UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

Case No. 12-60460-CIV-ZLOCH

C.V., by and through his next friends,
Michael and Johnette Wahlquist, et al.,

Plaintiffs,

v.

JUSTIN M. SENIOR, in his official
capacity as Interim Secretary of the Agency
for Health Care Administration, et al.,

Defendants.

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REPORT AND RECOMMENDATION

This matter is before this Court on Defendants' Motion for Summary Judgment. ECF No. 588. The motion was referred to the undersigned for a report and recommendation. ECF No. 275; *see also* 28 U.S.C. § 636(b); S.D. Fla. Mag. R. 1. Having carefully reviewed the motion, the response, the reply, the entire case file, and applicable law, having held a hearing on the matter, ECF No. 615, 619, and being otherwise fully advised in the premises, the undersigned hereby RECOMMENDS that the motion be GRANTED.

I. Background

Plaintiffs filed this case in March 2012 as a putative class action seeking systemic changes to Florida's administration of Medicaid services to disabled children. As Defendants, following substitutions, the Complaint names: (1) Justin M. Senior, in his official capacity as Secretary of the Agency for Health Care Administration ("AHCA"), the single state agency responsible for administering Florida's Medicaid program; (2) Celeste Philip,

M.D., in her official capacity as the State Surgeon General and Secretary of the Florida Department of Health ("DOH"); (3) Cassandra G. Pasley, in her official capacity as the Director of the DOH's Division of Children's Medical Services; and (4) eQHealth Solutions, Inc., a Louisiana non-profit corporation in privity with the AHCA.[1] Compl. 7; ECF No. 620 at 9.

At the time the operative Complaint was filed, ECF No. 62, named Plaintiffs were categorized into two groups. The first classification included three "institutionalized" children, that is, children who were residing in one of three Florida nursing homes. Compl. 3. The second classification included seven children who were alleged to be "at risk" of institutionalization. Compl. 3–4. But, today, due to unfortunate and unforeseen circumstances, such as death, "aging out" of the system, and relocation, only three named Plaintiffs remain. Those Plaintiffs—C.V., M.D., and C.M.—have never been institutionalized. ECF No. 589 ¶ 26.

On February 29, 2016, after substantial discovery took place, this Court denied Plaintiffs' motion for class certification. ECF No. 448. Plaintiffs' proposed class included "[a]ll current and future Medicaid recipients in Florida under the age of 21, who are (1) institutionalized in nursing facilities, or (2) medically complex or fragile and at risk of institutionalization in nursing facilities." ECF No. 329 at 2. In short, this Court found that the proposed class was simply "too broad and over inclusive so as to be adequately defined." ECF No. 395 at 13; ECF No. 448 at 2. Therefore, the merits of Plaintiffs' claims now depend solely on the factual allegations *apropos* to C.V., M.D., and C.M.

[1] Pursuant to an agreement, eQHealth was subsequently dismissed as a party. ECF No. 322. Because the remaining Defendants are all State of Florida officials sued in their official capacities, they may be collectively referred to as "the State" or "Florida."

The Complaint currently raises four causes of action.[2] Counts 1 and 2 raise claims for alleged violations of Title II of the Americans with Disabilities Act ("ADA") and the Rehabilitation Act, respectively. Both statutes are substantively the same, *see Badillo v. Thorpe*, 158 F. App'x 208, 214 (11th Cir. 2005), and identical allegations support both claims. Specifically, the remaining named Plaintiffs allege that Florida has violated each Act by placing them at risk of segregation in a confined institutional setting[3] and by denying them medically necessary services. Compl. 40–43. More specifically, the Complaint alleges that C.V., M.D., and C.M. are customarily denied private duty nursing services, thereby placing them at risk of undue institutionalization. *See* Compl. 4, 26–30.

Private duty nursing ("PDN") services are skilled nursing services often provided in the recipient's home. They are intended for individuals "who require more individual and continuous care than is available from a visiting nurse or routinely provided by the nursing staff of the hospital or skilled nursing facility." 42 C.F.R. § 440.80. Under the Early and Periodic Screening, Diagnosis and Treatment ("EPSDT") provisions of the United States Medicaid Act, Florida is required to provide medically necessary PDN services that are "sufficient in amount, duration, and scope" to all qualified children under the age of twenty-

[2] A fifth cause of action concerning the State's administration of the Pre-Admission Screening and Resident Review ("PASRR") provisions of the Nursing Home Reform Amendments of 1987 to the United States Medicaid Act was recently dismissed. ECF No. 631, 617. Under the PASRR program, "the State is required to screen incoming nursing facility patients for mental illness and mental retardation, determine whether placement in a nursing facility is appropriate and if specialized services are needed, and to provide the specialized services that are necessary." Compl. ¶ 94. Although the Complaint alleged that Florida's administration of the PASRR program is inadequate, the Complaint did not allege that C.V., M.D., or C.M. were ever harmed or at imminent risk of harm as a result of the State's inadequate administration of that program. Rather, the PASRR claims only applied to currently or formerly institutionalized Plaintiffs who are no longer in this case. *See, e.g.*, Compl. ¶¶ 281–82, 329–32.

[3] Under certain circumstances, undue institutionalization is itself discrimination under Title II of the ADA. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 597–603 (1999).

one.[4] 42 C.F.R. § 440.230(b); *Moore ex rel. Moore v. Reese*, 637 F.3d 1220, 1255 (11th Cir. 2011).

Florida does not dispute that C.V., M.D., and C.M. need PDN services due to their complex medical conditions. C.V. has Hurler Syndrome, which, among other things, requires him to breath with a tracheotomy tube that must be cleaned every five minutes. Compl. 26. M.D. has been diagnosed with cerebral palsy and Strider Syndrome, which also leads to breathing problems as well as frequent seizures. Compl. 28. M.D. cannot speak and requires constant supervision to avoid suffocating on her own saliva. *Id.* C.M. has been diagnosed with chromosome deletion syndrome, chronic respiratory failure, and severe cerebral palsy. Compl. 29. He, too, requires constant supervision for the cleaning of his tracheotomy tube and the administration of over twenty-five medications. *Id.* Notably, each child's parent(s) or legal guardian(s) work full-time jobs, and none are skilled nurses. Compl. 26–30, 34. Hence, each child's physician has prescribed PDN services.[5] Compl. 26–30.

