

No. 05-5100, 05-5107

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

OKLAHOMA CHAPTER OF THE)	
AMERICAN ACADEMY OF)	
PEDIATRICS (OKAAP), <i>et al.</i> ,)	
)	
Plaintiffs-Appellants/)	
Cross-Appellees,)	
)	Lower Court No.
v.)	01-CV-0187-CVE-SAJ
)	
MICHAEL FOGARTY, Chief Executive)	
Officer of the Oklahoma Health Care)	
Authority (OHCA), <i>et al.</i> ,)	
)	
Defendants-Appellees/)	
Cross-Appellants.)	

PLAINTIFFS-APPELLANTS/CROSS-APPELLEES'
RULE 60(b)(6) MOTION FOR RELIEF FROM FINAL JUDGMENT

COME NOW the Plaintiffs-Appellants/Cross-Appellees (“Plaintiffs”) and respectfully move the Court, pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure,^{1 & 2} to grant relief from this Court’s: (a) January 3, 2007 Judgment

¹ Plaintiffs’ Motion is properly filed with the Circuit because this Court has issued a Mandate reversing the District Court’s decision. *See Pierce v. Cook & Co.*, 518 F.2d 720, 722 (10th Cir. 1975) (agreeing to consider Rule 60(b)(6) Motion, reasoning that “[b]ecause our judgment is final and mandate issued, the trial court could well believe that it is without power to determine a legal question contrary to the decision of the court of appeals”); *see also Ute Indian Tribe of the*

and Opinion; and (b) February 13, 2007 Mandate. In light of Congress's recent clarification of pertinent federal statutory law, and in the interest of substantial justice, Plaintiffs respectfully ask the Court to: (a) reconsider its decision that "medical assistance" as used in 42 U.S.C. §§ 1396a(a)(8) and 1396a(a)(10)(A) is limited to "financial assistance"; (b) modify its Mandate as appropriate; and (c) remand to the District Court with appropriate instructions, including, but not limited to, instructions to reinstate the District Court's May 19, 2005 Permanent Injunction against Defendants.³ In support of this Motion, Plaintiffs show the Court as follows:

Uintah and Ouray Reservation v. State of Utah, 114 F.3d 1513, 1515 (10th Cir. 1997) (Tacha, J.).

² **10th Cir. Rule 41.2 Statement:** Good cause exists for filing this Motion more than one year after the Mandate was issued. Importantly, the one-year time limitation period which applies to other Rule 60(b) motions "does not apply to (6)." *Pierce*, 518 F.2d at 722. Rule 60(c)(1) only provides that a Rule 60(b)(6) motion must be brought "within a reasonable time." The Motion could not have been brought within a year from issuance of the Mandate. The Mandate was issued on February 13, 2007. However, the event which gave rise to this Motion -- enactment of the Patient Protection and Affordable Care Act ("PPACA") -- did not occur until March 23, 2010. Plaintiffs have been diligent in bringing this Motion quickly -- fewer than 90 days -- after the passage of the pertinent clarification of law found in the PPACA. Under these facts, Plaintiffs' Motion has been filed within a "reasonable time." *See, e.g., Pierce*, 518 F.2d at 722 (Tenth Circuit granted Rule 60(b)(6) relief where motion was filed nearly four years after the decision from which relief was sought and seven months after the Oklahoma Supreme Court decision which gave rise to relief); and *Thompson v. Bell*, 580 F.3d 423, 443 (6th Cir. 2010) (finding motion to be timely even though it was filed more than four years after promulgation of a rule which gave rise to relief).

³ Counsel for Defendants has informed the undersigned that Defendants object to this Motion and the relief requested herein.

A. Introductory Statement

On January 3, 2007, this Court issued a decision that stripped over 350,000 vulnerable children of the enforceable right to receive *any* health care services. Very recently, the U.S. Congress unmistakably clarified that the Court's decision in this regard was based upon a "misunderstanding" of a two-word phrase as used in the Medicaid Act, "medical assistance." Specifically, Congress has now unequivocally clarified that "medical assistance" as used in the Medicaid Act has always included "care and services" and is not limited to "financial assistance" as this Court held. In light of this clarification of federal law, Plaintiffs seek relief -- pursuant to Rule 60(b)(6) -- from the Mandate of this Court so that substantial justice can be served and a manifest injustice can be averted. Substantial justice will not permit the denial of a child's right to receive health care services based on a "misunderstanding." The Court should grant Plaintiffs' Motion.

