Clerk of the Superior Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2022-000221-001 DT 06/13/2023

HONORABLE JOSEPH P. MIKITISH

CLERK OF THE COURT
P. McKinley
Deputy

SARRA L

ADITYA DYNAR

v.

MIKE FAUST (001)
ARIZONA DEPARTMENT OF CHILD SAFETY (001)

DINITA JAMES

JUDGE MIKITISH
OFFICE OF ADMINISTRATIVE HEARINGS
REMAND DESK-LCA-CCC

UNDER ADVISEMENT RULING/
ADMINISTRATIVE REVIEW DISMISSED

OAH No: 21C-1159943-DCS

Appellees the Department of Child Safety (the Department or DCS) and its Director (the Director) in his official capacity (collectively, Appellees) filed a Motion to Dismiss this action for a judicial review of the administrative decision on February 27, 2023; the Appellant Sarra L (the Appellant or Sarra) filed her Opposition to the Motion on March 7, 2023; and the Appellees filed their Reply on March 22, 2023. This Court heard argument on April 13, 2023, and took the matter under advisement. For the reasons stated below, the Motion is granted.

I. Background

The matter arises from an incident in November in which Sarra took her then seven-year-old son to play with a younger friend at a park in Tucson for approximately 30 minutes while she went shopping for groceries at a nearby store. A park employee phoned the police who came and

waited with the children until Sarra returned. Tucson police charged Sarra with contributing to the delinquency of a minor, and she pled guilty to those charges. After she successfully completed a diversion program, the criminal charges were dismissed pursuant to a plea agreement.

In January 2021, the Department's Protective Services Review Team (PSRT) proposed to enter a substantiated finding of neglect on the Central Registry. The PSRT gave Sarra notice of the proposed decision on January 22, 2021, and the Department ultimately certified that administrative decision. Sarra appealed the decision. An Administrative Law Judge (ALJ) heard the appeal and entered a decision on April 29, 2022, approving the proposed decision based on a "probable cause" standard specified in A.R.S. § 8-811 (K). On June 16, 2022, the Department approved the ALJ decision and certified it as its final administrative decision. Five days later, the Department placed Sarra's name on the Central Registry. On July 15, 2022, Sarra filed her Notice of Appeal for Judicial Review of Administrative Decision.

In November 2022, Sarra filed her opening brief in this appeal. On January 24, 2023, the Department advised Sarra that it had withdrawn its substantiation decision. On January 25, 2023, the Department filed a Notice of Withdrawal of Agency Action and provided a copy of the Notice to Sarra. Thereafter, the parties filed their pleadings on the Motion to Dismiss.

II. Legal standard

A motion to dismiss is appropriate when the plaintiff is not entitled to relief under any interpretation of the facts. *Coleman v. City of Mesa*, 230 Ariz. 352, 356 ¶ 8 (2012).

III. Discussion

In their Motion to Dismiss, the Appellees first argue that, because they have withdrawn their substantiation decision, the case is now moot. They argue that there is no longer a finding against her that would be entered on the Central Registry and that the PSRT would take no further action. See Exhibit A to Notice of Withdrawal of Agency Action. Therefore, the Appellees conclude that the administrative decision that is the subject of the judicial review action no longer exists. They argue that the Appellees have given Sarra the relief that she was seeking in this action, and that only abstract legal issues remain, the outcome of which have no practical effect between the parties. The Appellees further acknowledge that Sarra is the prevailing party entitled to an award of reasonable costs and fees.

The Appellees argue that the mootness doctrine is well-established in Arizona law and can arise from a passage of time or when events or actions render the issue in a case abstract or advisory. See *Mesa Mail Publishing Co. v. Board of Supervisors of Maricopa County*, 26 Ariz.

521 (1924) ("it would be ridiculous for this court to now enter an order directing the Board of Supervisors of Maricopa County to perform a duty that could be performed only in July and August 1922"); *Sedona Private Property Owners Association v. City of Sedona,* 192 Ariz. 126, 127 (App. 1998) (city ordinance adopted by citizen initiative mooted when City Council voted unanimously to repeal the ordinance; "a case becomes moot when an event occurs which would cause the outcome of the appeal to have no practical effect on the parties.").