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[4] For a service to be found "medically necessary," it must meet the following five conditions:

> 1. Be necessary to protect life, to prevent significant illness or significant disability, or to alleviate severe pain; 2. Be individualized, specific, and consistent with symptoms or confirmed diagnosis of the illness or injury under treatment, and not in excess of the patient's needs; 3. Be consistent with generally accepted professional medical standards as determined by the Medicaid program, and not experimental or investigational; 4. Be reflective of the level of service that can be safely furnished, and for which no equally effective and more conservative or less costly treatment is available; statewide; and 5. Be furnished in a manner not primarily intended for the convenience of the recipient, the recipient's caretaker, or the provider.

Fla. Admin. Code 59G-1.010(166)(a).

[5] The fact that a provider has prescribed services does not, in itself, make such services "medically necessary." Fla. Admin. Code 59G-1.010(166)(c).

The primary issue in this case concerns the amount of PDN hours that Florida authorizes. In a process called "prior authorization," Florida determines the medical necessity of requested services at least every 180 days.[6] Compl. ¶ 85. "The goal of prior authorization is to assure that the care and services proposed to be provided are actually needed, that all equally effective, less expensive alternatives have been given consideration and that the proposed service and materials conform to commonly accepted standards." *Moore*, 637 F.3d at 1238. As of 2011, eQHeatlh performs prior authorization reviews for any requests for PDN services by M.D. and C.M. Compl. 12; ECF No. 589 ¶¶ 6, 32. In 2014, after the Complaint was filed, DOH contracted with Ped-I-Care, who now performs prior authorization reviews for any requests for PDN services by C.V.[7] ECF No. 589 ¶¶ 9, 33.

The Complaint generally condemns Florida's "policies, practices, and regulations to reduce private duty nursing services" during prior authorization reviews. Compl. ¶ 19. The Complaint specifically identifies three policies that allegedly result in denied or reduced PDN services. At the time the Complaint was filed, each of these policies was located in the AHCA's Home Health Services Coverage and Limitations Handbook ("*Handbook*"), which was incorporated by reference into Rule 59G-4.130 (2011) of the Florida Administrative Code. Until recently, the *Handbook* specified the services provided by the State and the policies that regulate them. ECF No. 589 ¶ 3.

The first policy is referred to as the "convenience standard." Compl. ¶¶ 65, 277a. Specifically, the *Handbook* states that "Florida Medicaid does not reimburse private duty

[6] The process has two stages, if necessary. The first level of review is performed by a nurse who can only approve, but cannot deny, services. Compl. ¶¶ 86–88. If the nurse cannot approve services, medical necessity is then reviewed by a physician. *Id.*

[7] Prior to that time, eQHealth also performed prior authorization reviews for any requests for PDN services by C.V. Compl. 12.

nursing services provided solely for the convenience of the child, the parents or the caregiver." *Handbook* 2-18. This policy is an extension of the definition of "medically necessary" found in Rule 59G-1.010(166) of the Florida Administrative Code. As part of that regulation, a service is not deemed "medically necessary" unless it is "furnished in a manner not primarily intended for the convenience of the recipient, the recipient's caretaker, or the provider," among other things. *See supra* note 4. In the Complaint, Plaintiffs allege that "Defendants adopted and have applied this policy without the authority of any similar federal Medicaid policy, rule or statute, giving Defendants a basis to deny private duty nursing service hours that have been prescribed by Plaintiff and Plaintiff Class members' treating physicians." Compl. 34. Further, the Complaint states, Florida's "application of this policy has forced and is forcing parents and caregivers to institutionalize their children." Compl. 34–35.

The second *Handbook* policy states that PDN services "will be decreased over time as parents and caregivers are taught skills to care for their child and are capable of safely providing that care or as the child's condition improves." *Handbook* 2-21; Compl. ¶¶ 66, 277b. Plaintiffs allege that pursuant to this policy, "Defendants seek to force parents to provide life sustaining, medically necessary care, usually performed by licensed and trained nurses, to their own children." Compl. 34. Due to this policy, the Complaint states, "Plaintiff and Plaintiff Class members have been placed in nursing homes and are at risk of being placed in a nursing home because Defendants have unlawfully shifted the burden for providing skilled nursing services to the parents or caregivers of children who are not skilled nurses." *Id.*

The third *Handbook* policy states that "[a] recipient who is medically able to attend a prescribed pediatric extended care ('PPEC') center and whose needs can be met by the PPEC shall be provided with PPEC services instead of [PDN] services." *Handbook* 2-20;

Compl. ¶ 278a.[8] A PPEC center, also referred to as a medical daycare, "is a 'non-residential facility' that provides 'short, long-term, or intermittent medical care' to medically fragile children." Compl. 35 n.1. Children may attend PPEC Centers for as many as twelve hours per day, seven days per week.[9] *See* Fla. Stat. § 400.914(2)(a) (2016). Plaintiffs allege that this policy of preferring PPEC centers "further promote[s] institutionalization by restricting [PDN] services only to those children who 'are unable to attend a [PPEC] Center.'" Compl. 35. According to Plaintiffs, this policy "will force children who would otherwise remain in their homes and integrated communities to be placed in a segregated facility entirely composed of other medically fragile children." *Id.*

With respect to C.V., M.D., and C.M., the Complaint specifically demonstrates a pattern of prior authorization denials "based upon the current policies and practices of the Defendants." Compl. 27, 29, 30. For example, the Complaint alleges that since June 2006, the AHCA denied C.V. the appropriate hours of PDN care at least 13 times at certification reviews. Compl. ¶ 207. Since 2008, M.D. was denied the prescribed PDN hours on five separate occasions. Compl. ¶ 222. And, since 2011, C.M. was denied hours once. Compl. ¶ 234. As grounds for the denials, the AHCA expressly stated that the hours were primarily intended for the convenience of the recipient's caretaker. ECF No. 620 at 14–15, 17, 21. The Complaint alleges that the denials "are not based on a change in the medical necessity of the services," but are "an administrative action made to save money." Compl. 27, 28, 30.

