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IN THE SUPREME COURT OF FLORIDA

Case No.: SC13-1549
On a Certified Question from the
United States Court of Appeals for
the Eleventh Judicial Circuit
Case No.: 12-14212

J.R.,

Appellant,

vs.

BARBARA PALMER,
Director of Agency for Persons with Disabilities,

Appellee.

APPELLANT'S REPLY BRIEF

Peter P. Sleasman, Fla. Bar No. 367931
Kristen Cooley Lentz, Fla. Bar No. 649635

Florida Institutional Legal Services Project
Florida Legal Services, Inc.
14260 W. Newberry Rd., #412
Newberry, FL 32669
(352) 375-2494 (ph)
(352) 331-5202 (fax)
peter@floridalegal.org
kristen@floridalegal.org

Attorneys for Appellant

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ARGUMENT

Appellee's answers to all three questions certified by the Eleventh Circuit Court of Appeals are based on the erroneous equation of eligibility for receipt of services from the Agency for Persons with Disabilities (APD) with the criteria for involuntary commitment under Fla. Stat. §393.11. Appellee asserts that the review of services through the support plan process will necessarily reveal the need for discontinuing an involuntary commitment because, allegedly, "APD's services are no longer proper" when the criteria for involuntary commitment have ceased to exist. Answer Brief at 17.

Appellee's premise ignores the plain statutory language contained in Chapter 393, ignores the fundamental differences between the criteria for involuntary commitment and the eligibility criteria for receipt of APD services, and ignores the findings of the Eleventh Circuit Court of Appeals which already considered and rejected this argument. *See* Order at 23-25. Because Appellee's basic premise is incorrect, her arguments regarding the answers to all three certified questions posed by the Eleventh Circuit are flawed and should be rejected.

I. The Support Plan Review Does Not Explicitly or Implicitly Require APD to Consider the Propriety of Ongoing Involuntary Commitment.

The Eleventh Circuit Court of Appeals noted, and Appellee concedes, that Fla. Stat. §393.0651, which sets out the support plan review process, does not expressly

specify that APD must review a client's involuntary placement. Order at 23; Answer Brief at 16. "APD has pointed to nothing explicit in the statute indicating that an obligation exists and has offered no evidence of procedures in place" to require review of involuntary commitment. Order at 23.

While the support plan process evaluates the client's need for services and requires that those services be provided in the least restrictive most cost beneficial setting, it does not in any way address the other essential criterion for involuntary commitment. *See* Fla. Stat. §393.0651(5). The Eleventh Circuit already found that the support plan reviews "consider only half of the ultimate question of whether it is necessary for someone to be admitted to residential services." Order at 24. There is no language in the statutes mandating the meaningful periodic review of an involuntary commitment as required by due process.

Appellee argues that this omission does not violate J.R.'s constitutional rights because "section 393.0651 [the support plan review process] implicitly requires that a goal of every support plan for an involuntarily admitted client is that the client progress to a point *that the client's support team determines that APD's services are no longer proper because the three factors required for involuntary commitment have ceased to exist."* (emphasis added). Answer Brief at 17. This assertion is based on the incorrect premise that the standards and eligibility criteria

for assessing the propriety of an APD client's services are the same as the criteria for involuntary commitment under Fla. Stat. §393.11.

The court may enter an order for involuntary admission to residential services only if the court finds that: (1) the person who is the subject of the proceeding is "intellectually disabled" or "autistic," and (2) placement in a residential setting is the least restrictive and most appropriate alternative to meet the person's needs, *and* because of the person's degree of intellectual disability or autism, the person either: (a) lacks sufficient capacity to give consent to a voluntary application for services from Defendant and lacks basic survival and self-care skills to such a degree that close supervision and habilitation in a residential setting is necessary and, if not provided, would result in a real and present threat of substantial harm to the person's well-being, or (b) is likely to physically injure others if allowed to remain at liberty. (emphasis added). Fla. Stat. §393.11(8).