Sarra argues that the case is not moot. She first argues that the Department has no authority to "unsubstantiate" a child neglect finding at this stage of the proceedings. She argues that the Department has only those powers conferred on it by statute. See *Facilitec, Inc. v. Hibbs,* 206 Ariz. 486, 488 ¶ 10 (2003). She argues that Arizona law allows the Department to "unsubstantiate" a probable cause finding only under two circumstances: 1) where the Director modifies the determination of the ALJ within 30 days pursuant to A.R.S. § 41-1092.08 (B); and 2) where the Department changes the finding from substantiated to unsubstantiated before the administrative hearing, pursuant to A.R.S. § 8-811 (E). Sarra also acknowledges that an ALJ can order the Department to amend the information or finding substantiating a claim if he or she determines the probable cause does not exist after presentation of evidence. A.R.S. § 8-811 (K). Sarra further notes that if the Department determined that a report was substantiated, the Department shall maintain the report in the Central Registry for 25 years after the date of the report.

Sarra further argues that even if DCS could undo a finding of substantiation, it would have to do it in a reasoned fashion, not in a manner that is arbitrary, without explanation, or in an attempt to evade adjudication. See *Mofrad v. INS,* 30 F.3d 139 (9th Cir. 1994). She argues that the Department must provide some "explanation for its action including a rational connection between the facts found in the choice made," or its decision is arbitrary, capricious, and unlawful. *Compassionate Care Dispensary, Inc. v. Arizona Department of Health Services,* 244 Ariz. 205, 213 ¶ 25 (App.2018) (internal quotes and citations omitted). Sarra argues that because the Department offers no explanation for its decision to unsubstantiate its findings, the decision is arbitrary and capricious.

Sarra further argues that, if the Department is allowed to unsubstantiate findings, the Department is still required to maintain its record of a finding of neglect. According to Sarra, that means it will move her name from the Registry to another Department database. That finding could be used in another enforcement action if one were initiated. Therefore, she argues that she is still harmed unless the court orders the Department to eliminate her name from all of the databases entirely.

Sarra further argues that the Department makes clear that it will continue to use the "probable cause" standard, deny parties a right to a jury trial, and take other unconstitutional

actions identified in her notice of appeal. She argues that courts are skeptical of voluntary cessation that occurs "late in the game" because such lateness "suggests that the [party] is attempting to manipulate the court's jurisdiction." *Harrell v. Florida Bar*, 608 F.3d 1241, 1266, (11th Cir. 2010) (citations and internal quotes omitted). She argues that in the Department's Notice of Withdrawal, the Department "makes no admissions and takes no position on any of [those] issues," and argues that Sarra's "legal arguments… are without merit," and further that it is not "waiving legal arguments in opposition." Sarra argues that the Department has vigorously prosecuted the case. She argues that courts require a strong showing that a party's cessation of conduct is a true assurance that it won't do the same thing again. She argues that the Department has not established that the issues presented are truly moot.

Sarra goes on to argue that even if the Department decision to substantiate the finding did render the case moot, this Court should still decide the merits based on an exception to mootness. She argues that Arizona courts will decide even a moot case if it addresses "a question of public importance or one that is likely to recur even though the question is presented in the moot case." *Fraternal Order of Police Lodge 2 v. Phoenix Employee Relations Board*, 133 Ariz. 126, 127 (1982). Sarra argues that the questions in this case are of considerable public importance because it has a broad impact beyond the resolution of the case. She argues that there is exceptional public importance in the constitutionality of statutes like A.R.S. § 8-811 allowing persons to be placed on the Central Registry based on a probable cause standard. She argues that federal and state courts across the country have declared the probable cause standard unconstitutional. She also argues that the case also raises the applicability of the right to a jury trial. She argues that numerous people may be included on the Central Registry, even without knowing it. She argues that the parties in this case have sufficient adversarial interest to present the arguments plead to the court.

Sarra further argues that the case should still be heard because her injury is capable of repetition while evading review. She argues that she has good reason to believe that she will face enforcement of the same laws in the same way in the future. Because of her parenting philosophy, she argues that she is at risk for the Department to bring another action against her.