For each denial, Plaintiffs were forced to engage in an appeal called a fair hearing process in order to obtain the appropriate hours. *See id.* Although each appeal was

[8] This policy comes from the 2012 version of the *Handbook*.

[9] The State's policies governing the provision of PPEC services are contained in a separate Handbook: the Prescribed Pediatric Extended Care Services Coverage and Limitations Handbook, which is incorporated by reference into Florida Administrative Code Rule 59G-4.260(2). ECF No. 620 at 7–8. The Complaint does not challenge any of the policies in that Handbook, however.

successful, Plaintiffs no longer wish to engage in this negative cycle. So, after their most recent denial, Plaintiffs filed this lawsuit. The Complaint states that Florida's policies and practices specifically place them "at risk of institutionalization" in a Florida nursing facility because, without the appropriate hours of medically necessary services, their parents or caregivers will no longer be able to care for them at home. Compl. 27, 29, 30.

Counts 3 and 4 raise related claims pursuant to 42 U.S.C. § 1983 for alleged violations of the United States Medicaid Act. Count 3 states that the AHCA's regulatory definition of "medical necessity," and Defendants' policies and practices "for providing private duty nursing, below the level that is medically necessary, violate the EPSDT provisions of the federal Medicaid Statute." Compl. 43. Count 4 states that as a result of Defendants' policies and practices that limit the provision of medically necessary services, which "result in extended delays and outright denials of medically necessary care to the Plaintiffs," the specialized services that Plaintiffs need "are not provided with reasonable promptness, in violation of 42 U.S.C. § 1396a(a)(8)." Compl. 44.

As recourse, Plaintiffs seek declaratory and injunctive relief, but not damages.[10] Specifically, Plaintiffs request for this Court to "[o]rder the Defendants to provide private duty nursing services that will allow the Plaintiffs and Plaintiff class members to live in their homes and communities." Compl. 46. Plaintiffs also seek for Defendants "to cease the practice of denying or reducing Plaintiff and Plaintiff Class members' services at recertification where there has been no change in the medical necessity of such services." *Id.*

In February 2013, Florida moved to dismiss Plaintiffs' claims for lack of jurisdiction. ECF No. 117. That motion argued that Plaintiffs' claims were moot because Florida had

[10] This Court dismissed Plaintiffs' claim for "compensatory services." ECF No. 399.

recently (as of January 2013) discontinued use of, and proposed formal rule changes to, the offending policies that Plaintiffs challenge. Nevertheless, this Court denied the motion, finding that most of the rule changes were not yet final. ECF No. 175 at 13–14. Additionally, the Court noted that Florida did nothing to modify the regulatory definition of "medically necessary" and, thus, "that definition still applies to Plaintiffs and allegedly deprives them of services and benefits that they seek through this litigation." *Id.* at 19.

In March 2014, Florida filed a "renewed" motion to dismiss. ECF No. 237. The renewed motion explains that the relevant rule changes are now final and that all relevant *Handbook* policies developed under the medical-necessity definition have since been formally repealed. *Id.* at 12. However, because Florida had still not touched the regulatory definition of "medically necessary," the Court again denied the motion. ECF No. 287 at 25–26; ECF No. 310; *see also* ECF No. 395 at 19–20.

In the instant Motion for Summary Judgment, filed in January 2017, Florida again argues that Plaintiffs' claims are moot due to the policy changes.[11] ECF No. 588. This motion highlights the prior policy changes and explains that Florida has since adopted new Rule 59G-4.261(4), which "expressly provides that the convenience standard contained in the general definition of 'medical necessity' in Rule 59G-1.010(166) 'shall not be applicable when determining the medical necessity of private duty nursing services.'" *Id.* at 12. Additionally, the motion states that the offending policies have not been applied in over three years since they were first pulled from practice, such that "no dispute of material fact remains to be adjudicated." *Id.* at 5.

[11] Defendants group the first two challenged policies into one: "**First**, Plaintiffs claim that the State applies the convenience standard to require parents and other caregivers to provide PDN services themselves, *and* denies PDN services to the extent that parents and other caregivers are available to provide those services." ECF No. 588 at 6 (second emphasis added). For clarity, the undersigned treats them separately.

II. Standard of Review

Although Florida's motion is labeled as a Motion for Summary Judgment, to the extent it seeks dismissal solely on grounds of mootness, it is actually a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. *See Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1182 (11th Cir. 2007). In this regard, the motion presents a "factual attack" to this Court's subject-matter jurisdiction because it relies on matters outside the Complaint. *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990). In a factual attack:

> the trial court may proceed as it never could under 12(b)(6) or Fed. R. Civ. P. 56. Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction—its very power to hear the case—there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.

Id. (quoting *Williamson v. Tucker*, 645 F.2d 404, 412–13 (5th Cir. 1981)).

The only exception is when the jurisdictional basis of a claim is intertwined with the merits such that a decision on one would effectively decide the other. *Id.* at 1530. Under this scenario, "the district court should apply a Rule 56 summary judgment standard when ruling on a motion to dismiss which asserts a factual attack on subject matter jurisdiction." *Id.* Of course, the summary judgment standard is more restrictive than the former. Under Rule 56, "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). However, this Court may not weigh any evidence and must resolve all reasonable inferences in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Stack v. Dep't of Army*, 160 F. App'x 857 (11th Cir. 2005).

