IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

ADRIANA PARRALES et al.,

Plaintiffs,

v. CASE NO. 4:15cv424-RH/CAS

ELIZABETH DUDEK, in her official capacity as Secretary for the Florida Agency for Health Care Administration,

Defendant.

_____/

ORDER DENYING THE MOTION TO DISMISS

This is an action brought under Title II of the Americans with Disabilities Act seeking declaratory and injunctive relief. The plaintiffs are five adults with disabilities who reside in the community and are eligible to receive home and community-based services through a portion of Florida's Medicaid program referred to as the Long-Term Care Managed Care Waiver Program ("LTC Waiver Program"). The defendant is Secretary of the Florida Agency for Health Care Administration, the state agency responsible for the implementation and oversight of the LTC Waiver Program.

The plaintiffs allege in their complaint that the defendant's flawed implementation and oversight of the LTC Waiver Program places them at risk of unnecessary institutionalization, in violation of the ADA. The defendant has moved to dismiss the complaint for lack of standing and ripeness and for failure to state a claim under the ADA. This order denies the motion to dismiss.

I

The Medicaid program is the nation's primary effort to provide medical care for patients of limited economic means. As the Eleventh Circuit has described the program,

> Medicaid is a cooperative venture of the state and federal governments. A state which chooses to participate in Medicaid submits a state plan for the funding of medical services for the needy which is approved by the federal government. The federal government then subsidizes a certain portion of the financial obligations which the state has agreed to bear. A state participating in Medicaid must comply with the applicable statute, Title XIX of the Social Security Act of 1965, as amended, 42 U.S.C. § 1396, *et seq.*, and the applicable regulations.

Harris v. James, 127 F.3d 993, 996 (11th Cir. 1997) (quoting *Silver v. Baggiano*, 804 F.2d 1211, 1215 (11th Cir. 1986)).

In addition to the mandatory primary state plan Medicaid services, a state may also apply for additional services through certain "waiver" programs. Florida obtained a waiver from the federal government to provide home and community-based ("HCB") services to persons at risk of institutionalization. At issue here is a

specific HCB program, referred to as the LTC Waiver Program, which operates under Florida's Long-Term Care Managed Care Program and provides HCB services to adults who are otherwise eligible for nursing-home care.

Florida's LTC Waiver Program is presently administered through seven private managed-care organizations under contract with AHCA. Each managed-care organization employs case managers to facilitate the assessment and development of care plans for individual enrollees.

II

Title II of 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. Regulations implementing provisions of Title II 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). Further, "[a] public entity, in providing any aid, benefit or service, may not, directly or through contractual licensing, or other arrangements, on the basis of a disability deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit or service." 28 C.F.R. § 35.130(b)(1). The regulations also provide:

> A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration (i) that have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability; [or] (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities.

28 C.F.R. § 35.130(b)(3). And "[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." 28 C.F.R. § 35.130(b)(7).

Under *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999), a state violates the ADA if it unnecessarily isolates disabled individuals in institutions. *See also Radaszewski ex rel. Radaszewski v. Maram*, 383 F.3d 599 (7th Cir. 2004); *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175 (10th Cir. 2003).

III

The complaint alleges that AHCA's implementation of the LTC Waiver Program has resulted in denials, delays, or insufficient provision of services, placing the plaintiffs at risk of unnecessary institutionalization in violation of the ADA. The complaint further alleges that AHCA, in its implementation and oversight of the LTC Waiver Program, has failed to provide meaningful guidance and information on authorization decisions for the plaintiffs to properly access or

challenge the program's services. In ruling on a motion to dismiss, the facts alleged in the complaint must be taken as true and construed in the plaintiffs' favor. This order sets out the facts out that way.

Each of the five plaintiffs are Medicaid recipients enrolled in the LTC Waiver Program who cannot remain safely in the community without adequate and reliable HCB services. Each plaintiff currently resides in the community, wishes to continue to do so, and could continue to do so with appropriate services.

