UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Anmarie Calgaro,

Plaintiff,

vs.

St. Louis County; Linnea Mirsch, individually and in her capacity as Interim Director of St. Louis County Public Health and Human Services; Fairview Health Services, a Minnesota nonprofit corporation; Park Nicollet Health Services, a nonprofit corporation; St. Louis County School District; Michael Johnson, individually and in his official capacity as Principal of the Cherry School, St. Louis County School District; and J.D.K.,

Defendants.

Civil Action No.: 0:16-cv-03919-PAM-LIB

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT FAIRVIEW HEALTH SERVICES' MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(1) AND FED. R. CIV. P. 12(b)(6)

Fairview Health Services ("Fairview") respectfully submits this memorandum of law in support of its motions under Fed. R. Civ. P. 12(b)(1) and 12(b)(6) to dismiss the claims made against Fairview in the Complaint.

INTRODUCTION AND PROCEDURAL POSTURE

Plaintiff has sued Fairview under 42 U.S.C. § 1983 alleging that Fairview violated her rights under the Fourteenth Amendment. This allegation fails to state a claim because Fairview is a private hospital, not a state actor, and therefore is not subject to the Fourteenth Amendment or to claims under 42 U.S.C. § 1983. Because Plaintiff has asserted no other basis for this Court's subject-matter jurisdiction over the claims against Fairview, the Complaint fails to state a claim against Fairview upon which relief may be granted. Because this Court lacks subject-matter jurisdiction over those claims, they should be dismissed.

The Complaint was served on Fairview on November 17, 2016, and the present motions under Rule 12(b) were served within 21 days of service of the Complaint. As a result, Fairview's deadline for serving an answer has been tolled pending the Court's decision on the motions. Fed. R. Civ. P. 12(a)(4).

FACTUAL BACKGROUND

E.J.K. f.k.a. J.D.K. ("E.J.K.") is a 17-year-old transgender youth who identifies as female. [Doc. 1, ¶¶ 18, 68.] Plaintiff is E.J.K.'s biological mother. [Doc. 1, ¶ 3.] E.J.K. resides on her own and has not resided with Plaintiff since early 2015. [Doc. 1, ¶ 53 & Ex. A.] E.J.K. resides in St. Louis County, Minnesota, and receives funding from the county to help support her living expenses. [Doc. 1, ¶ 54.]

Fairview Health Services is a private nonprofit corporation organized under the laws of the State of Minnesota. [Doc. 1, ¶ 12.] Fairview is alleged to have

provided medical services to E.J.K. at her request, including the provision of prescription medication. [Doc. 1, ¶ 101.] E.J.K. is alleged to have paid for these medical services with medical assistance funds. [Doc. 1, ¶ 102.] Plaintiff objects to Fairview providing E.J.K. medical services. [Doc. 1, ¶ 120.]

Plaintiff instituted this action pursuant to 42 U.S.C. § 1983, alleging that Fairview has violated her rights under the Due Process Clause of the Fourteenth Amendment.[1] [Doc. 1, ¶ 173.] Plaintiff seeks injunctive relief and a declaration that Fairview has violated her rights under the Due Process Clause of the Fourteenth Amendment. *Id.*

ISSUES PRESENTED

1. Whether the claims against Fairview should be dismissed because the Complaint fails to state a claim under 42 U.S.C. § 1983 against Fairview.
2. Whether the claims against Fairview should be dismissed because this Court lacks subject-matter jurisdiction over the claims against Fairview.

[1] Plaintiff's due-process claim is premised on the argument that she has no procedure available to her under Minnesota law through which she can have a court determine whether E.J.K. is an unemancipated minor subject to her custody and control. [Doc. 1, ¶ 189.] Plaintiff does not explain why an action under the Minnesota Uniform Declaratory Judgments Act "to declare rights, status, and other legal relations whether or not further relief is or could be claimed" fails to provide her with the procedural means of obtaining such relief. Minn. Stat. § 555.01 (2016). Further, for the reasons argued by the other defendants, Plaintiff's due-process arguments would be without merit even if a state declaratory-judgment action were an insufficient vehicle for obtaining the actual relief that she seeks. Fairview joins in the arguments for dismissal made by Park Nicollet Health Services and the other defendants with regard to this issue.