Here, it is doubtful that the jurisdictional basis of Plaintiffs' claims are intertwined with the merits. *See Thomas v. Branch Banking & Trust Co.*, 32 F. Supp. 3d 1266, 1269 n.2 (N.D. Ga. 2014). However, the undersigned finds it unnecessary to weigh any evidence in order to resolve Florida's motion. Moreover, Florida is certainly aware of the appropriate standard, having filed six other mootness motions in this case, yet it specifically asked this Court to apply the more restrictive summary judgment standard. ECF No. 588 at 7–8. Therefore, the undersigned will do so.

III. Analysis

Article III of the United States Constitution "limits the jurisdiction of federal courts to the consideration of 'Cases' and 'Controversies.'" *Soliman v. U.S. ex rel. INS*, 296 F.3d 1237, 1242 (11th Cir. 2002) (quoting U.S. Const. art. III, § 2). For a claim to be justiciable, i.e., capable of being resolved by this federal Court, the plaintiff must have standing and his claims must be ripe, among other things. *See Levy v. Miami-Dade Cty.*, 358 F.3d 1303, 1305 (11th Cir. 2004). The Supreme Court has stated that "the irreducible constitutional minimum of standing contains three elements":

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (alterations in original) (citations omitted).

The doctrine of mootness has been described as "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the

litigation (standing) must continue throughout its existence (mootness)." *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980) (quoting Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L.J. 1363, 1384 (1973)). Although this view is not comprehensive due to exceptions, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190–91 (2000), it illustrates the principle nicely. Even when there is standing at the inception of a case, "[i]f events that occur subsequent to the filing of a lawsuit or an appeal deprive the court of the ability to give the plaintiff or appellant meaningful relief, then the case is moot and must be dismissed." *Soliman*, 296 F.3d at 1242 (quoting *Al Najjar v. Ashcroft*, 273 F.3d 1330, 1336 (11th Cir. 2001)). Stated differently, "a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Id.* (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)). "The doctrine of mootness derives directly from the case or controversy limitation because 'an action that is moot cannot be characterized as an active case or controversy.'" *Id.* (quoting *Adler v. Duval Cty. Sch. Bd.*, 112 F.3d 1475, 1477 (11th Cir. 1997)). Thus, if an action is moot, "dismissal is required because mootness is jurisdictional." *Id.* (quoting *Al Najjar*, 273 F.3d at 1336).

Florida's primary argument is that this action is moot due to its own decision to repeal and discontinue use of the offending policies. Voluntary cessation is an exception to the mootness doctrine. *Troiano v. Supervisor of Elections in Palm Beach Cty., Fla.*, 382 F.3d 1276, 1282 (11th Cir. 2004). "It is well settled that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'" *Friends of the Earth*, 528 U.S. at 189 (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)). Otherwise, the defendant would be "free to return to his old ways" at the conclusion of the case. *Id.* (quoting *Aladdin's Castle*, 455 U.S. at 289 n.10).

However, this concern is less warranted where the defendant is a government actor, as here. *Beta Upsilon Chi Upsilon Chapter at the Univ. of Florida v. Machen*, 586 F.3d 908, 916 (11th Cir. 2009). In such cases, there is a "rebuttable presumption that the objectionable behavior will not recur," *Troiano*, 382 F.3d at 1283, and "an assertion of mootness will be rejected '*only* when there is a substantial likelihood that the offending policy will be reinstated if the suit is terminated," *Beta Upsilon*, 586 F.3d at 917 (quoting *Troiano*, 382 F.3d at 1284). Indeed, where the defendant is a government actor, "the Supreme Court has held almost uniformly that voluntary cessation of the challenged conduct moots the claim." *Id.*

In the Eleventh Circuit, "[t]hree factors are relevant in conducting this mootness inquiry":

> First, we consider whether the termination of the offending conduct was "unambiguous." Second, we look to whether the change in government policy or conduct appears to be the result of substantial deliberation, or is simply an attempt to manipulate jurisdiction. Third, we ask whether the government has "consistently applied" a new policy or adhered to a new course of conduct.

Nat'l Ass'n of Boards of Pharmacy v. Bd. of Regents of the Univ. Sys. of Georgia, 633 F.3d 1297, 1310 (11th Cir. 2011). With these principles in mind, the undersigned will now separately address each factor.

A. The Policies Have Been Unambiguously Terminated

As explained above, the Complaint challenged three *Handbook* policies that allegedly lead to the denial or reduction of PDN services: (1) the convenience standard; (2) the requirement for parents or caregivers to perform skilled nursing services; and (3) the PPEC Center preference. The first policy is a descendant of the convenience standard within the generic definition for "medically necessary" found in Rule 59G-1.010(166). The three policies have since been formally repealed, and PDN services have been expressly

exempted from application of the convenience standard within the generic definition for "medically necessary." ECF No. 589 at 4–5. It is difficult to discern a more clear way that the State could have terminated the offensive policies at issue.

As explained in Florida's prior motions to dismiss, the relevant changes began in January 2013, when the AHCA first "published provider alerts implementing immediate (as of the date of publication) policy changes and clarifications." ECF No. 117 at 3. For example, with respect to the first two policies identified in the Complaint, on January 31, 2013, Florida informed eQHealth that it would no longer apply the convenience standard to determine the medical necessity of PDN services. ECF No. 233-1 ¶ 8. Additionally, on the next day, Florida issued a notice stating that it would *not* require parents to participate to the fullest extent possible when performing skilled interventions that normally could only be provided by a licensed nurse. ECF No. 237 at 6.

At the same time, the AHCA "initiated rule development pursuant to Florida's Administrative Procedures Act (Chapter 120, Florida Statutes) to codify those policy changes and clarifications through promulgated rules." ECF No. 117 at 3. Specifically, Florida deleted from the *Handbook* the statement that "Medicaid does not reimburse private duty nursing services provided primarily for the convenience of the child, the parents, or the caregiver"; the statement that caregivers are required "to participate in providing care to the fullest extent possible"; and other subordinate policies that arguably applied the convenience standard or that put pressure on caregivers to provide services that should be provided by skilled nurses.[12] ECF No. 237 at 5–7.