One plaintiff is Adriana Parrales. Ms. Parrales is 28 years old and lives with her mother, who is her sole caregiver. Ms. Parrales has a genetic condition known as neurofibromatosis type 2, which results in painful tumors growing on her spine, brain, and other areas. She is ventilator dependent and requires around-the-clock care. Since enrolling in the LTC Waiver Program, Ms. Parrales has been subjected to arbitrary decisions concerning her total healthcare needs and was not authorized sufficient services to keep her healthy and safe in the community. For example, after Ms. Parrales was hospitalized in 2014, she required 24-hour skilled in-home nursing care but was authorized for only one hour of nursing care per weekday for the first three months following her hospitalization. This required Ms. Parrales's mother to care for her 23 hours per day, at times wearing sanitary pads to stay by her side, in order to prevent serious harm or death in the community setting. Through the intervention of an attorney, Ms. Parrales was later authorized 16 hours

of nursing care per day, but she has experienced gaps in certain services when authorizations expire.

Another plaintiff is Sally Gilley. Ms. Gilley is 45 years old and lives with her aunt, who is her sole caregiver. Ms. Gilley has a minor child who lives in the home as well. Ms. Gilley has been a paraplegic since 2003 and was diagnosed with multiple sclerosis in June 2004. She has a colostomy, urostomy, suprapubic catheter, and a G-tube for all medication and for nutritional supplementation. She needs skilled in-home nursing services to attend to infected wounds, change her catheter, and treat the frequent infections at the catheter insertion point. Since enrolling in the LTC Waiver Program, Ms. Gilley has experienced delays and insufficient provision of services to keep her healthy and safe in the community. For example, Ms. Gilley's repeated requests for physical-therapy services went unanswered for over a year. Through the intervention of an attorney, she was finally authorized for a physical therapy assessment on June 11, 2015, but physical therapy visits have yet to be finalized. Additionally, for several months Ms. Gilley was not provided appropriate catheters or urostomy bags to prevent infections, resulting in trips to the hospital and repeated infections. The appropriate urostomy bags were finally authorized in July 2015 through the intervention of an attorney.

Another plaintiff is Janet Cramer. Ms. Cramer is 80 years old and lives at home with her 84-year-old husband, who is unable to assist with her physical care.

Ms. Cramer is paralyzed from her chest down. She requires around-the-clock care and total assistance with all activities of daily living. Since enrolling in the LTC Waiver Program, Ms. Cramer has been subjected to arbitrary decisions concerning her total healthcare needs and was not authorized sufficient services to keep her healthy and safe in the community. For example, Ms. Cramer's physician requested that she receive 24-hour personal-care services, but the request remained unanswered for two weeks, at which point only three hours of daily personal-care services were authorized. Additionally, Ms. Cramer's transportation services provided through the LTC Waiver Program have failed to arrive at least 10 times, have been late at least 10 times, and once failed to arrive with appropriate equipment for a person in a wheelchair, resulting in a serious injury to Ms. Cramer.

Another plaintiff is Josephine Hollister. Ms. Hollister is 90 years old and lives at home. She has a professional guardian appointed through the Florida courts. Ms. Hollister has physical and orthopedic impairments as well as signs of dementia. She requires total assistance with her activities of daily living and cannot live independently without adequate in-home care services. Since enrolling in the LTC Waiver Program, Ms. Hollister has been subjected to arbitrary decisions concerning her total healthcare needs and was not authorized sufficient services to keep her healthy and safe in the community. For example, despite requesting 168 hours per week of in-home care services, Ms. Hollister was

authorized only 53 hours per week and was not provided a sufficient justification for the decision. Ms. Hollister sent a letter to AHCA requesting a reconsideration of her services; she never received a response and her request for a fair hearing was not acted upon. A new request was sent on June 4, 2015, and the fair hearing process is ongoing.

The fifth plaintiff is James McGriff. Mr. McGriff is 46 years old and lives with his fiancé, who is his sole caregiver. Mr. McGriff is legally blind, insulin dependent due to type II diabetes, on oxygen for chronic obstructive pulmonary disorder, and suffers from additional chronic medical conditions. He suffered a stroke in 2011 that impaired his speech, cognition, and mobility. Mr. McGriff requires assistance with bathing, grooming, housekeeping, preparing meals, eating, transportation, and shopping. Mr. McGriff's fiancé and sole caregiver has her own disabilities and medical problems that severely limit her physical functioning. Since enrolling in the LTC Waiver Program, Mr. McGriff has been subjected to arbitrary decisions concerning his total healthcare needs and was not authorized sufficient services to keep him healthy and safe in the community. For example, his home-delivered-meals benefit was cut off without sufficient explanation, and his transportation benefits have been arbitrarily limited to one day per month, preventing him from accessing Medicaid services and participating in the community. He also stopped receiving latex gloves and antibacterial soap, which

previously allowed him to safely participate in community-based services and receive assistance from his fiancé. Mr. McGriff is currently appealing the service and benefit denials.