STANDARD

A motion to dismiss for lack of subject matter jurisdiction may challenge the complaint either on its face or on the factual truthfulness of its averments. *Smith v. Univ. of Minn. Med. Ctr.-Fairview Riverside*, Civil No. 09-293 (JRT/JSM), 2010 WL 3893902, at *5 (D. Minn. July 14, 2010) (citing *Titus v. Sullivan*, 4 F.3d 590, 593 (8th Cir. 1993)). In a facial challenge, this court limits its review to the complaint and applies the same standard that is applied in motions brought under Fed. R. Civ. P. 12(b)(6). *Id.*

To survive a motion under Fed. R. Civ. P. 12(b)(6), the plaintiff's complaint must supply factual allegations that raise the right to relief above the level of speculation. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In evaluating whether the complaint satisfies this requirement, the Court must assume that all facts pleaded in the complaint are true. *Id.* Significantly, the "obligation to provide the 'grounds' of the [plaintiff's] 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.*

Moreover, federal courts are courts of limited jurisdiction possessing only that power authorized by the Constitution and by statute. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 144 S. Ct. 1673, 1675 (1994). Therefore, when conducting this review, a federal court must presume that a cause lies outside its limited jurisdiction and place the burden of establishing the contrary on the party asserting that jurisdiction exists. *Id.* at 377, 144 S. Ct. at 1675.

ARGUMENT

Congress has extended original federal-question jurisdiction to federal district courts in civil actions arising under federal statutes. 28 U.S.C. § 1331. In this case, Plaintiff alleges that the Court may exercise federal-question jurisdiction over the claims against Fairview because 42 U.S.C. § 1983 provides her a remedy against Fairview against a purported violation of her rights under the Due Process Clause of the Fourteenth Amendment. [Doc. 1, ¶ 1.]

The Due Process Clause of the Fourteenth Amendment provides that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 2. The Due Process Clause only regulates conduct that "may fairly be said to be that of the States" and "erects no shield against merely private conduct." *Blum v. Yaretsky*, 457 U.S. 991, 1003, 102 S. Ct. 2777, 2785 (1982).

Section 1983 provides that

> [a]ny person who, under color of any statute, ordinance, regulation, custom, or usage of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983. Like the Due Process Clause itself, it is well-established that this statute does not extend to merely private conduct. *Am. Mfgrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49–50, 119 S. Ct. 977, 985 (1999).

Instead, in order to establish a claim under Section 1983, a plaintiff must show (1) that she was deprived of a right secured by the Constitution or laws of the United States, and (2) that the alleged deprivation was committed under the color of state law. *Id.* at 49–50, 119 S. Ct. at 985. Proof that the deprivation occurred under color of state law requires a showing that both (a) the deprivation was caused by the exercise of a right or privilege created under state law, and (b) that "the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Id.* at 50, 119 S. Ct. at 985 (quotation omitted). A threshold issue in the present case is whether Fairview may fairly be said to be a state actor. Fairview is not a state actor.

For a private entity to have its acts converted into state actions, there must be a sufficiently close nexus between the State and the private entity, as evidenced by the State's exercise of coercive power or "such significant encouragement" that the decisions of the private actor must be deemed to be those of the State itself rather than the private actor. *Id.* at 52, 119 S. Ct. at 986. The acts of a private entity that are taken with "the mere approval or acquiescence of the State" are not state actions and do not convert the private entity into a state actor. *Id.* at 52, 119 S. Ct. at 986. Here, as a matter of law, there is no nexus between Fairview's private conduct and any state mandate or action.[2]

[2] The absence of the required nexus suggests that this Court is also without jurisdiction to consider any challenge against the public-entity defendants for the conduct of Fairview. *See Blum*, 457 U.S. at 1003–05, 102 S. Ct. at 2785–86 (stating that no state action was involved, on which to hold a state actor liable,

Under this standard, it is well-established that "if the action of [a healthcare provider] was a purely private action, then section 1983 affords no basis for federal jurisdiction" and such a claim is "properly dismissed for lack of subject matter jurisdiction." *Lubin v. Critterden Hosp. Ass'n*, 713 F.2d 414, 415 (8th Cir. 1983); *accord Alexander v. Pathfinder, Inc.*, 189 F.3d 735, 740 (8th Cir. 1999); *Parisier v. Christian Health Care Sys., Inc.*, 816 F.2d 1248, 1252 (8th Cir. 1987); *Hayden v. Bracy*, 744 F.2d 1338, 1342 (8th Cir. 1984); *Hoyt v. St. Mary's Rehabilitation Ctr.*, 711 F.2d 864, 865–67 (8th Cir. 1983); *Briscoe v. Bock*, 540 F.2d 392, 395–96 (8th Cir. 1976); *Smith*, Civil No. 09-293 (JRT/JSM), 2010 WL 3893902, at *11.