Eligibility for APD services is much broader than those criteria listed in Fla. Stat. §393.11. Provision of APD services is governed by rule and by Medicaid waiver criteria.[1] Eligibility for APD services requires only that the person be at least three years of age, meet residency and domicile requirements, and have a diagnosis of a specified intellectual disability. 65G-4015, Fla. Admin. Code.

[1] APD's residential services are funded in large part through Florida's Developmental Disabilities Medicaid Waiver program. This includes individuals who are receiving services voluntarily as well as those who are involuntarily committed. Order at 4; Dkt. #44-1, p.2.

Medicaid Waiver criteria are similarly broad.[2] APD provides services to a large number of persons with intellectual disabilities, not just those who have been involuntarily admitted to residential services. *See* Order at 4. In addition, as noted by the Eleventh Circuit, APD provides Medicaid waiver services pursuant to Chapter 393 to many individuals on a voluntary basis.[3] *Id*.

APD and the Medicaid Waiver provide a wide range of services including dental services, companion services, medical supplies and equipment, dietitian, occupational therapy, personal care assistance, supported employment, supported living coaching, and transportation. *See generally* Waiver Handbook, Ch. 2. These services address issues that go well beyond the criteria for involuntary commitment.

As the Eleventh Circuit Court of Appeals' opinion pointed out, the need for these kinds of services may continue long after the client no longer met the dangerousness criteria of Fla. Stat. §393.11. Order at 24 (noting "the benefits provided to APD clients clearly continue beyond when one reaches the point of no

[2] Eligibility for the Medicaid waiver requires that the individual has a qualifying disability and has severe functional limitations in at least three of the major life activities, including self-care, learning, mobility, self-direction, understanding and use of language, and capacity for independent living. *Developmental Disabilities Waiver Services Coverage and Limitations Handbook*, App. C-1, incorporated into rule by 59G-13.083, Fla. Admin. Code. (Waiver Handbook).

[3] The Court specifically found that the statute does not equate the Medicaid "medical necessity" requirement to the statutory criteria for eligibility for involuntary residential services. Opinion at 24, fn. 11.

longer being a danger to himself or others"). In addition, "J.R. could continue to make progress with respect to his vocational and social skills by remaining in some form of residential services long after he is no longer a danger to himself or others." *Id*. Thus, a support plan review could continue to find a need for client services long after the client no longer meets the criteria for involuntary commitment.

Appellee states that the support plan review process contained in Fla. Stat. §393.0651 will necessarily "ensure each year that every non-secure residential facilities client is still properly placed within APD's services." Answer Brief at 16. The problem is that a person could be "properly placed within APD's services" even if he or she no longer meets the criteria for involuntary commitment. Without a statutory mandate to evaluate the continuing need for an involuntary commitment, the support plan process could continue year after year without ever evaluating the need for the involuntary commitment. The great risk for J.R. and others is that the support team, even if well intentioned, will continue to prescribe services for reasons unrelated to his risk of harming others long after he no longer is likely to physically harm anyone, and these services will result in continued un-reviewed involuntary commitment. Further, many of the clients who have been involuntarily committed may be able to receive services on a voluntary basis even

after they no longer meet the criteria for involuntary commitment.[4]

Based on Appellee's argument, the support plan team would only ask to lift an involuntary commitment order when the client no longer needs APD services. This is not the statutory standard for determining whether an involuntary commitment order is still appropriate. The question is not whether APD services, generally, are needed or proper. The question is whether the person would harm themselves or others if allowed to remain at liberty.[5] The client's legal commitment status does not necessarily determine the services APD must provide them. Likewise, the services provided by APD do not determine the client's legal commitment status. Therefore, a support plan review process that does not specifically consider the criteria for continued involuntary commitment is insufficient for determining the continued propriety of an involuntary commitment order.

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[4] JR's involuntary commitment does not mean that he lacks capacity to voluntarily consent to services. *See* Fla. Stat. §393.11(9). JR does not have a guardian or other surrogate decision-maker and he retains his capacity to make his own decisions. *See* Fla. Stat. §393.11(10).