Similarly, with respect to the PPEC preference, Florida repealed the policy that stated "[a] recipient who is medically able to attend a [PPEC] center and whose needs can

[12] Parents or caregivers may still provide PDN services, if "willing and capable." ECF No. 345-1 at 81.

be met by the PPEC shall be provided with PPEC services instead of private duty nursing services." ECF No. 589 at 5. Florida also revised the *Handbook* "to provide that a parent or legal guardian has a right to choose between private duty nursing services or PPEC services, or a combination of both," and informed parents of this change through personal letters. ECF No. 117 at 10; ECF No. 237 at 9–11. Each of these formal changes became "final" on June 25, 2013, when Rule 59G-4.130 was amended to incorporate the revised *Handbook*, dated March 2013. ECF No. 589 ¶ 13.

Furthermore, today, the State's policies and practices are even further removed from those challenged in the Complaint. In addition to the enactment of new Rule 59G-4.261(4), after the filing of the last mootness motion, the State officially retired the *Handbook.* ECF No. 589 ¶ 4. Now, the provision of medically necessary services, including PDN services, is governed by a separate administrative rule that incorporates by reference a specific-service Coverage Policy. *Id.* For example, the new PDN Coverage Policy is incorporated by reference into Rule 59G-4.261 of the Florida Administrative Code, which became effective November 17, 2016. *Id.*

In response to the instant motion, Plaintiffs do not take issue with the substance of Florida's policy changes.[13] ECF No. 619 at 24–25; *see also* ECF No. 220. Rather, Plaintiffs attempt to minimize the importance of the repealed policies in this case by interpreting the Complaint broadly. For example, Plaintiffs argue that this case is not moot because "this case includes the failure to provide *all* medically necessary services, and not just private duty nursing services." *See* ECF No. 608 at 4–5 (emphasis added). Similarly, they argue that the convenience standard has not been unambiguously terminated because

[13] Plaintiffs were aware of the proposed changes and had the opportunity to object, but did not. ECF No. 619 at 38.

it still exists within the general definition of "medically necessary," which applies to a panoply of other services. *See id.* at 6–9.

Additionally, Plaintiffs question the State's recent decision to govern the provision of skilled services through separate, service-specific coverage policies, rather than the *Handbook*. *See id.* at 10–13. Plaintiffs argue that the State now places additional limits on the types of medically necessary services—including PDN services, PPEC services, and Personal Care Services—that medically complex children may receive, "which are without legal validity." *Id.* at 2. According to Plaintiffs, "The standards utilized by AHCA further create[] ambiguity by isolating conditions that would be deemed to fall into the [definition of] medical necessity . . . ." *Id.* at 10. "Now," Plaintiffs assert, "instead of stating that services prescribed by doctors are not for the convenience of the caretaker, care is denied when the defendants disagree with a medical professional and deem the medical care, treatment, or monitoring [is] not sufficiently skilled to require a nurse." *Id.* at 10–11. Thus, Plaintiffs argue that the convenience of the caretaker standard is still alive, "but with another category selected for ineligibility," and that "parents are [still] required to perform[] skilled nursing tasks to their children." *Id.* at 11.

In the same vein, Plaintiffs challenge the State's use of Job Aids, which Plaintiffs describe as a "screening tool" for physician reviewers to determine the medical necessity of services. *Id.* at 11, 13. Plaintiffs state that in June 2016, the AHCA revised these "guidelines" for physician reviewers to "further limit[] the types of conditions covered" for PDN services. *Id.* at 11. Plaintiffs argue that the use of Job Aids is invalid (under state law) because they are "not adopted through formal rulemaking procedures." *Id.* at 13. Additionally, Plaintiffs argue:

> The existence of, and ease of creating, such tools raises the ambiguity of the termination of the conduct of ceasing services due to requiring parents to do medical services for their

> children – as the state can always add another "Job Aid" . . . without any notice, which would automatically change the interpretation of "medically necessary" and restrict services to these children.

Id.

The undersigned rejects Plaintiffs' attempts (on the eve of trial) to again rewrite the Complaint and expand the scope of this case to the provision of other medically necessary services. *See Gilmour v. Gates, McDonald & Co.*, 382 F.3d 1312, 1314–15 (11th Cir. 2004). Plaintiffs lack standing to challenge the State's provision of medically necessary services in general, and Rule 8(a) forbids such a challenge. Near the inception of this case, the undersigned found that Plaintiffs' claims were sufficiently pleaded and justiciable because they were factually grounded in concrete denials of medically necessary services that were allegedly based upon the offensive policies, placing Plaintiffs at real and imminent risk of future denials and undue institutionalization. ECF No. 287 at 19–20. However, with respect to C.V., M.D., and C.M., Plaintiffs' claims depend exclusively on the denial of PDN services as a result of the State's offensive policies. *See* Compl. 26–30. To date, Plaintiffs have not sufficiently alleged or presented any evidence to show an "injury in fact" based upon the denial of any other medically necessary service.

Similarly, the undersigned rejects Plaintiffs' attempts to challenge the convenience standard within the regulatory definition of "medically necessary" in the abstract. In truth, the Complaint challenged that definition only insofar as it was the basis for the *Handbook* policy that led to the denial of requested PDN services. *See* ECF No. 241 at 9 ("This definition is the linchpin to the policies and practices Named Plaintiffs challenge . . . ."). There are no allegations or evidence that the convenience standard is used to unlawfully deny any other medically necessary services. Thus, although the convenience standard in the definition of medically necessary still exists and applies to other services provided by

the State, Plaintiffs' concerns *in this case* have been fully addressed by the repeal of that policy and the adoption of new Rule 59G-4.261(4). That rule makes absolutely clear that the convenience standard in the definition of "medically necessary" no longer applies to the provision of PDN services, the only medically necessary service that is relevant to Plaintiffs' claims. As a result, this Court can no longer say that the definition "still applies to Plaintiffs and allegedly deprives them of services and benefits that they seek through this litigation." ECF No. 175 at 19.