The plaintiffs' case managers have not explained the determinations of available services, how to request and document the need for those services, or how to challenge an inadequate care plan. The care planning process has failed to reflect the availability and limitations of a plaintiff's caregiver and individual circumstances. In addition, the plaintiffs say that the criteria that AHCA has referenced in its contracts with the managed-care organizations are so voluminous, confusing, and irrelevant that the criteria cannot be effectively explained, applied, or enforced.

IV

A motion to dismiss for lack of standing or ripeness is properly brought under Federal Rule of Civil Procedure 12(b)(1) as a challenge to the court's subject-matter jurisdiction. A defendant may attack subject-matter jurisdiction facially or factually. *Morrison v. Amway Corp.*, 323 F.3d 920, 925 n.5 (11th Cir. 2003). "Facial attacks challenge subject matter jurisdiction based on the allegations in the complaint, and the district court takes the allegations as true in deciding whether to grant the motion." *Id.* On the other hand, "[f]actual attacks challenge subject matter jurisdiction in fact, irrespective of the pleadings. In

resolving a factual attack, the district court may consider extrinsic evidence such as testimony and affidavits." *Id.* (internal citation omitted). Here, the defendant's standing and ripeness arguments are limited to the allegations contained in the complaint and thus constitute a facial attack on jurisdiction.

A motion to dismiss for failure to state a claim upon which relief can be granted is properly brought under Rule 12(b)(6). For purposes of a Rule 12(b)(6) motion, the complaint's factual allegations, though not its legal conclusions, must be accepted as true. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A motion to dismiss is not the vehicle by which the truth of a plaintiff's factual allegations should be judged. Instead, it remains true, after *Twombly* and *Iqbal* as before, that "federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later." *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168-69 (1993).

V

The defendant argues the complaint should be dismissed under Rule 12(b)(1) for want of subject matter jurisdiction because the plaintiffs lack standing and the claims are not ripe. "Standing and ripeness present the threshold jurisdiction question of whether a court may consider the merits of a dispute." *Elend v. Basham*, 471 F.3d 1199, 1204 (11th Cir. 2006).

Standing requires (1) an injury in fact; (2) a causal connection between the injury and the complained of conduct; and (3) likelihood that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The defendant claims that the plaintiffs have failed to allege a sufficiently imminent risk of institutionalization to satisfy the injury-in-fact requirement for standing. The defendant further claims that the plaintiffs have failed to show how any alleged injuries are traceable to AHCA's actions and how any declaratory or injunctive order against AHCA would redress the injuries.

"In order to satisfy the 'injury in fact' requirement of standing, a plaintiff need not wait for an injury to occur. An allegation of future injury satisfies this prong of standing so long as the alleged injury is 'imminent' or 'real and immediate' and not merely 'conjectural' or 'hypothetical.' " *31 Foster Children v. Bush*, 329 F.3d 1255, 1265 (11th Cir. 2003) (quoting *Lujan*, 504 U.S. at 560).

The complaint alleges that each plaintiff has suffered from arbitrary delays, denials, or insufficient provision of services under the LTC Waiver Program. And the complaint alleges that each plaintiff has a continuing need for adequate services in order to remain safely in the community and avoid institutionalization. The complaint alleges that, under AHCA's implementation and oversight of the LTC Waiver Program, which the plaintiffs must continue to rely upon in order to avoid institutionalization, the plaintiffs have repeatedly been delayed or denied

sufficient services to remain safely in the community. These are adequate allegations of injury-in-fact.