[5] The Eleventh Circuit addressed the differences in the eligibility criteria for waiver services and involuntary commitment stating "if every person eligible for HCBS Medicaid Waiver services were at a great risk of harm to self or others, one would have to ask why the state of Florida has allowed 20,000 individuals to stay on the HCBS Medicaid Waiver services wait list. The record contains no evidence to support a finding that any person admitted to residential services, voluntarily or involuntarily, must pose a threat to self or others." Order at 24, fn. 11.

Appellee's argument that the support plan review process implicitly requires a review of involuntary commitment orders is simply wrong. To satisfy due process, the support plan process must mandate the consideration of the ongoing involuntary admission order. Order at 17. Chapter 393 fails that mandate.

II. There is No Requirement in Chapter 393 that Requires APD to Petition the Circuit Court for Release from an Involuntary Commitment when Circumstances that Led to the Initial Admission Have Changed.

Chapter 393 does not expressly provide for any discharge process for individuals, such as J.R., who have been involuntarily committed pursuant to Fla. Stat. §393.11.[6] Involuntary commitment orders are indefinite in duration. There is no requirement in the statute for APD to petition the circuit court for discharge and there is no requirement for the circuit court, the only entity with the authority to release a person from an order, to periodically review the continuation of the order. It should also be noted that APD has adopted no rule or policies which would require APD to petition the circuit court. Order at 23; Dkt. #41-2, ¶17.

Appellee, nevertheless, contends that Chapter 393 contains an implicit obligation for APD to petition the court if J.R. no longer meets the criteria for involuntary commitment for two reasons: (1) APD will want to be released from the "burdens" of providing services and (2) the requirement of providing services

[6] The *only* explicit discharge process for persons such as JR is habeas corpus. §393.11(11). As noted by the Eleventh Circuit, habeas corpus, in and of itself, is not sufficient. Order at 18-19.

in the least restrictive environment will prompt APD to seek to discharge those clients who have no need for their services.[7] Answer Brief at 17-18. Neither reason gives rise to any obligation to end the commitment because the criteria for providing services are not the same as the criteria for involuntary commitment. APD's reasoning fails to take into account that its "burden" of providing services may continue long after J.R. no longer meets the criteria for involuntary commitment.

As noted above, APD funds residential services for all clients, voluntary and involuntary, through the Medicaid waiver. As a waiver recipient, J.R. would have a right to continue to receive APD waiver services after release from an involuntary admission order as long as he continued to meet waiver eligibility criteria and the services were medically necessary. Waiver Handbook at C-3, D. It is highly likely that individuals such as J.R. will continue to receive services from APD even after they no longer require involuntary admission. *See* Order at 24 (noting that J.R. may benefit from and remain in some form of residential services

[7] Appellee's argument regarding certified question two is also based on the assumption that the support plan process in §393.0165 will identify and refer to APD those individuals who no longer meet the criteria of involuntary commitment. As Appellant demonstrated in argument I, *supra*, nothing in §393.0165 supports such an assumption. First, there is no assurance that the support plan review process will appropriately evaluate an individual's continuing need for involuntary commitment. Second, even if such an evaluation did take place, there is nothing within §393.0165 that requires the support team members to take action toward terminating an involuntary commitment.

"long after" he is no longer a danger to himself or others). Therefore, the supposed motivation for APD to seek discharge to reduce its burden of providing services would not be present.

Chapter 393's mandate that APD clients be provided services in the least restrictive environment does not compel APD to discharge an individual who no longer meets involuntary commitment criteria. As noted above, concerns about providing services in the least restrictive setting "only answers half of the ultimate question" regarding the need to continue an involuntary commitment. Order at 24. For example, APD may decide that a group home is the least restrictive setting for J.R. for a variety of reasons unrelated to his likelihood to physically harm others.[8]

APD repeatedly states that the trigger for APD's obligation to petition the court for release will occur only when J.R. no longer requires any APD services.[9] This is a complete misstatement of the legal standard for involuntary commitment. An involuntary commitment order should be terminated when the individual is no longer at risk of harming themselves or others regardless of whether services generally are still appropriate. If Appellee's argument is accepted, then there is a great risk that individuals who continue to need APD services, but who no longer

[8] A group home provides a family living environment including supervision and care necessary to meet the physical, emotional, and social needs of its residents. See 393.063(17).