B. Section 2304 of the Patient Protection and Affordable Care Act

On March 23, 2010, the "Patient Protection and Affordable Care Act" ("PPACA") was signed into law. *See* Pub. L. No. 111-148, 124 Stat. 119 (2010). Section 2304 of the PPACA, which is headed "Clarification of Definition of Medical Assistance," amends the Medicaid Act, 42 U.S.C. § 1396d(a) (Social Security Act § 1905d(a)), as follows:

The term "medical assistance" means payment of part of all of the cost of the following care and services, **<or the care and services themselves, or**

both,> (if provided in or after the third month before the month in which the recipient makes application for assistance....”

(amendment in bracketed bold text).

As explained in the House Report generated in connection with the PPACA, this clarification of the definition of “medical assistance” was a response to “[s]ome recent court opinions” that had “questioned the longstanding practice of using the term ‘medical assistance’ to refer to both payment for services and the provision of services themselves.” H.R. Rep. No. 111-299, at 649-50, 2009 WL 3321420 (Oct. 14, 2009). One such “recent court opinion” was this Court’s opinion in the case at bar. *See Okla. Ch. of the Am. Acad. of Ped. (OKAAP) v. Fogarty*, 472 F.3d 1208 (10th Cir. 2007) (“*OKAAP I*”), *cert. denied*, 522 U.S. 813 (2007). In particular, the Court followed a 2006 decision from another panel of the Tenth Circuit and dicta from a 2003 Seventh Circuit opinion in concluding that: “the term ‘medical assistance,’ as employed in [42 U.S.C.] § 1396a(a)(8) refers to ‘financial assistance rather than medical services.’” *OKAAP II*, 472 F.3d at 1214 (quoting *Mandy R. ex rel. Mr. and Mrs. R. v. Owens*, 464 F.3d 1139, 1143 (10th Cir. 2006); *Bruggeman v. Blagojevich*, 324 F.3d 906, 910 (7th Cir. 2003)). On this basis, the *OKAAP II* Court held that children enrolled in Oklahoma’s Medicaid program have no enforceable right to actually receive *any* health care services under sections of the Medicaid Act which form the early and periodic screening, diagnostic and treatment (“EPSDT”) program for children (42 U.S.C. §§

1396a(a)(8) and 1396a(a)(10)(A)). *Id.* at 1214-15.⁴

As the House Energy and Commerce Committee explicates in the House Report, “medical assistance” as used in the Medicaid Act has *never* been understood to be limited to “financial assistance”:

Section 1905(a) of the Social Security Act defines the term “medical assistance.” The term is expressly defined to refer to payment but has generally been understood to refer to both the funds provided to pay for care and services and to the care and services themselves. The Committee, which has legislative jurisdiction over Title XIX of the Social Security Act, has always understood the term to have this combined meaning. Four decades of regulations and guidance from the program’s administering agency, the Department of Health and Human Services, have presumed such an understanding and the Congress has never given contrary indications.

Some recent court opinions have, however, questioned the longstanding practice of using the term “medical assistance” to refer to both the payment for services and the provision of the services themselves. These opinions have read the term to refer only to payment; this reading makes some aspects of the rest of Title XIX difficult and, in at least one case, absurd. If the term meant only payments, the statutory requirement that medical assistance be furnished with reasonable promptness “to all eligible individuals” in a system in which virtually no beneficiaries receive direct payments from the state or federal governments would be nearly incomprehensible.

Other courts have held the term to be payment as well as the actual provision of the care and services, as it has long been understood. The Circuit Courts are split on this issue and the Supreme Court has declined to review the question. *To correct any misunderstandings as to the meaning of the term*, and to avoid additional litigation, the bill would revise section 1905(a) to read, in relevant part: “The term ‘medical assistance’ means payment of part

⁴ This Court also held that the District Court erred in determining that the “equal access” provision of the Medicaid Act -- 42 U.S.C. § 1396a(a)(30)(A) -- confers enforceable rights on beneficiaries. *OKAAP II*, 472 F.3d at 1215. Plaintiffs do not challenge this aspect of the Court’s decision as part of this Motion.

or all of the cost of the following care and services, or the care and services themselves, or both.” This *technical correction* is made to conform this definition to the longstanding administrative use and understanding of the term. It is effective on enactment.

H.R. Rep. No. 111-299, at 649-50 (emphasis added).

Thus, with the enactment of the PPACA in March of 2010, Congress has unmistakably clarified that the Tenth Circuit’s opinion in *OKAAP II* was based upon a “misunderstanding” of the meaning of “medical assistance.”