In their Reply, the Appellees argue that the facts of the case supported the finding of substantiation, but also supported leniency. The Appellees argue that a change in leadership at the Department provided an impetus to review the case and issue the Notice of Withdrawal. They note that by issuing the Notice of Withdrawal, they have given Sarra the relief she sought, namely that the matter be dismissed. Because they have provided the relief requested by Sarra, the Appellees assert that there is no live controversy.

The Appellees further argue that the statutes cited by Sarra merely provide procedural rules for conducting the administrative process. They argue that these rules do not limit the

Department's discretion to make the threshold decision of whether to substantiate a finding of abuse or neglect. They argue that if a procedural rule was violated, the matter should be remanded back to the agency. See e.g., *Zavala v. Arizona State Personnel Board,* 159 Ariz. 256, 267 (App.1987) ("the general rule seems to be that where an administrative agency has been found to have acted in violation of procedural requirements or arbitrarily, the administrative agency is entitled to have the proceedings returned to it.").

The Appellees further argue that agencies have discretion in litigation matters. The Appellees argue that conducting litigation is a statutorily mandated function that provides agencies with a need to exercise discretion. See *Aida Renta Trust v. Department of Revenue,* 197 Ariz. 222, 234 (App. 2000), as corrected. The Appellees argue that the Department exercised that discretion by deciding not to continue pursuing litigation in this case.

The Appellees further argue that there is no requirement to articulate the reasons that it exercised its discretion in this litigation. They argue that the cases cited by the Appellant involve policy decisions, not decisions whether to take enforcement actions or continue litigation matters.

The Appellees go on to argue that Sarra did not seek relief concerning additional records at the Department other than those at the Central Registry. They argue that the Department has taken no action regarding their request and her newly requested relief is unavailable in this judicial review action. The Appellees argue that, pursuant to the stay order, the Appellees removed Sarra from the Central Registry and changed its records to reflect that the initial finding was unsubstantiated. The Appellees argue that the Central Registry finding was not disclosed outside of the agency since the time that it was active, and therefore no party need be informed about the subsequent decision not to substantiate. The Appellees argue that this Court has no authority in this judicial review action to eliminate her name from the Department's databases altogether.

The Appellees further argue that the voluntary cessation doctrine is not applicable to this judicial review action. They argue that the Arizona cases cited for the doctrine were enforcement actions that agencies brought to enjoin unlawful conduct, and the doctrine was applied to determine whether the case could be mooted by the alleged offenders' voluntary cessation of the practices alleged to be unlawful. The Appellees argue that those cases do not apply to agencies seeking to exercise litigation discretion.

The Appellees argue that the exceptions to the mootness doctrine do not apply. For the capable of repetition but evading review exception, the Appellees argue that the Appellant herself must be at risk of future harm. They argue that the administrative record supports the conclusion that the Appellant does not intend to let her son play by himself at a public

playground in the future. For the public importance exception, the Appellees argue that "Arizona courts will generally not reach constitutional questions if the case can be fairly decided on nonconstitutional grounds." *Philip B. v. Arizona Department of Child Safety,* 512 P.3d 1043, 1048, ¶ 19 (App.2022). They argue that the constitutional issues have been briefed and argued in other JRAD cases, but Arizona courts have not reached the issues. The Appellees argue that a constitutional claim is more appropriate in a case of original jurisdiction in Superior Court than in the judicial review of administrative decision action such as this one where the case is limited to the decision before the agency.

Based on the issues presented, the Court decides as follows:

1. The matter is moot.

In this case, the Appellees have the authority to decide whether to substantiate a proposal for finding neglect. See A.R.S. § 8-811. While, as Sarra notes, the applicable statutes do not expressly provide Appellees the authority to amend its decision from a finding of substantiation to non-substantiation after the commencement of a judicial review of administrative decision action, such action is reasonably implied for jural entities engaging in litigation. "The Legislature is not required to expressly set forth all authority granted to an agency." *Arizona Cannabis Nurses Association v. Arizona Department of Health Services,* 242 Ariz. 62, 67 ¶ 15 (App. 2017). Further, our courts have determined that agencies have discretion over litigation matters. *Aida Renta Trust v. Department of Revenue,* 197 Ariz. 222, 234 ¶ 34 (App. 2000), as corrected. As any parties in litigation, agencies must evaluate the pros and cons of continuing with an appeal. In this case, the Appellees' decision to unsubstantiate the finding of neglect and refrain from including any finding on the central registry serves as the equivalent of a dismissal with prejudice in civil litigation. Our courts have held that a plaintiff has "an absolute right to a voluntary dismissal with prejudice" so long as the opposing party's "rights are protected." *Turf Paradise, Inc. v. Maricopa County,* 179 Ariz. 337, 341-342 (App. 1994). While Sarra argues that her future rights could still be impacted if the Appellees were to use the initial finding of neglect in any future proceeding, an appropriate order of the court dismissing the case will forestall any future use of the initial neglect finding and potential negative impact on Sarra.

2. No agency obligation to explain change in litigation.

Sarra cites to no authority that an agency's obligation to examine relevant data and articulate an explanation for its action applies in resolving litigation. In this case, where the agency is taking an action favorable to the opposing party, such a result would infringe on the agency's discretionary functions to conduct litigation in a manner the agency determines is consistent with law and practical with policy considerations. *Aida Renta Trust v. Department of Revenue,* 197 Ariz. at 234 ¶ 34.

3. Department not forestalling review of constitutionality of applicable statutes

Sarra's arguments that the agency's actions are intended to forestall a review of the constitutionality of the applicable statutes fall short. The Appellees acknowledge that they will continue to follow the statutes, as they must, until the statutes are amended, or a court rules them unconstitutional. As Sarra acknowledges, agencies are creations of statutes and cannot act outside of the statutory mandates. "Arizona courts will generally not reach constitutional questions if a case can be fairly decided on nonconstitutional grounds." *Philip B v. Arizona Department of Child Safety,* 512 P.3d 1043, 1048, ¶ 19 (App.2022). In this case, given the Motion to Dismiss, the case can be concluded without reaching constitutional issues. If the parties continue to desire addressing concerns regarding constitutional infirmities, claims against the validity of statutes can be brought in a variety of ways, including by declaratory judgment. *Mills v. Arizona Bd. of Tech. Registration*, 253 Ariz. 415, 423 ¶ 20 (2022) ("by adopting the UDJA, the legislature empowered the courts to 'declare rights, status, and other legal relations,' § 12-1831, including deciding whether statutes are unconstitutional"). Therefore, the agency does not gain any advantage by dismissing this case against Sarra. The doctrine of voluntary cessation does not apply in this case.

4. Exceptions to mootness doctrine do not apply.

Sarra's arguments that the matter should be heard even if moot because it involves matters of great public importance likewise must fall short. While the Department clearly deals with important issues involving the public, this Court must give due consideration to the limitations of an administrative appeal. On appeal, the Court can only address the issues properly raised by the agency's action. In this case, because the Department has changed its final decision, this Court's authority should be likewise circumscribed to the matter before it.

Likewise, Sarra's arguments that her case is capable of repetition but evading review does not comport with the factual record before the agency. Sarra testified that she would not leave her child alone in a park again. The Court cannot conclude that it is unlikely that her case will be repeated against her.

5. Conclusion

Based on the foregoing,

IT IS ORDERED granting the Motion to Dismiss based on the Notice of Withdrawal of Agency Action and the Department's determination that the Department will no longer place

Sarra on the Central Registry or take any other adverse action against her because of the initial substantiation decision.

IT IS FURTHER ORDERED remanding this matter to the Office of Administrative Hearings for any further appropriate proceedings.

IT IS ALSO ORDERED no matters remain pending in connection with this appeal. This is a final order. *See* Rules 12(c), 12(d), 14(b), Sup. Ct. R. App. P. – Civil and Rule 54(c), Ariz. R. Civ. P.

IT IS FURTHER ORDERED signing this ruling as a formal order of the Court.

/s/ Joseph P. Mikitish
THE HON. JOSEPH P. MIKITISH
Judge of the Superior Court

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