As a matter of law, the mere fact that a private healthcare provider is extensively regulated by the state and receives state or federal funding for the services that it provides is simply not enough to establish the required nexus to convert the private provider's acts into state acts. *Alexander*, 189 F.3d at 740; *Lubin*, 713 F.2d at 415–16; *Briscoe*, 540 F.2d at 394, 396.

Simply put,

> [m]any decisions in our society, right or wrong, simply must be left to the good judgment and discretion of private individuals, including physicians and other professionals, subject to whatever statutes or regulations may validly be issued by one or another level of government.

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when "[t]he decisions about which respondents complain are made by physicians and nursing home administrators, all of whom are concededly private parties" and therefore those decisions did not provide a basis for holding the state itself liable). If Fairview is not a state actor, then its actions cannot be ascribed to the public-entity defendants for purposes of Section 1983.

Hoyt, 711 F.2d at 866–67.

For example, in *Blum*, a group of nursing-home patients brought a Section 1983 claim related to their physicians' periodic determinations as to whether the services provided to the patients remained "medically necessary" for purposes of Medicaid reimbursement. 457 U.S. at 994, 102 S. Ct. at 2781. If the physicians determined that the services were no longer "medically necessary," then the patient was discharged from the nursing home or transferred to a facility providing a lesser degree of care. *Id.* at 994, 102 S. Ct. at 2781. The patients were not provided with notice or a hearing before the physicians made their determinations, and *Blum* considered whether the lack of such a process violated the patients' due-process rights. *Id.* at 1003, 102 S. Ct. at 2785.

In finding that no violation occurred, the Supreme Court reasoned that "the decision to discharge or transfer a patient originates not with state officials, but with the nursing homes that are privately owned and operated." *Id.* at 1003, 102 S. Ct. at 2785. The fact that Medicaid payments were adjusted or discontinued "in response to a decision to discharge or transfer a patient does not constitute approval or enforcement of that decision." *Id.* at 1005, 1010, 102 S. Ct. at 2786, 2789. Because no state action was involved, the patients' due-process rights were not violated and their Section 1983 claim failed. *Id.* at 1012, 102 S. Ct. at 2790.

The Eighth Circuit reached a like decision in *Alexander*, which involved a patient who was discharged from a group home because his medical problems had become so severe that the facility was no longer able to adequately care for

him. 189 F.3d at 738–39. The Eighth Circuit determined that the decision to discharge the patient was not subject to a Section 1983 suit because the facility that made the decision was "a private corporation and the fact that it receives Medicaid funds does not convert it into a state actor." *Id.* at 740 (citing *Blum*, 457 U.S. at 1002–12, 102 S. Ct. at 2785–86). Similarly, in *Hoyt*, the plaintiff sought to use Section 1983 as a vehicle to challenge the decisions of a physician as to the care and treatment provided to a patient. 711 F.2d at 865. The Eighth Circuit rejected the invitation, stating that it would not adopt a rule that subjected every medical decision to constitutional review. *Id.*

Smith is particularly instructive, because it involved a Section 1983 claim asserted against a hospital Fairview operated. *Smith*, Civil No. 09-293 (JRT/JSM), 2010 WL 3893902, at *9. As in the prior cases, the plaintiff challenged, on constitutional grounds, Fairview's decision to cease providing him medical care. *Id.* at *4. This Court, Magistrate Judge Mayeron presiding, determined that it lacked subject-matter jurisdiction over the claim. *Id.* at *9, *11. Magistrate Judge Mayeron reasoned that Fairview is a private party, that its medical decisions were not compelled by statute or regulation, and that Fairview's receipt of Medicaid funds for providing services did not convert its actions into state actions. *Id.* at *9, *11.

