

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

John Doe, et al.

v.

Civil No. 18-cv-1039-JD
Opinion No. 2021 DNH 001

Commissioner, New Hampshire
Department of Health and Human
Services

O R D E R

Four individual plaintiffs brought suit, challenging practices used by the Commissioner of the New Hampshire Department of Health and Human Services ("the Commissioner") and four New Hampshire hospitals to involuntarily detain individuals who experience mental health crises and seek treatment in hospital emergency rooms.¹ The New Hampshire Hospital Association and twenty hospitals ("the hospitals") were granted leave to intervene in the action to bring claims against the Commissioner.² The Commissioner moves to dismiss the hospitals' remaining claims for lack of subject matter jurisdiction, asserting sovereign immunity under the Eleventh Amendment and a lack of standing. The hospitals object.

¹ The plaintiffs' action was filed as a putative class action against the Commissioner, and a plaintiff class has now been certified for purposes of the plaintiffs' federal claim against the Commissioner, Count I.

² The hospitals have voluntarily dismissed their state law claims, Counts IV and V, without prejudice.

Background

The detailed factual background in this case, as alleged in the hospitals' amended complaint, was provided in the court's order denying the Commissioner's previous motion to dismiss, document number 148, and will not be repeated here.

The hospital plaintiffs are the New Hampshire Hospital Association, Alice Peck Day Memorial Hospital, Androscoggin Valley Hospital, Catholic Medical Center, Cheshire Medical Center, Concord Hospital, Cottage Hospital, Elliot Hospital, Frisbie Memorial Hospital, HCA Health Services of New Hampshire (Parkland Medical Center and Portsmouth Regional Hospital), Huggins Hospital, Littleton Hospital Association (Littleton Regional Healthcare), LRGHealthcare (Franklin Regional Hospital and Lakes Region General Hospital), Mary Hitchcock Memorial Hospital, Monadnock Community Hospital, New London Hospital, Southern New Hampshire Medical Center, Speare Memorial Hospital, Upper Connecticut Valley Hospital, Valley Regional Hospital, and Weeks Medical Center. The hospitals name the Commissioner in her official capacity as the defendant in this case.

The hospitals' allege that the Commissioner requires the hospitals to examine, evaluate, and board psychiatric patients, who are subject to involuntary emergency admission ("IEA") certification, until such time as they are transported to a

designated receiving facility. The hospitals bring three federal claims against the Commissioner, pursuant to 42 U.S.C. § 1983, alleging that the Commissioner's practice of boarding IEA-certified persons in their emergency departments is violating their constitutional rights.

In Count I, the hospitals allege that the Commissioner's boarding practice constitutes an unlawful taking of their property for public use in violation of the Fifth and Fourteenth Amendments. In Count II, they allege that the practice interferes with their possessory rights in their emergency departments which constitutes an unreasonable seizure of their property in violation of the Fourth Amendment. In Count III, they allege that the practice violates their rights to procedural and substantive due process under the Fourteenth Amendment by seizing and taking their property and denying them their fundamental right to use their emergency departments. The hospital plaintiffs seek a declaration that the Commissioner's practice violates their federal constitutional rights and a permanent injunction against the practice. They also are requesting nominal damages and attorneys' fees and costs.

Discussion

The Commissioner moves to dismiss the hospitals' claims on the grounds that the claims are barred by sovereign immunity

under the Eleventh Amendment and that the hospitals lack standing to bring the claims. The hospitals object, arguing that the exception to sovereign immunity provided under [Ex Parte Young](#), 209 U.S. 123 (1908), applies to their claims. They also argue that they have standing to bring their claims.

I. Standard of Review

The Commissioner's motion to dismiss challenges the court's subject matter jurisdiction and is brought pursuant to [Federal Rule of Civil Procedure 12\(b\)\(1\)](#). Under Rule 12(b)(1), the court construes the allegations in the complaint liberally, treats all well-pleaded facts as true, and resolves inferences in the plaintiffs' favor. [Jalbert v. U.S. Securities & Exchange Comm'n](#), 945 F.3d 587, 590-91 (1st Cir. 2019). In addition to the complaint, the court may consider other evidence submitted by the parties without objection. [Hajdusek v. United States](#), 895 F.3d 146, 148 (1st Cir. 2018). The plaintiff, as the party invoking federal jurisdiction, bears the burden of showing that subject matter jurisdiction exists when challenged by a motion to dismiss on that ground. [Lujan v. Defenders of Wildlife](#), 504 U.S. 555, 561 (1992).

II. Eleventh Amendment

The Commissioner contends that sovereign immunity under the Eleventh Amendment bars the hospitals' claims and that the exception under Ex Parte Young does not apply. Specifically, the Commissioner argues that the state is the real party in interest. She also argues that Count III, which alleges a violation of procedural and substantive due process, is based solely on allegations that she is violating New Hampshire law. Further, the Commissioner argues that the Eleventh Amendment bars the hospital's claim for nominal damages.

In the absence of consent by the state, the Eleventh Amendment provides the state immunity from suit brought in federal court by citizens of that state or another state. [Pennhurst St. Sch. & Hosp. v. Halderman](#), 465 U.S. 89, 100 (1984). When a state official is sued, the suit is barred if "the state is the real, substantial party in interest." [Id.](#) at 101. Congress's enactment of 42 U.S.C. § 1983 did not waive states' sovereign immunity to suit in federal court. [Spencer v. N.H. St. Police](#), 2019 WL 1546995, at *1 (D.N.H. Apr. 9, 2019). Any waiver of sovereign immunity must be express. [Blanchette v. Tretyakov](#), 2020 WL 4219787, at *3 (D. Mass. July 23, 2020).

"[A] suit challenging the constitutionality of a state official's action is not one against the State." [Pennhurst](#), 465 U.S. at 102. For that reason, claims for prospective injunctive

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