C. Background

On March 19, 2001, the Oklahoma Chapter of the American Academy of Pediatrics (“OKAAP”), the Community Action Project of Tulsa County and several Medicaid-eligible children brought suit against State officials responsible for implementing and administering Oklahoma’s Medicaid program. The first named Defendant, Michael Fogarty, was -- and is -- the Chief Executive Officer of the Oklahoma Health Care Authority (“OHCA”), Oklahoma’s single state Medicaid agency.

Plaintiffs brought claims pursuant to 42 U.S.C. § 1983 to enforce the EPSDT and “equal access” provisions of the Medicaid Act. Pertinently, Plaintiffs alleged that Defendants had failed -- as required by 42 U.S.C. §§ 1396a(a)(8) and 1396a(a)(10)(A) -- to furnish necessary and required health care (EPSDT) services to eligible Oklahoma children and that Defendants had failed to deliver such services with reasonable promptness. *See OKAAP II*, 472 F.3d at 1210.

As the Supreme Court has recognized, “EPSDT programs *provide* health care *services* to children to reduce lifelong vulnerability to illness or disease.” *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 433 (2004) (emphasis added). Both § 1396a(a)(8) and § 1396a(a)(10)(A) -- the rights conferring provisions of the EPSDT mandate -- use the phrase “medical assistance.” Specifically, § 1396a(a)(8) requires that “medical assistance” “shall be furnished with reasonable promptness to all eligible individuals.” Section 1396a(a)(10)(A) requires that all Medicaid state plans provide “for making medical assistance available,” including EPSDT. *See also* 42 U.S.C. § 1396d(a)(4)(B) (defining “medical assistance” as including EPSDT).⁵

On May 30, 2003, the District Court certified and determined the Plaintiff class to be: “all children under the age of 21 who are now, or in the future will be, residing in Oklahoma and who have been, or will be, denied or deprived of Medical Assistance as required by law.” Ex. 1 (Dkt. #131 at 14). At the time of trial, there were approximately 355,000 children enrolled in Oklahoma’s Medicaid program. *OKAAP v. Fogarty*, 366 F.Supp.2d 1050, 1057 (N.D. Okla. 2005) (“*OKAAP I*”).

On March 22, 2005, after 19 days of trial, the District Court entered its

⁵ EPSDT services that must be provided to all eligible individuals under the age of 21 include “[a]ll medically necessary health care services...” *See* 42 U.S.C. § 1396d(r)(5).

comprehensive Findings of Fact and Conclusions of Law. *See OKAAP I*. By way of example only, the District Court found that:

- “[R]ecipients in Oklahoma often experience long delays in obtaining appointments for provision of medically necessary care.” *OKAAP I*, 366 F.Supp.2d at 1079;
- Medicaid patients in Oklahoma City with seizure disorders must wait “around a year to be seen by a pediatric neurologist.” *Id.* at 1067;
- Some of these patients have poorly controlled seizures, and without the prompt care of a neurologist, the seizures will have a negative impact on school performance, development, behavior, and the “overall medical well-being” of these children. *Id.*;
- Office-based ear, nose and throat (“ENT”) specialists in Oklahoma simply refused to treat children on Medicaid. *Id.* at 1067-68;
- There was “lack of access to a pediatric orthopedist” which “denies children with complex orthopedic problems needed care.” *Id.* at 1069;
- The “network of child psychiatrists in Oklahoma who are willing to treat Medicaid children is inadequate.” *Id.* at 1070;
- Oklahoma ranked near the bottom of the 50 states in the delivery of mandatory EPSDT health screening examinations. *Id.* at 1081;
- Defendants’ own statistics showed that less than 3% of children enrolled in the Medicaid program received mandatory blood lead screenings. *Id.* at 1084;
- A significant number of Medicaid children were not current on their immunizations (*e.g.*, less than one half of children enrolled in Oklahoma’s Medicaid managed care program had received many vital vaccines, including DTP). *Id.* at 1085;
- Only 34% of Oklahoma’s pediatricians participated fully in the Medicaid program. *Id.* at 1063; and

- “[M]any Medicaid children, including children who need the care and supervision of a pediatrician, do not have access to pediatricians.” *Id.* at 1064.

