UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

JACQUELINE JONES,

Plaintiff,

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

THOMAS ARNOLD, in his official Capacity as the Secretary of Florida Agency for Health Care Administration

DR. ANNA VIAMONTE ROSS, in her official capacity as Secretary, Florida Department of Health

Defendants.
_____/

DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT

The Defendants, THOMAS ARNOLD, in his official capacity as the Secretary of the Florida Agency for Health Care Administration, and DR. ANNA VIAMONTE ROSS, in her official capacity as Secretary, Florida Department of Health, by undersigned counsel, hereby move pursuant to Rule 12(b)(1) and (6), Fed. R. Civ. P., to dismiss this cause for lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, and because the claims are barred by issue or claim preclusion. As grounds therefore, Defendants state as follows:

1. On December 15, 2009, Plaintiff Jones filed an amended complaint, which was served on Defendants on the same date via the CM/ECF system (Amended

Complaint). The Amended Complaint alleges that Defendants violate Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132 (ADA), and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a) (Rehab Act) by denying in-home health services to Plaintiff Jones and a putative class of similarly-situated persons.[1]

2. This Court should dismiss Plaintiffs' Amended Complaint. Plaintiff Jones' case is moot, because Defendants are currently in the process of enrolling Plaintiff Jones in the Traumatic Brain Injury / Spinal Cord Injury Medicaid Waiver Program (TBI/SCI Waiver Program). Affidavit of Kristen Russell. Because the named plaintiff's case became moot prior to certification of the class[2], the action is moot and must be dismissed.

3. This Court should dismiss the Amended Complaint pursuant to pursuant to Rule 12(b)(1) and (6), Fed. R. Civ. P..

4. Even if this Court were to find that Plaintiff Jones' case is not moot, or that the mootness of Plaintiff Jones' case does not render the entire action moot, the Amended Complaint should still be dismissed pursuant to Rule 12(b)(6), Fed. R. Civ. P., because the Amended Complaint fails to state a claim upon which relief can be granted.

[1] The putative class consists of Florida disabled residents with a spinal cord injury who are Medicaid recipients; reside in the community; desire to continue to reside in the community instead of a nursing facility; could reside in the community with appropriate Medicaid-funded services; and are at risk of being forced to enter a nursing home because Defendants do not provide adequate community-based services. ¶ 34 of Amended Complaint.

[2] Plaintiff Jones' case became moot prior even to any motion for certification of the putative class.

5. Plaintiffs' claim for the provision of community-based personal care services exceeds the scope of the ADA, because the applicable statute and implementing regulations do not require provision of the services sought by the Amended Complaint.

6. Plaintiffs' requested class remedy would result in a fundamental alteration of the Florida Medicaid Program, which the ADA does not require.

7. Plaintiff's claims, both individually and on behalf of a putative class, are barred by issue or claim preclusion (or collateral estoppel) in that, by the Settlement Agreement and Final Order in Dubois v. Levine, Case No. 4:03-CV-107-SPM, Plaintiff impermissibly seeks to relitigate issues disposed of in that class action litigation.

8. As further support for this Motion, the Defendants direct this Court to the following Memorandum of Law, which is attached hereto and incorporated herein by reference.

MEMORANDUM OF LAW

I. The Amended Complaint Should Be Dismissed Because Plaintiff Jones' Case is Moot

Plaintiff Jones' case is moot. According to the December 18, 2009, Affidavit of Kristen Russell, the Medicaid Waiver Administrator for the State of Florida's TBI/SCI Waiver Program, Defendants are currently in the process of enrolling Plaintiff Jones onto the TBI/SCI Waiver Program. A home visit was conducted by TBI/SCI Waiver Program personnel with Plaintiff Jones to discuss her needs on December 17, 2009. Affidavit of Kristen Russell, ¶ 2.C. On December 18, 2009, TBI/SCI Waiver Program personnel mailed documents to Plaintiff Jones to be completed by her physician, so that a formal

determination of her eligibility for TBI/SCI Waiver Program services could be made by the Department of Elder Affairs, Comprehensive Assessment and Referral for Long Term Care Services program (CARES), the entity responsible for determinations of eligibility for community based services in lieu of nursing home services. Id., ¶ 2.D. Once such a determination is made, TBI/SCI Waiver Program personnel will develop a plan of care and authorize services based upon Plaintiff Jones' needs and the service limitations of the TBI/SCI Waiver Program established by rule and law. Id. It is anticipated that CARES will generate a Notification of Level of Care within 15 business days of receipt of the completed documentation from Plaintiff Jones' physician, and that Plaintiff Jones can expect to begin receiving services within 5 business days of Defendants' receipt of a positive CARES Notification of Level of Care. Id., ¶ 2.E. Ms. Russell stated that she is "unaware of any factors that would suggest that Ms. Jones will not be placed in the [TBI/SCI Waiver Program]" once the required processes have been completed. Id., ¶ 2.F.

