9).
70. New "crisis enrollments" are funded solely through attrition of current DD Waiver recipients. (Arnold Depo., II, 196:20 - 197: 3).
71. As of March 1, 2011, there were 30,033 individuals enrolled in the DD Waiver. (Ex. "B", ¶ 23).
72. As of November 1, 2011 there were 29,624 individuals enrolled in the DD Waiver evidencing the declining number of DD Waiver clients. (Ex. "B", ¶ 21).
73. The number of unduplicated recipients is shrinking. (Ball Depo., 162:1-11)
74. APD provides services to waitlisted persons through general revenue funds in their Individual Family Supports ("IFS") program. (Dkt. No. 62, ¶ 146).
75. IFS funds are used to void crisis situations. (Arnold Depo., I, 122:8-12).
76. The number of waitlisted individuals receiving services through the Individual Family Supports (IFS) program ranges from 1,000 to 1,600 individuals. Funding for the IFS program comes from General Revenue Funds and Social Services Block Grant. (Ball Depo., Ex 10, at7; Ex. "T", Table 2a).

77. For persons with developmental disabilities, APD is the only agency that provides follow-along or “Phase II” supported employment services. (Arnold Depo., II, 147:10-13).
78. Supported employment may mean the provision of a personal care assistant to come into the work site when the individual needs it. (Arnold Depo., II, 149:8-10).
79. The Supported employment services, Phase II, can be funded through the IFS program. (Arnold Depo., II, 150:3).
80. If there is no funding to provide the service or to even make the commitment for Phase II, the service won’t be provided. (Arnold Depo., II, 150:16-18).
81. The disbursement of IFS funds to the area offices is typically dependent on the waitlist caseload size and their last expenditure pattern. (Arnold Depo., II, 151:8-10).
82. There are no standard operating procedures, policies or spending plan memos for the use of IFS funds by the area administrators. (Arnold Depo., II, 151:18-23; 153:22-23).
83. If there is not enough funding to provide Phase II Supported Employment to all who qualify, the area offices determine what to do with the IFS funds. (Arnold Depo., II, 154:20-25).
84. The APD can utilize IFS funds to provide waiver services such as Adult Day Training in an ongoing manner, for years and years or decades and decades. (Arnold Depo., II, 171:25 - 172:14).

85. Services provided through IFS are the same as those provided on the DD Waiver
(Arnold Depo., II, 173:3-6).

86. Defendants have assigned all waitlisted persons to prioritization categories.
(Arnold Depo., II, 176:13-19).

87. Defendants do not know if any of the Plaintiffs received notification of their
assigned waitlist prioritization category. (Dkt. No. 62, ¶ 23; Dkt. No. 63, ¶ 23).

88. Applicants are only notified of their prioritization category if they ask for it.
(Arnold Depo., I, 117:9-12)

89. Applicants who seek a reassessment of their prioritization category will get notice
in writing of the agency's determination but it is uncertain if that written notice
will contain fair hearing rights. (Arnold Depo., I, 124:13-21).

90. Changing categories on the waitlist prioritization requires affirmative action by
the family or individual to the agency, e.g. (Arnold Depo., I, 122:22 - 123:2).

Respectfully submitted on behalf of the Plaintiffs in support of their Motion for
Summary Judgment.

Dated this 2nd day of May 2012.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by CM/ECF to all attorneys of record this 2nd day of May 2012.

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