The same reasons warrant dismissal of the claims against Fairview in the present matter. Fairview is a private non-profit corporation. As such, its decisions are not state acts unless its acts are compelled by a state mandate. The mere fact that the decision may result in the payment of public funds to Fairview based on

E.J.K.'s receipt of medical assistance does not alter the character of the decision when it was made. *Blum*, 457 U.S. at 1005, 1010, 102 S. Ct. at 2786, 2789. Nor does the fact that the decision is to *provide* medical care rather than to *terminate* medical care imbue the decision with a constitutional component it would not otherwise have. *See id.* at 1005–06, 102 S. Ct. at 2786–87 (describing the process for making the initial determination that treatment was medically necessary, and noting that "the physicians, and not the forms, make the decision about whether the patient's care is medically necessary.").

Ultimately, this Court must focus on the particular conduct that is being challenged. *Am. Mfgrs. Mut. Ins. Co.*, 526 U.S. at 51, 119 S. Ct. at 985. Here, the action Plaintiff challenges is Fairview's alleged provision of healthcare services to E.J.K. at her request, but without Plaintiff's consent. [Doc. 1, ¶¶ 101, 120.] Fairview is allegedly providing services pursuant to a Minnesota statute that states that a minor "may give effective consent to personal, medical, dental, mental and other health services, and the consent of no other person is required" when the minor (1) "is living separate and apart from parents or legal guardians," without regard to the consent of the parent or the duration of the independent residence, and (2) "is managing personal financial affairs, regardless of the source or extent of the minor's income." Minn. Stat. § 144.341 (2016).[3]

[3] The Complaint demonstrates that E.J.K. may provide effective medical consent under this statute. First, E.J.K. does not reside with either of her parents. [Doc. 1, ¶ 53.] Under the statute, Plaintiff's objection to E.J.K.'s independent residence does not affect E.J.K.'s ability to provide the medical consent. Minn. Stat.

The statute permits the person providing the medical services to rely in good faith on the minor patient's representation that these legal requirements are satisfied. Minn. Stat. § 144.345 (2016). Further, the statute extends to the medical provider the ability to exercise the provider's independent professional judgment as to whether the minor's parents need to be informed of the treatments being provided to the minor. Minn. Stat. § 144.346 (2016).

The statute affords significant discretion to the medical provider. First, nothing in the statute *requires* the medical provider to accept the minor as a patient or to provide any treatment. That decision is a voluntary decision by a private medical provider. Second, the statute extends to the medical provider the discretion to weigh the minor's representations and to consider whether parental notice is necessary. Section 144.345 does not require the provider to accept the minor's representations, nor does Section 144.346 require the provider to withhold information from a parent. These decisions are left to the judgment of the provider. The state does not control the exercise of that judgment. As a consequence, Fairview's decision to treat E.J.K. is not mandated by the statute, but is instead the decision of a private party, not a state actor. *See Am. Mfgrs. Mut. Ins. Co.*, 526 U.S. at 52–54, 119 S. Ct. at 986–87. As the act of a private party, the treatment being provided is not subject to the Fourteenth Amendment or 42 U.S.C. § 1983.

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§ 144.341. Second, E.J.K. manages her own finances, albeit receiving financial support from St. Louis County. [Doc. 1, ¶ 54.] However, the source of the funds that E.J.K. is using to support herself are not relevant to her ability to provide effective medical consent under the statute. Minn. Stat. § 144.341.

The Complaint therefore fails to state a claim against Fairview and the Court is without subject-matter jurisdiction over Plaintiff's challenge to Fairview's alleged decision. *Lubin*, 713 F.2d at 415.

CONCLUSION

Fairview is a private hospital, not a state actor, and its alleged decision to provide E.J.K. medical services at her request, consistent with the effective medical consent that E.J.K. may provide under Minnesota law, does not have a constitutional component. Accordingly, the Complaint fails to state a Section 1983 claim against Fairview and this Court is without subject-matter jurisdiction over Plaintiff's claims against Fairview. Accordingly, Fairview respectfully requests that this Court grant its motion to dismiss.

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Dated: December 15, 2016

/s/ Paul C. Peterson

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LR 7.1(f) WORD COUNT COMPLIANCE CERTIFICATE

I, Paul C. Peterson, certify that Defendant Fairview Health Services' Memorandum of Law in Support of Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6) complies with the word limits Local Rule 7.1(f) and with the type-size limit of LR 7.1(h). I further certify that, in the preparation of this memorandum, I used Microsoft Word's Office 2013, and that this work processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count. I further certify

that the above-referenced memoranda contains 3,149 words, and is set in a proportional font.

Lind, Jensen, Sullivan & Peterson
A Professional Association

Dated: December 15, 2016

/s/ Paul C. Peterson

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