Even though Plaintiff Jones is not yet receiving services from the TBI/SCI Waiver Program as of the date of this Motion, her case is moot now. Even if the Court were to order Defendants to place Plaintiff Jones on the TBI/SCI Waiver Program, the standard process of determination of eligibility, assessment of needs, and authorization of services would still have to take place. Defendants are already doing what Plaintiff Jones is asking the Court to order them to do: assessing the services and supports that would enable Plaintiff Jones to remain in the community and ensuring that Plaintiff Jones has access to Medicaid-covered services (for which she is eligible) that will meet her needs in

the community. Amended Complaint, ¶ 51, 54. There is no case or controversy before the Court with respect to Plaintiff Jones. As such, her case is moot.

In a class action proceeding, once the class has been certified mootness of the class representative's claim does not necessarily moot the entire action. Sosna v. Iowa, 419 U.S. 393 (U.S. 1975). However, where, as here, the named plaintiffs' case is mooted before the class is duly certified in accordance with Rule 23, Fed. R. Civ. P., the entire action is moot. Board of School Comm'rs v. Jacobs, 420 U.S. 128, 129 (U.S. 1975). This is the law in the Eleventh Circuit. 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"). In the instant case, the named plaintiff's case was mooted before any motion to certify was even filed with the Court. As such, there is no case or controversy before the Court at this time and the Court should dismiss pursuant to Rule 12(b)(1), Fed. R. Civ. P.

II. Plaintiffs' Claims for Community-Based Personal Care Services under the ADA and the Rehab Act Fail to State a Claim Upon Which Relief Can Be Granted Because the ADA Does Not Require a Public Entity to Provide Services of a Personal Nature

The entire premise of the Amended Complaint is undermined by the fact that the regulations promulgated pursuant to Title II of the ADA specifically provide that public entities do not have to provide services of the nature which Plaintiff is demanding. The specific services the Plaintiff is demanding in her Amended Complaint include assistance

transferring from her bed to her wheelchair and from her wheelchair back to her bed, assistance dressing, grooming, toileting, personal hygiene, food preparation, cleaning her room, and assistance being turned twice a night to prevent decubitus ulcers. Amended Complaint, ¶¶ 21, 24. Plaintiff contends that both the ADA and Rehab Act require the provision of personal care services. This is not the case.

Title II of the ADA states 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. Title II also prescribes remedies available for a violation of the above provision and authorizes the Attorney General to promulgate implementing regulations. 42 U.S.C. §§ 12133, 12134.

Several regulatory provisions promulgated pursuant to Title II of the ADA are of particular relevance in this case. First, there is the "integration mandate" of 28 C.F.R. § 35.130(d), upon which Plaintiff heavily relies, which states that "[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." Second, 28 C.F.R. § 35.130(b)(7), states that "[a] public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." Finally, and most importantly, 28 C.F.R. § 35.135 states that the ADA regulations do "not require a public

entity to provide to individuals with disabilities…**services of a personal nature including assistance in eating, toileting, or dressing**" (emphasis added).

Plaintiff wants the Courts to enforce one regulatory provision while ignoring another that specifically excludes the requested services from the scope of the first. Florida is required to administer its services "in the most integrated setting appropriate," but this cannot be read to require the Florida Medicaid Program to provide "services of a personal nature," which is precisely the kind of services Plaintiff is requesting here.[3] The ADA does not require the provision of these services.

