

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF NEW YORK

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SEAN ALLEN SIMONSON,

Plaintiff,

vs.

OSWEGO COUNTY, A MUNICIPAL  
CORPORATION OF THE STATE OF NEW  
YORK; and OSWEGO COUNTY  
DEPARTMENT OF SOCIAL SERVICES,

Defendants.

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**DEFENDANTS' REPLY  
MEMORANDUM OF LAW  
SUPPORTING MOTION TO  
DISMISS**

**Civil Case No.: 4:17-cv-1309  
(MAD/DEP)**

**INTRODUCTION**

Defendants Oswego County (“County”) and Oswego County Department of Social Services (“Department”) moved to dismiss Plaintiff’s Complaint because it was moot, for failure to state a claim, and because the Court lacked subject-matter jurisdiction as to parts of certain state-law claims due to Plaintiff’s late service of a notice of claim as required under New York State law. Plaintiff has entered a response conceding that the claims should be dismissed as against the Oswego County Department of Social Services, and that all claims for punitive damages should be dismissed, but otherwise opposing Defendants’ motion. Defendants now offer the following material in reply supporting the pending motion.

## ARGUMENT

### POINT I

#### PLAINTIFF HAS FAILED TO SHOW AN ACTUAL CASE OR CONTROVERSY

Plaintiff offers essentially three attempts to avoid Defendants' showing that the matters raised by the Complaint are moot: (1) his claim for noneconomic damages (i.e., emotional distress damages) purportedly remains alive; (2) his request for general injunctive relief prohibiting Defendants from discriminating purportedly remains alive; and (3) the circumstances do not offer sufficient guarantees that Defendants will not resume the complained-of discriminatory act – i.e., reinstitute the exclusion of sex reassignment procedures and medications from coverage under its health plan (the “Plan”) – once the litigation is dismissed. These arguments lack merit.

Plaintiff's claim that he suffered emotional distress from the alleged exclusion is not plausible on the face of the Complaint as required by *Iqbal/Twombly*. Notably, the Complaint affirmatively alleges that Plaintiff has, in fact, taken the “steps . . . in his transition” necessary to bring his “outside appearance into alignment with his male gender identity” notwithstanding the denial of coverage for such procedures and medications under the Plan. (Complaint ¶ 40.) Thus, he cannot claim he has suffered emotional distress from not having the opportunity to undergo the desired sex reassignment procedures. Nor is there any allegation in the Complaint that the denial of coverage was publicized or otherwise made known to third parties such that Plaintiff could claim that he was subjected to public humiliation or ridicule. In fact, the sole specific allegation in the Complaint as to Plaintiff's purported emotional distress is the claim that the exclusion was “particularly humiliating and degrading to [Plaintiff] because he knows Oswego County provides insurance coverage for the very same medically-necessary health care and

related treatments to other patients who are not transgender.” (Complaint ¶ 57.) This is not plausible on its face. Insurance plan exclusions – when they do not actually result in a person having to forego desired procedures – inspire paperwork, not despair. It is respectfully submitted that, under the circumstances, the bare allegation is inadequate to plead a claim for emotional distress and other noneconomic damages.

Nor can a request for a generic injunction survive when the specific act complained of – here the presence of the exclusion in the Plan – has been remedied prior to the commencement of litigation. Plaintiffs whose specific claims have been rendered moot cannot keep their lawsuits alive by the simple expedient of demanding an injunction that, in essence, parrots the existing law. Further, there is no case or controversy with respect to the request for injunctive relief because Plaintiff lacks standing to pursue it; he is retired and thus cannot show a “real and immediate, not conjectural or hypothetical” likelihood that he will be injured in the future absent the injunction. *Shain v. Ellison*, 356 F.3d 211, 215 (2d Cir. 2004) (internal citations and quotations omitted).