Additionally, the undersigned rejects Plaintiffs' suggestion that the offensive policies were merely transplanted into new Coverage Policies. The offensive policies were expressly terminated far prior to the enactment of the "new" criteria,[14] and Plaintiffs do not sufficiently establish how the current criteria governing the provision of PDN services are somehow unlawful under the ADA or the Medicaid Act. *See Moore*, 637 F.3d at 1255 ("A state may also limit required Medicaid services based upon its judgment of degree of medical necessity so long as such limitations do not discriminate on the basis of the kind of medical condition."). Although Plaintiffs argue that parents or caretakers are still required to perform "skilled" nursing services for their children, by their own argument, only non-skilled services are exempted under the coverage limitations. Moreover, the Coverage Policy for PDN services expressly exempts use of the convenience standard. ECF No. 589-1 at 12. Thus, the undersigned finds that the new Coverage Policy for PDN services does not apply the letter or spirit of the offensive ones.

Finally, the undersigned rejects Plaintiffs' last-ditch effort to divert their attack towards the State's use of Job Aids. Not only was that practice not challenged in the Complaint either, the use of Job Aids also does not create ambiguity concerning the

[14] Florida states that the "PDN Coverage Policy creates no new criteria, above and beyond medical necessity, that were not contained in the [*Handbook*]." ECF No. 611 at 7.

termination of the offending policies because they do not require the use of *any* policies. The Job Aid for PDN services, for example, is only used when a first-level reviewer cannot approve the requested services based on existing policies. It merely requires the first-level reviewer to compose a "Clinical Summary" for the physician reviewer and provides a template for required information, such as whether the patient is ventilator dependent or has seizures, *inter alia*. ECF No. 609-1 at 2–3. The goal of the Job Aid is to ensure that a Clinical Summary emailed to the Associate Medical Director for a physician's review "is complete, consistent and provides all the necessary information so that additional requests for information are minimized." *Id.* at 2. As such, it does not limit the types of conditions covered based on any policies, let alone any offensive ones, nor could it if it were revised in the future, as speculative as that concern may be.[15] Accordingly, the undersigned is now satisfied that the offensive policies have been unambiguously terminated.

B. The State's Changes Were Made in Good Faith and the Result of Substantial Deliberation

To make changes to the *Handbook*, the State must comply with a formal and extensive rulemaking process outlined in Chapter 120 of the Florida Statutes. *See* ECF No. 589 at 4 n.2. Similarly, to add Rule 59G-4.261(4), the State was required to comply with a public administrative process outlined in the Administrative Procedures Act, which took place over thirteen months. *Id.* at 4. The aforementioned changes took considerable time, deliberation, and effort, and they cannot be undone without complying with the extensive, public processes again.

Nonetheless, Plaintiffs speculate that the changes were made to manipulate this Court's jurisdiction. Plaintiffs impugn bad faith because the changes "occurred well after

[15] Florida notes that the June 2016 changes were not substantive in nature, as Plaintiffs suggest. ECF No. 611 at 8.

Plaintiffs' lawsuit had already begun," and because Florida did not provide a "contemporaneous policy explanation for why it was making those changes." ECF No. 608 at 16–17. Plaintiffs also state that Florida has never acknowledged the unlawfulness of its former policies. *Id.* at 17.

The undersigned rejects Plaintiffs' suggestion that the changes were made to manipulate this Court's jurisdiction or were otherwise brought in bad faith. The focus of this factor is less on the timing or subjective motive behind the initiation of changes, and more on the Defendants' intention to keep the changes at the conclusion of the lawsuit. *See Jacksonville Prop. Rights Ass'n, Inc. v. City of Jacksonville, FL*, 635 F.3d 1266, 1275 (11th Cir. 2011) (finding that "the City has not passed this legislation to manipulate our jurisdiction" where it saw nothing in the record to suggest that the City would re-enact the offensive policies and where amendment was "a time-consuming endeavor"); *Beta Upsilon*, 586 F.3d at 915 ("We are not concerned with UF's motivation for changing its registration policy, but only with whether a justiciable controversy exists."); *Coral Springs St. Sys., Inc. v. City of Sunrise*, 371 F.3d 1320, 1331 (11th Cir. 2004) ("Whether the repeal of a law will lead to a finding that the challenge to the law is moot depends most significantly on whether the court is sufficiently convinced that the repealed law will not be brought back."); *Jews for Jesus, Inc. v. Hillsborough Cty. Aviation Auth.*, 162 F.3d 627, 629 (11th Cir. 1998) ("Because there is no reason to think that the airport will change its policy at the conclusion of this lawsuit, we affirm the district court's dismissal of the suit as moot."). Indeed, in cases where government policies have been challenged, "an assertion of mootness will be rejected '*only* when there is a substantial likelihood that the offending policy will be reinstated if the suit is terminated.'" *Beta Upsilon*, 586 F.3d at 917 (quoting *Troiano*, 382 F.3d at 1284). Because mootness is a jurisdictional issue, this is true even if the change

occurs during an appeal. *See id.* at 916 ("This is so even if, as here, the court has heard oral argument and has taken the case under advisement.").