It is anticipated that Plaintiff will argue that 28 C.F.R. § 35.135 only operates if the state is not *already* providing personal care services in institutions. Once a state provides personal care services in an institution, according to the anticipated argument, the "integration mandate" of 28 C.F.R. § 35.130(d) kicks in and requires the state to provide those services in the community. However, that is not what the regulation actually says. It says that "[t]his part," meaning Title 28, Part 35, Code of Federal Regulations, **which includes the "integration mandate,"** "does not require a public entity to provide to individuals with disabilities… services of a personal nature including assistance in eating, toileting, or dressing." 28 C.F.R. § 35.135. This regulation is not ambiguous. There are no disputed terms. As such, the regulation is not subject to interpretation by the Court or any administrative agency. It must be given its plain meaning. As the Eleventh Circuit stated in Charter Fed. Sav. & Loan Ass'n v. Office of

[3] While the TBI/SCI Waiver Program does indeed provide "services of a personal nature," it is not required to do so by the ADA's integration mandate.

Thrift Supervision, 912 F.2d 1569, 1580-1 (11th Cir. 1990), "where the language selected by the drafters is clear and unequivocal, the courts are bound to give effect to the plain meaning of the chosen words [of a regulation] and no duty of interpretation arises." Id., citing KCMC, Inc. v. FCC, 600 F.2d 546, 549 (5th Cir. 1979).

The appendix to 28 C.F.R. § 35.130 clarifies that a public entity is not required to provide personal care services "except in special circumstances, such as where the individual is an inmate of a custodial or correctional institution." 28 C.F.R. Pt. 35, App. A, Subpart B, §35.130. Would the Plaintiff argue that a state that provides personal care services in a correctional institution is required by the integration mandate to provide such services in the community? This would be an absurd result, completely nullifying 28 C.F.R. § 35.135 of any effect.

The entire premise of Plaintiff's Amended Complaint, which is that the Florida Medicaid Program is required to provide personal care services as a result of the integration mandate, is undermined by 28 C.F.R. § 35.135. The Amended Complaint thus fails to state a claim upon which relief can be granted and should be dismissed pursuant to Rule 12(b)(6), Fed. R. Civ. P.

III. Plaintiffs' Requested Class Remedy Fails to State a Claim Upon Which Relief Can Be Granted Because It Would Result in an Impermissible Fundamental Alteration to the Florida Medicaid Program in Violation of the ADA

The State of Florida has no obligation to provide the putative class of plaintiffs with personal care services either by adding personal care services to its Medicaid State Plan or through its TBI/SCI Waiver Program, to the extent there are no unfilled slots.

Medicaid is a joint federal-state venture created by federal statute, Title XIX of the Social Security Act of 1965, as amended. 42 U.S.C. § 1396 *et seq*. (Medicaid Act). In order to participate in Medicaid, a state must submit a plan to the federal government outlining its program to fund medical services for the poor and needy in accordance with the federal Medicaid Act. If the federal government approves the plan, it "then subsidizes a certain portion of the financial obligations which the state has agreed to bear." Harris v. James, 127 F.3d 993, 996 (11th Cir. 1997) (citing Silver v. Baggiano, 804 F.2d 1211 (11th Cir. 1986). Currently, with the addition of stimulus funds pursuant to the American Recovery and Reinvestment Act of 2009, the federal government provides 67.64% of the money in Florida's Medicaid program for the Fiscal Year 2009. 74 Fed. Reg. 64697-64700.

The federal Medicaid Act defines "medical assistance" to mean payment for all or part of the services listed in 42 U.S.C. § 1396d(a)(1) through (28). 42 U.S.C. § 1396d(a). Only seven of the twenty-eight services listed are mandatory, meaning that a state must include such in its state plan in order to participate in Medicaid. 42 U.S.C. § 1396a(a)(10)(A). Mandatory services for adults over the age of 21 include inpatient hospital services, outpatient hospital services, laboratory and x-ray services, **nursing facility services**, nurse-midwife services, and certified nurse practitioner services. See 42 U.S.C. § 1396a(a)(10)(A) (requiring state plans to provide at least the services listed in § 1396d(a)(1) through (5), (17) and (21)). Thus, Florida is required by federal law to make nursing facility services available and, if these services are medically necessary for the

putative class members, they are entitled to them as a matter of federal law. See e.g., Goldberg v. Kelly, 397 U.S. 254 (1970).

Florida may include any of the twenty-one services listed in 42 U.S.C. § 1396d(a), including personal care services. However, it is essential to note that Florida is not required to provide such services to comply with the Medicaid Act, and, to the extent that Florida opts not to provide any of these twenty-one other services, Florida's Medicaid recipients to do not have an entitlement to those services.