[9] Appellee repeats this erroneous position throughout her brief. Early in her brief, Appellee asserts that for an involuntarily committed client, "discharge from all APD services requires a court order." Answer Brief at 2.

meet the criteria for involuntary commitment, will continue to be involuntarily committed long after they should be released from the order.

Appellee's argument is based on a scenario where individuals who no longer meet involuntary commitment criteria will also no longer need APD services. However, given the nature of the disabilities required by Fla. Stat. §393.11, this will rarely be the case. As noted by the Eleventh Circuit, many individuals will continue to receive APD services after they no longer need an involuntary commitment order. Order at 24. The difference would be that the client would receive only those services they choose to receive voluntarily. *See Tarlow v. District of Columbia*, 920 F. Supp. 2d 112, 123-24 (D.D.C. 2013) (noting in a case involving the rights of developmentally disabled individuals that the state's authority to confine a voluntary patient is defined by the scope of his consent). Although J.R. may continue to receive services from APD, his legal status would change. J.R. would still be entitled to continue to receive services from APD on a voluntary basis, receiving only those services he chooses to receive. APD's argument misses this critical and fundamental point in the due process analysis.

III. Chapter 393 Does Not Provide a Statutory Mandate to Meaningfully Review Involuntary Admissions Consistent with the Requirements of Due Process.

The Eleventh Circuit Court of Appeals analyzed *Parham v. J.R.*, 442 U.S. 584 (1979) and *Williams v. Wallis*, 734 F.2d 1434 (11th Cir. 1984) to provide four

"Guiding Principles" for analyzing Florida's involuntary commitment to residential services scheme. Order at 16. These principles include: (1) some form of periodic review is required to protect against the erroneous deprivation of liberty; (2) adversarial judicial review is not necessary to protect against the erroneous deprivation of liberty where medical professionals are well positioned and *mandated to consider* the propriety of ongoing commitment; (3) adversarial judicial review is not necessary to protect against the erroneous deprivation of liberty where medical professionals are well positioned and *mandated to act* when an ongoing commitment is no longer proper; and (4) the availability of adversarial judicial review in the form of habeas corpus proceedings serves as a back-up plan to protect against erroneous deprivations of liberty. *Id.* at 17-18.

Chapter 393 does not meet any of the requirements of the Eleventh Circuit's guiding principles. For purposes of this Reply, Appellant will specifically focus on Appellee's arguments regarding guiding principles two and three: whether there is an obligation for APD to review the propriety of commitment orders and whether there is an obligation for APD to act when a commitment order is no longer proper.

Appellee argues it has an implied obligation to review the propriety of an involuntary commitment order and to act when a commitment order is no longer proper because "the lengthy waitlist for APD services confirms that a residential placement would not be continued longer than necessary." Answer Brief at 23.

This statement is factually incorrect. As discussed *supra*, there is only a marginal relationship, at best, between the criteria used to determine whether someone requires involuntary commitment and whether that same person would still need residential placement and continued APD services.

A client's legal commitment status most likely will not change his continuing need for APD services. In all likelihood, a client will continue to receive APD services voluntarily even after the involuntary commitment order is dropped. As the Court specifically pointed out, "the benefits provided to APD clients *clearly continue* beyond when one reaches the point of no longer being a danger to himself or others." (emphasis added). *Id.* Therefore, removing J.R.'s involuntary commitment order would not necessarily open a slot for someone on the waitlist to receive services.[10]

Additionally, J.R.'s medical professionals are not *mandated* to consider the propriety of ongoing commitment. Appellant argues, and the Eleventh Circuit agrees, that there is no explicit requirement for support plan reviews to include consideration of the propriety of an involuntary admission order. Order at 23-24. The question in this analysis is not whether a review of the propriety of the commitment order and/or discharge from an involuntary commitment order *could*

[10] Even if there was some benefit to APD to discharge clients who are involuntarily committed, an incentive of this nature is not an "obligation" that satisfies the constitutional requirements of due process.

happen at a support plan review, but whether the statute *requires* review of the propriety of the commitment order and/or discharge from an involuntary commitment order. *See Coe v. Armour Fertilizer Works*, 237 U.S. 413, 425 (1915) (noting that elements of procedural due process must be provided as an essential part of the statutory provision, and not awarded as a mere matter of favor or grace).