Here, although the changes were initiated after Florida received notice of this lawsuit, and the subjective motivation for change is not entirely clear, there is simply no evidence to suggest that Florida is reasonably likely to reenact or apply the offensive policies at the conclusion of this lawsuit. *See id.* at 917. Moreover, unlike in *Rich v. Sec'y, Florida Dep't of Corr.*, 716 F.3d 525, 532 (11th Cir. 2013), Florida has repeatedly promised not to return to its old ways, and it does not now argue that the offensive polices are still legal. ECF No. 588 at 15. As a result, because the Defendants are government actors, the undersigned can only assume that the changes were motivated by a genuine change of heart, made for the benefit of the people they serve. *See Martin v. Houston*, No. 2:14-CV-905-WKW, 2016 WL 7426563, at *8 (M.D. Ala. Dec. 23, 2016). After all, the administration of health care services is an evolving, fluid process. Therefore, even if this lawsuit was the catalyst for change, as Plaintiffs suggest, this alone is not enough to overcome the rebuttable presumption that the "objectionable behavior will *not* recur." *Beta Upsilon*, 586 F.3d at 917 (quoting *Troiano*, 382 F.3d at 1283). Accordingly, the undersigned finds that the State's changes were the result of substantial deliberation and not an attempt to manipulate jurisdiction.[16]

C. The Changes Have Been Consistently Applied

Plaintiffs' primary argument is that the State of Florida "continues its conduct in denying medically necessary services to medically complex children, which leads to a risk

[16] This finding also precludes any belief that Plaintiffs' claims are capable of repetition, yet evading review, although Plaintiffs did not raise that argument. *Jews for Jesus*, 162 F.3d at 629 n.4.

of being institutionalized in a skilled nursing facility."[17] ECF No. 608 at 1; ECF No. 619 at 21–25. Although Plaintiffs admit that, "[s]ince 2013, the State has not required children to attend PPEC centers rather than receive PDN services, nor have Plaintiffs been denied any PDN services on the ground that PPEC services were available," ECF No. 589 ¶ 18, they argue that the State still applies the convenience standard and requires parents or caregivers to provide skilled nursing services to their children.

At the same time, Plaintiffs suggest that Florida's policy changes came "too late in the game" for this Court to determine if they have been consistently applied. ECF No. 608 at 18; *see Rich*, 716 F.3d at 532. In this regard, the undersigned acknowledges that PDN services were only recently exempted from application of the convenience standard within the regulatory definition of "medically necessary." Yet, it is important to recognize that, through provider alerts, Florida purported to discontinue applying all offensive policies, including the convenience standard, in early 2013. This has provided the undersigned with ample time to review the State's conduct for consistency. *See* ECF No. 608 at 18 (citing *Jews for Jesus*, 162 F.3d at 629). Having done so, the undersigned is persuaded that the offensive policies are no longer applied to deny any PDN services.[18] ECF No. 589-2; ECF No. 589-3.

Plaintiffs do not present any evidence that shows otherwise. *Cf. Nat'l Advert. Co. v. City of Miami*, 402 F.3d 1329, 1334 (11th Cir. 2005) ("[O]nce the repeal of an ordinance has

[17] As there is some overlap, the undersigned has also considered Plaintiffs' arguments in this section when determining whether the offensive policies have been unambiguously terminated.

[18] Plaintiffs state that the State's declarants are basing their testimony on their review of business records that are not in evidence and are, therefore, inadmissible. ECF No. 609 at 2. However, the undersigned finds that this is not a valid reason to disregard the State's evidence. *See Stanley v. Kansas Counselors of Kansas City*, 639 F. App'x 589, 590–91 (11th Cir. 2016) (unpublished); *Duke v. Nationstar Mortg., L.L.C.*, 893 F. Supp. 2d 1238, 1244 (N.D. Ala. 2012) ("Contrary to the Dukes' contention, personal knowledge can be based on a review of relevant business files and records.").

caused our jurisdiction to be questioned, [plaintiff] bears the burden of presenting affirmative evidence that its challenge is no longer moot. Mere speculation that the City may return to its previous ways is no substitute for concrete evidence of secret intentions."); *see also* Fed. R. Civ. P. 56(c) (setting forth procedure for asserting that a fact is genuinely disputed). Rather, Plaintiffs attempt to poke holes in the State's implementation of change itself and, in doing so, *assume* that the offensive policies are still applied or will be applied in the future. For example, Plaintiffs believe that parents and caregivers are still "required to and encouraged to provide [PDN] services to their medically complex child[ren]" because the State's contract with Ped-I-Care does not include a limitation for the convenience standard, and because Ped-I-Care's provider manual requests documentation as to whether the parent or caregiver is "willing and able" to provide services for the child. ECF No. 608 at 9–10, 18. Plaintiffs also argue that Defendants do not train their care coordinators or reviewers as to the limitations on the convenience standard, citing a Power Point presentation on the provision of PDN services that does not expressly acknowledge the discontinued use of the convenience standard. *Id.* at 9–10.

The undersigned declines to adopt Plaintiffs' pessimistic and unreasonable assumptions, however. For starters, Ped-I-Care's contract requires it to comply with current state law and authorizes sanctions for violating that law. ECF No. 609-4 at 125, 300–01, 304. Thus, the fact that it does not expressly include a limitation for the convenience standard does not mean that the convenience standard still applies. Likewise, the Ped-I-Care provider manual's reference to care that the parent or caregiver is willing and able to provide does not "require" parents or caretakers to provide PDN services; it merely provides an option for those who prefer to provide PDN services themselves. *See* ECF No. 345-1 at 315. If so, they can receive reimbursement pursuant to the PDN Coverage Policy. ECF No. 589-1 at 13. Lastly, there is no valid reason to think that eQHealth's first-level

reviewers are unaware of the current standards. As Florida explains, the State elsewhere informs its first-level reviewers that the convenience standard does not apply to PDN services. ECF No. 612-1. Thus, in sum, there is simply nothing to suggest that either Ped-I-Care or eQHealth actually apply the offensive policies during prior authorization reviews.

In fact, perhaps most importantly, C.V., M.D., and C.M. admit "the Defendants have continued to authorize the appropriate amount of care for the plaintiffs" throughout the course of this litigation. ECF No. 608 at 10; *see also* ECF No. 620 at 9–10, 12. Since 2012, "no Plaintiff has engaged in the fair hearing process to challenge a denial or reduction of PDN services." ECF No. 589 ¶ 35. As a result, C.V., M.D., and C.M. cannot point to a single denial of PDN services in at least four years (covering at least eight certification reviews), let alone a denial based upon an offensive policy.