As to causation, the defendant claims the complaint fails to show how any alleged injury is due to the actions of AHCA as opposed to the plaintiffs' respective managed-care organizations. But the causation requirement for standing is "something less than the concept of proximate cause." *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1273 (11th Cir. 2003) (quotations omitted). "Instead, even harms that flow indirectly from the action in question can be said to be 'fairly traceable' to that action for standing purposes." *Id.* Here, the complaint alleges that AHCA is the sole state agency responsible for the administration of Florida's Medicaid program and remains accountable for the operation of the LTC Waiver Program. And the complaint further alleges that the plaintiffs are unable to meaningfully access or challenge the provision of services under the LTC Waiver Program that allow them to avoid institutionalization because AHCA has failed to adequately inform them of the program's contours. This is sufficient to satisfy the causation requirement of standing. *See Gaines v. Hadi*, No. 06-60129-CIV, 2006 WL 6035742, at *10 (S.D. Fla. Jan. 30, 2007); *Day v. District of Columbia*, 894 F. Supp. 2d 1, 22-23 (D.D.C. 2012). If the plaintiffs prevail in showing an ADA violation, it is likely their injury will be redressed. The plaintiffs have standing to maintain this suit.

And the claims are ripe. The plaintiffs allege more than simply a generalized fear of future institutionalization. They have alleged denials, delays, or insufficient provision of services that are necessary to avoid institutionalization, and a present lack of meaningful guidance to properly access or challenge the services that are available. While some plaintiffs have fair hearings still pending, claims brought under Title II of the ADA do not require an exhaustion of administrative remedies. *See Smith v. Miami-Dade Cty.*, 21 F. Supp. 3d 1286, 1291 n.2 (S.D. Fla. 2014) (citing *Bledsoe v. Palm Beach Cty. Soil & Water Conservation Dist.*, 133 F.3d 816, 824 (11th Cir. 1998)). The complaint survives a facial attack to the court's subject-matter jurisdiction.

VI

The defendant has also moved to dismiss under Rule 12(b)(6) for failure to state a claim under Title II of the ADA. "To state a claim under Title II of the ADA, a plaintiff must allege: (1) that he is a 'qualified individual with a disability;' (2) that he was 'excluded from participation in . . . or denied the benefits of the services, programs, or activities of a public entity' or otherwise 'discriminated [against] by such entity;' (3) 'by reason of such disability.' " *Shotz v. Cates*, 256 F.3d 1077, 1079 (11th Cir. 2001) (quoting 42 U.S.C. § 12132).

The defendant argues that the plaintiffs fail to allege denial of access to the services at issue by reason of their disabilities. The *Olmstead* decision forecloses

this argument. Unnecessary institutionalization of individuals with disabilities is discrimination by reason of disability under Title II of the ADA. *Olmstead*, 527 U.S. at 600. *See also Haddad v. Dudek*, 784 F. Supp. 2d 1308 (M.D. Fla. 2011). The plaintiffs here are not simply challenging their inability to access the services under the LTC Waiver Program. By a fair reading of the complaint, the plaintiffs allege that, due to AHCA's ineffective implementation and oversight of the LTC Waiver Program, they will have to enter a nursing home in order to receive the Medicaid benefits to which they are entitled. And it is not fatal that the plaintiffs are not presently institutionalized. *See* U.S. Dep't of Justice, "Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.*" question 6 (June 22, 2011), *available at* http://www.ada.gov/olmstead/q&a_olmstead.htm ("the ADA and the *Olmstead* decision extend to persons at serious risk of institutionalization or segregation and are not limited to individuals currently in institutional or other segregated settings"). *See also Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1181 (10th Cir. 2003) (holding that the protections of the integration mandate "would be meaningless if plaintiffs were required to segregate themselves by entering an institution before they could challenge an allegedly discriminatory law or policy that threatens to force them into segregated isolation"); *Cruz v. Dudek*, No. 10-23048-CIV, 2010 WL 4284955, at *12 (S.D. Fla. Oct. 12, 2010)

("Although *Olmstead* involved plaintiffs who were seeking to be removed from institutions, the holding applies equally to plaintiffs who are seeking to avoid institutionalization." (citing *Fisher*, 335 F.3d at 1181)). The complaint adequately states a claim under Title II of the ADA for which relief can be granted.

VII

The complaint alleges that the plaintiffs are at imminent risk of unnecessary institutionalization due to AHCA's implementation and oversight of the LTC Waiver Program. The allegations may or may not be true. But the allegations are adequate to invoke the court's subject-matter jurisdiction and to state an ADA claim on which relief can be granted. Accordingly,

IT IS ORDERED:

The defendant's motion to dismiss, ECF No. 15, is DENIED.

SO ORDERED on December 24, 2015.

s/Robert L. Hinkle
United States District Judge