In addition to the Medicaid services offered under a state's Medicaid State Plan, a state may also enter into an agreement with the federal government to offer services under a waiver program, such as the TBI/SCI Waiver Program. See 42 U.S.C. § 1396n(c). Under home and community-based waiver programs such as the TBI/SCI Waiver Program, the federal government agrees to "waive" certain requirements of the Medicaid Act without jeopardizing federal financial participation. 42 U.S.C. § 1396n(c)(3). Most importantly for the purposes of this case, the Medicaid Act permits waiver of the comparability requirement of 42 U.S.C. § 1396a(a)(10)(B). Id. This provision requires state plans to offer the services in 42 U.S.C. § 1396d(a) to all Medicaid recipients in the same amount, duration and scope. 42 U.S.C. § 1396a(a)(10)(B). By providing for a waiver of the comparability requirement, the Medicaid Act permits states to discriminate on the basis of disability.

The Medicaid Act also permits waiver of Medicaid requirements with respect to limiting the number of persons receiving waiver services and eliminating the statewideness requirement. While a state must provide services under its State Plan to

everyone who meets the state's Medicaid eligibility requirements, the waiver law specifically allows states to "cap" the number of persons receiving waiver services. 42 U.S.C. § 1396n(c)(9)-(10). Waiver of statewideness means that states can limit the provision of HCBS services to certain parts of the state as opposed to persons living throughout the state. 42 U.S.C. § 1396n(c)(3).

It is important to note that while the federal Medicaid Act permits states to create home and community-based waiver programs, it does not require states to do so. As the Medicaid Act states, "a State plan approved under this subchapter ***may*** include as „medical assistance' under such plan payment for part or all of the cost of home or community-based services (other than room and board) approved by" the federal government. 42 U.S.C. § 1396n(c)(1) (emphasis added). Neither does the Medicaid Act require the federal government to approve states' home and community-based waiver programs. The Secretary of the Department of Health and Human Services "***may*** by waiver" allow states to create home and community-based programs. Id. (emphasis added).

The Florida Medicaid Program does not provide in-home personal care services for adults like the putative class member plaintiffs. While Florida does provide in-home personal care assistance through its TBI/SCI Waiver Program, Florida has opted to place a cap on the number of persons enrolled in this program. The TBI/SCI Waiver Program does not have adequate openings at this time to accommodate all members of the putative class. The Amended Complaint does not allege that Florida has violated the Medicaid Act by failing to provide in-home personal care assistance. However, it does request that

the Court order Defendants to provide such services to members of the putative class. Such an order would effectively nullify one or more provisions of the Medicaid Act, thus forcing modifications that would "fundamentally alter" the Medicaid Program in violation of ADA regulations. 28 C.F.R. § 35.130(b)(7).

By ordering the provision of such services, the Court would invalidate the Medicaid Act's explicit statement that the only mandatory services are those found at 42 U.S.C. § 1396d(a)(1) through (5), (17), and (21) by converting personal care assistance from an optional service to a mandatory service. 42 U.S.C. § 1396a(a)(10)(A). This would require Florida to undertake a massive program expansion to ensure the provision of personal care assistant services to Medicaid recipients, fundamentally altering the program in the process.

In the alternative, such an order would invalidate the provision in 42 U.S.C. § 1396n(c)(1) declaring that home and community-based waiver programs are optional for states and that states can cap enrollment in such programs. The TBI/SCI Waiver Program does not have adequate numbers of qualified community providers to sustain the significant increase in capacity that would come from invalidating enrollment caps. Requiring Defendants to transfer large numbers of persons onto the TBI/SCI Waiver Program would fundamentally alter it in the process.

In summary, no state is required to offer personal care assistance services as part of its Medicaid State Plan, and Florida has not opted to do so. Every state is required to provide nursing facility services as part of its Medicaid State Plan, and Florida provides such services to eligible Medicaid recipients. Florida offers personal care services within

nursing facilities to Medicaid recipients who require them, both disabled and non-disabled. No state is required to create home and community-based waiver programs. Florida has created and received federal approval for several such waivers, including the TBI/SCI Waiver Program. Florida offers personal care services as part of the TBI/SCI Waiver Program. Florida has capped the enrollment in the TBI/SCI Waiver Program to 375, which is permitted under the Medicaid Act and has been approved by the federal government. The relief requested in the Amended Complaint would fundamentally alter Florida's Medicaid Program by requiring Defendants to either offer personal care services as part of the Medicaid State Plan or uncap or increase enrollment in the TBI/SCI Waiver Program. It should be noted that Florida is not able to take either of these measures without approval from the federal government.