Plaintiffs' only grievance now is that their nurses regularly miss shifts, resulting in "effective" denials. ECF No. 608 at 10. But, surely this is not enough to save Plaintiffs' claims for trial. This new allegation is not triable in this case for the same reason as Plaintiffs' attempts to attack the State's Medicaid system in general: it is not sufficiently pleaded in the Complaint. For over four years now, this case has been about three policies that effectively led to the denial of medically necessary PDN services to Plaintiffs—not nurses who fail to show up for work for reasons unrelated to the policies.[19] To the extent Plaintiffs desire to challenge other aspects of the State's administration of Medicaid services to disabled children, Plaintiffs may file a different case. The relevant inquiry here is whether the State continues to apply the offensive policies, and the undersigned finds that it does not.

[19] The reason appears to be related to the State's budget. *See* ECF No. 609 at 4–5.

D. Conclusion

In sum, the undersigned concludes that Plaintiffs' claims are moot. By any fair reading of the Complaint, the success of the remaining Plaintiffs' claims each depends exclusively on the existence and application of the identified policies leading to the reduction or denial of PDN services. It was the existence and application of those policies that gave them standing to allege an imminent risk of being denied medically necessary PDN services and, thus, a risk of undue institutionalization. ECF No. 287 at 19–20; *see also* ECF No. 329 at 8–11. In addition, it was the existence and application of those policies that could establish their entitlement to declaratory or injunctive relief. *Bolin v. Story*, 225 F.3d 1234, 1242 (11th Cir. 2000) ("In order to receive declaratory or injunctive relief, plaintiffs must establish that there was a violation, that there is a serious risk of *continuing* irreparable injury if the relief is not granted, and the absence of an adequate remedy at law." (emphasis added) (citing *Newman v. Alabama*, 683 F.2d 1312 (11th Cir. 1982))).

But, to the extent the Complaint challenges those policies on their face, the written policies simply no longer exist, and there is nothing to suggest that they would be reinstated if the suit is terminated. *See Coral Springs Street Sys.*, 371 F.3d at 1331 n.9 ("The federal courts of appeal have virtually uniformly held that the repeal of a challenged ordinance will moot a plaintiff's request for injunctive relief in the absence of some evidence that the ordinance has been or is reasonably likely to be reenacted."). Similarly, to the extent the Complaint challenges those policies as applied to the remaining Plaintiffs, the policies were discontinued from use in early 2013, and there is no real indication that Florida would ever apply them again in the future.

As a result, Plaintiffs can no longer show that they are at imminent risk of being denied medically necessary PDN services or are otherwise at risk of undue institutionalization in violation of the ADA, the Rehabilitation Act, or the Medicaid Act. *See*

Shotz v. Cates, 256 F.3d 1077, 1081 (11th Cir. 2001) ("In ADA cases, courts have held that a plaintiff lacks standing to seek injunctive relief unless he alleges facts giving rise to an inference that he will suffer future discrimination by the defendant.").[20] And, without the policies, they cannot establish entitlement to declaratory or injunctive relief based upon facts and theories alleged in the Complaint.[21] *See Green v. Mansour*, 474 U.S. 64, 73 (1985) ("We think that these cases demonstrate the impropriety of the issuance of a declaratory judgment in this case. There is no claimed continuing violation of federal law, and therefore no occasion to issue an injunction. Nor can there be any threat of state officials violating the repealed law in the future."); *Carver Middle Sch. Gay-Straight All. v. Sch. Bd. of Lake Cty., Florida*, 842 F.3d 1324, 1330 (11th Cir. 2016) ("[A] court cannot grant declaratory relief when there is no 'immediate and definite governmental action or policy that has adversely affected and continues to affect a present interest.'" (quoting *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 125–26 (1974))); *Shotz*, 256 F.3d at 1082 ("Injury in the past, however, does not support a finding of an Article III case or controversy when the only relief sought is a declaratory judgment." (quoting *Malowney v. Federal Collection Deposit Group*, 193 F.3d 1342, 1348 (11th Cir. 1999))).

Of course, the present inability to establish harm is not necessarily a bad thing for Plaintiffs. To the extent Plaintiffs filed this lawsuit seeking to improve Florida's administration of Medicaid services to disabled children, Plaintiffs have succeeded. At a systemic level, Florida has "cease[d] the practice of denying or reducing Plaintiff[s'] services

[20] At the summary judgment stage, standing requires "a factual showing of perceptible harm." *Lujan*, 504 U.S. at 567.

[21] Although the two inquiries are different, "the analysis of whether a case is moot overlaps with the analysis of whether a permanent injunction is appropriate on the merits because both are concerned with the likelihood of future unlawful conduct." *Sheely*, 505 F.3d at 1182 n.10. Here, without the offensive policies, Plaintiffs cannot establish by a preponderance of the evidence that this form of equitable relief is necessary. The likelihood of future violations is simply too remote.

at recertification where there has been no change in the medical necessity of such services." Compl. 46. As for C.V., M.D., and C.M., they have received all the PDN services they have requested in the last four years. Thus, it can now be said that Florida "provide[s] private duty nursing services that will allow [them] to live in their homes and communities." Compl. 46; *see also* ECF No. 623 at 2.

This progress was not possible without change. Nonetheless, because of the changes, this Court can no longer provide Plaintiffs with any additional, meaningful relief. Therefore, Plaintiffs' claims must be dismissed as moot.

IV. Recommendation

Accordingly, the undersigned recommends that Florida's Motion for Summary Judgment, ECF No. 588, be construed as a 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction and that the motion to dismiss be GRANTED.

Within fourteen days after being served with a copy of this Report and Recommendation, any party may serve and file written objections to any of the above findings and recommendations as provided by the Local Rules for this district. 28 U.S.C. § 636(b)(1); S.D. Fla. Mag. R. 4(b). The parties are hereby notified that a failure to timely object waives the right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions contained in this Report and Recommendation. 11th Cir. R. 3–1 (2016); *see Thomas v. Arn*, 474 U.S. 140 (1985).

DONE AND SUBMITTED at Fort Lauderdale, Florida this 22nd day of March, 2017.

PATRICK M. HUNT
UNITED STATES MAGISTRATE JUDGE