Finally, Plaintiff’s insistence that there remains a danger Defendants will resume the Plan exclusion is meritless. Defendants entered into an agreement with a governmental entity *prior* to the litigation whereby they committed to remove, and in fact did remove, the exclusion (the “Assurance of Discontinuance”). This fact was not present in the cases relied on by Plaintiff, which involved either defendants making spontaneous changes without the involvement of a governmental entity or a binding agreement with a governmental entity, or defendants making changes only after litigation was commenced and they were subject to judicial orders to do so. *See Knox v. Service Employees International Union, Local 1000*, 567 U.S. 298 (2012) (practice ceased pursuant to order of lower court in course of litigation); *Friends of the Earth, Inc. v.*

*Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000) (pre-litigation voluntary compliance with terms of facility's permit, and post-litigation-commencement closure of facility violating permit); *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283 (1981) (city voluntarily repealed objectionable language in provision, without binding agreement with governmental entity to continue to exclude the language); *U.S. v. New York City Transit Authority*, 97 F.3d 672 (2d Cir. 1996) (unilateral change in policy following EEOC proceedings in which Authority refused to enter into conciliation agreement); *Hispanic Leadership Fund, Inc. v. Walsh*, 42 F.Supp.3d 365 (N.D.N.Y. 2014) (board of elections voluntarily promised not to enforce challenged statute, but did not actually rescind statute). This case, in fact, presents the paradigm example of a practice that the Court may regard as extremely unlikely to recur; if the doctrine is not applied in this case, it amounts to reading the doctrine out of the law.<sup>1</sup>

Plaintiff's claims are thus moot, depriving the Court of subject-matter jurisdiction because no case or controversy exists (or has existed since before Plaintiff filed his claims).<sup>2</sup> Defendants respectfully submit the Complaint should be dismissed.

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<sup>1</sup> Plaintiff's contention that the Assurance of Discontinuance's disclaimer that it waived any private rights under the law somehow affects this Court's subject-matter jurisdiction (Opposition pp. 8-9) is meritless. If the Assurance of Discontinuance eliminated the alleged injury, Plaintiff would have no private right of action, not because of the language of the Assurance of Discontinuance but because of the reality of the Assurance of Discontinuance's practical impact on Plaintiff's health insurance benefits. This impact would not be affected by the disclaimer language in the Assurance of Discontinuance. Nor, of course, can Defendants and the New York State Attorney General, by agreement, expand the subject-matter jurisdiction of this Court to include matters that are not justiciable "cases or controversies."

<sup>2</sup> Plaintiff insinuates that Defendants changed the Plan to eliminate the exclusion just ahead of his filing the Complaint as a maneuver to bolster its position in this litigation. The argument depends on the absurd suggestion that Defendants had some precognitive ability to determine when Plaintiff was *about to* file the litigation. The much more reasonable conclusion, it is submitted, is that once he received notice of the elimination of the Plan exclusion, Plaintiff rushed to file his lawsuit in the hopes of preserving his claims. In fact, he did so two days after the notice was issued. (See Motion Exhibit 2.)

**POINT II**

**PLAINTIFF’S CONTENTIONS REGARDING THE  
TIMELINESS OF HIS NOTICE OF CLAIM WITH RESPECT  
TO DENIALS PRIOR TO MARCH 16, 2017 ARE MERITLESS**

Plaintiff argues, in essence, that because the Plan exclusion was present continuously from March, 2015 through November, 2017, it constituted a “continuous denial” such that his June 14, 2017 Notice of Claim was timely as to all denials of coverage in that period. However, Plaintiff’s claims, if any, accrued on the discrete occasions when benefits were denied, not every day the exclusion language appeared in the Plan. *See, e.g., Veltri v. Building Services 32b-J Pension Fund*, 393 F.3d 318, 325 (2d Cir. 2004) (as a general matter, a claim for improper denial of benefits accrues when there has been a clear repudiation of the claim by the fiduciary which is known to the claimant). Because applicable state law requires a notice of claim to be served within ninety days of accrual of a claim, the Notice of Claim is untimely as to any denials occurring prior to March 16, 2017.

As to the remainder of Plaintiff’s arguments, Defendants rest upon their initial motion papers.

**CONCLUSION**

For all the foregoing reasons, and upon all the above-cited authorities, Defendants respectfully request the Court grant an order dismissing the Complaint, and each claim in the Complaint, with prejudice, and award such other and further relief as the Court deems just.

Dated: January 25, 2018  
East Syracuse, New York

Respectfully submitted,

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