Because the relief requested under the ADA would fundamentally alter the Florida Medicaid Program, it is not required by the ADA and Plaintiffs have failed to state a claim upon which relief can be granted. This Court should dismiss the Amended Complaint pursuant to Rule 12(b)(6), Fed. R. Civ. P.

IV. Issue or Claim Preclusion Bars This Action

In Dubois v. Levine, supra, the Federal District Court for the Northern District of Florida addressed a claim on behalf of a statewide class of persons with brain and spinal cord injuries that the State Defendants, the secretaries of the Florida Agency for Health Care Administration and the Department of Health (the same defendants in the case sub judice)

engaged in a "systemic and continuing failure to provide the named Plaintiffs and alleged

class members (Plaintiffs) with medically necessary home and community based services" in violation of the Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973, Title XIX of the Social Security Act, and all implementing regulations. See Complaint, attached as Exhibit A.

The Court certified as a class "all individuals with traumatic brain or spinal cord injuries who the state has already determined **or will determine** to be eligible to receive services from Florida's Medicaid Waiver Program for persons with traumatic brain and spinal cord injuries and have not received such services." (Emphasis added.) See Settlement, attached as Exhibit B. This Settlement was approved by the Court and the Court dismissed the action with prejudice pursuant to the Settlement's terms on January 4, 2007. See Order of Dismissal with Prejudice, attached as Exhibit C. There is no question Plaintiff Jones (as well as any other representative plaintiff who may be chosen) is within the scope of the class.

From these documents, it is self-evident that the issues and claims Plaintiff and the putative class seek to litigate here have been litigated to conclusion in Dubois. The law is clear that the doctrine of issue preclusion (or collateral estoppel) bars a party from what is tantamount to a collateral attack on a settlement issued in a prior class action asserting essentially the same claims or issues. Reyn's Pasta Bella, LLC v. Visa USA, Inc., 442 F. 3d 741 (9th Cir. 2006); Carter v. Rubin, 14 F. Supp. 2d 22 (D.C. D.C. 1998).

There are four core issues that are addressed in applying issue preclusion or collateral estoppel: (1) identity of issues; (2) prior adjudication resulting in a final judgment on the merits; (3) whether Plaintiff here was a party or in privity with a party to

the prior adjudication; and (4) whether that party had a full and fair opportunity to litigate the issue in the prior proceeding. 47 Am. Jur. 2d, Judgments, sec. 489. In the case at bar, the issues are identical—the provision of Medicaid Waiver Services to BSCIP persons who are on a wait list and therefore not receiving those services and are at risk for institutionalization. The prior adjudication in Dubois case resulted in a final judgment on the merits. Further, the parties are identical because Plaintiff here is necessarily included in the definition of the class in Dubois. And finally, as a member of the Dubois class, Plaintiff had every opportunity through class counsel to litigate her issues in the prior proceeding. (In fact, Plaintiff here makes no challenge to the correctness, propriety or fairness of the Dubois proceeding.)

The federal courts generally follow a three-step process in determining whether issue preclusion applies: (1) the identification of issues in the two actions to determine whether the issues are sufficiently similar and sufficiently material in both actions to justify invoking the doctrine; (2) the examination of the record of the prior case to decide whether the issue was litigated in the first case; and (3) the examination of the record in the prior proceeding to ascertain whether the issue was necessarily decided in the first case. Id. Here, there is no doubt the issues are sufficiently similar and sufficiently material to justify invoking the doctrine; and the issues were both litigated and necessarily decided in Dubois. Accordingly, the doctrine of issue preclusion (or claim preclusion or collateral estoppel) applies to bar this action.

CONCLUSION

This Court should dismiss the Amended Complaint as moot, or, in the alternative, for failure to state a claim upon which relief can be granted, or because the claims are barred by issue or claim preclusion.

Respectfully submitted this 29th day of December, 2009.

AGENCY FOR HEALTH CARE ADMINISTRATION

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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 the following: Stephen F. Gold, 1709 Benjamin Franklin Parkway, Second Floor, Philadelphia, PA 19103, and Jay M. Howanitz, SPOHRER & DODD, P.L., 701 West Adams Street, Suite 2, Jacksonville, Florida 32204 this 29th day of December, 2009.

s/ Andrew T. Sheeran
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ATTORNEY