It is noteworthy that APD has never put forth any evidence, and the statute does not mandate, that the propriety of a commitment order and/or discharge from involuntary commitment is *required* to happen on a periodic basis for clients who are involuntarily committed. In fact, in its Order, the Eleventh Circuit specifically points to APD's own admission that its providers *may* (not must) use the support plan to recommend further review of a client's order of involuntary commitment. (emphasis in original). Order at 23, fn. 10. The Eleventh Circuit found that the periodic support plan reviews, as described in the statute and presented by APD, are not enough to meet the requirements of Due Process. Order at 24.

Finally, because APD's current process does not require review of the involuntary commitment order or petitioning for discharge from the order, it is even more important to note that nothing in Chapter 393 mandates periodic review or discharge. As noted by the Eleventh Circuit, this is in contrast to *Parham* and *Williams*, where the Court found a sufficient review process for continued involuntary commitment. In *Parham*, the Court emphasized the statutory mandate

to afford release to a client no longer needing commitment and that the decision maker charge of the client's periodic review had the authority to afford the client release from the commitment. Order at 26-27. In *Williams*, a procedure existed by which a treatment team finding commitment no longer necessary was required to report their recommendation to the hospital superintendant with the power and duty to afford release. Order at 27.

Florida's scheme has no such mandatory release mechanism. It does not provide for the power and duty to release a client from their involuntary commitment order. The Eleventh Circuit specifically stated "the regime established in §393.11 contrasts to those in *Parham* and *Williams*, where the statutorily mandated goal of the periodic reviews was to consider release." Order at 25. Therefore, Florida's statute does not meet constitutional muster.

CONCLUSION

The crux of the District Court's decision and Appellee's argument is that §393.11 is constitutional, even though it omits periodic review, because APD will initiate a proceeding to terminate an involuntary admission order based on "its own best interests" to be released from the burden of providing services. *See* Dkt. #66 at 23. However, such a tenuous assumption is insufficient to protect J.R.'s due process rights. Throughout this litigation, Appellee has never asserted that it would petition the circuit court if it was determined that the client no longer meets

the involuntary admission requirements of §393.11. *See generally*, Dkt. ##10, 44, & 47. Furthermore, Appellee never suggested that such a process exists or how it would operate if it did. *Id*. Without a clear statutory mandate directly obligating APD to periodically review §393.11 involuntary admission orders and a further assurance in statute that the reviewing body has the authority to enforce release when it is warranted, the risk of continuing an involuntary admission when no longer warranted is just too great. For the reasons above, Appellant respectfully states that this Honorable Court answer all of the Eleventh Circuit's questions in the negative.

Respectfully submitted,

/s/ Peter P. Sleasman
Peter P. Sleasman
Fla. Bar. No.: 367931

Kristen Cooley Lentz
Fla. Bar No.: 649635

Florida Institutional Legal Services Project
Florida Legal Services, Inc.
14260 W. Newberry Rd., Ste. #412
Newberry, FL 32669-2765
(352) 375-2494 (telephone)
(352) 331-5202 (facsimile)
peter@floridalegal.org
kristen@floridalegal.org

ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this document was transmitted by electronic transmission to counsel for Appellee, Juan Collins and Leah Sevi, on this 13th day of December 2013.

/s/ Peter P. Sleasman

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that Appellant's Brief on the Merits is typed in 14-point proportionately spaced Times New Roman font.

/s/ Peter P. Sleasman