Based upon its extensive Findings of Fact, the District Court concluded that, “[i]n violation of 42 U.S.C. § 1396a(a)(8), defendants are not ensuring that medical assistance is furnished with reasonable promptness to all eligible individuals.” *OKAAP I*, 366 F.Supp.2d at 1109; *see also id.* at 1119. In support of this ruling, the District Court noted that “Plaintiffs have offered substantial evidence that the delays in treatment for children with specific conditions are medically inappropriate.” *Id.* at 1109. The District Court further concluded that there was a clear link between low provider reimbursement rates and these unreasonable delays in treatment. *Id.*⁶

On May 19, 2005, the District Court entered its Final Judgment and Permanent Injunction against Defendants. Ex. 2 (Dkt. #288). As part of the Final Judgment and Permanent Injunction, the Court ordered Defendants to:

- Institute, as an immediate interim measure, a new Medicaid fee schedule for all covered medically necessary physician services provided to minor children at a rate which equals one hundred percent (100%) of the rate paid by Medicare;
- Contract with a “nationally recognized economic consulting firm” to conduct a study to determine the Medicaid provider reimbursement rates

⁶ At the same time, the District Court determined that Defendants were in “substantial compliance” with EPSDT provisions, including § 1396a(a)(10)(A). *OKAAP I*, 366 F.Supp.2d at 1113 and 1119.

which are necessary “to assure reasonably prompt access to health care for minor children in the Oklahoma Medicaid Program”;

- Complete the rate study “within six months of the date that the contract is executed by the parties”; and
- Institute, following completion of the rate study, a new Medicaid fee schedule “determined by the consulting firm as necessary to assure reasonably prompt access to health care for minor children in the Oklahoma Medicaid Program.”

Id. at 3-6.

Both Plaintiffs and Defendants appealed various aspects of the District Court’s decision.⁷

Defendants did not seek a stay of the District Court’s May 19, 2005 Final Judgment and Permanent Injunction pending appeal. Pursuant to the District Court’s Final Judgment and Permanent Injunction, on July 14, 2005, Defendants approved the interim increase in Oklahoma’s Medicaid provider rates to the equivalent of 100% of Medicare. Ex. 3 (Status Report, Dkt. #333). However, Defendants failed to comply with other aspects of the Injunction. *See, e.g., OKAAP v. Fogarty*, 2006 WL 1623529 at *1 (N.D.Okla., June 6, 2006) (“*OKAAP*

⁷ Two of the issues Plaintiffs raised on appeal were (a) whether the District Court erred in ruling that “substantial compliance” is the proper standard to be applied when determining whether Defendants have violated the mandatory children’s health care requirements of Title XIX; and (b) whether the District Court erred in dismissing the organizational Plaintiff, OKAAP. *See* Plaintiffs’ Opening Brief, at 2. Defendants cross-appealed, pertinently raising the issue of whether the provisions of § 1396a(a)(8) create a private right of action. *See* Defendants’ Appeal Brief at 1.

III) (attached hereto as Ex. 4). Specifically, while Defendants commissioned a provider rates study and report (“Mercer Report”) which purported to comply with the Injunction, the District Court found the Mercer Report to be wholly inadequate. *OKAAP III*, 2006 WL 1623529 at *1-2. On June 6, 2006, the District Court entered an Order finding that: (a) the Mercer Report was “not valid and [did] not support a finding that defendants [had] complied with the Final Judgment and Permanent Injunction”; (b) “Mercer conducted no analysis of whether current rates are sufficient to assure the provision of ‘reasonably prompt’ care”; and (c) the survey data relied upon by Mercer was not statistically significant.” *Id.* at *2.

On January 3, 2007, this Court filed its Judgment and Opinion, reversing the District Court -- and holding that the District Court erred in granting injunctive relief against Defendants -- based primarily on the misunderstanding that “medical assistance” as used in the Medicaid Act is limited to “financial assistance.” *OKAAP II*, 472 F.3d at 1215-16; *see also* Ex. 5 (Judgment, 1/3/07). In this regard, the Court expressly held that “not only do the statutes cited by plaintiffs not obligate defendants to ensure that EPSDT services are ‘fully’ delivered to the plaintiff class, those statutes impose no obligation whatsoever on defendants to deliver any medical services.” *Id.* at 1215.

On January 17, 2007, Plaintiffs filed their petition for rehearing *en banc*. On February 5, 2007, this Court denied Plaintiffs’ petition for rehearing *en banc*.

On February 13, 2007, this Court issued a certified copy of its January 3, 2007 Judgment and Opinion as the Mandate of the Court. Ex. 6 (Letter from Shumaker to Lombardi, 2/13/07). The District Court filed the Mandate on February 15, 2007. Ex. 7 (Mandate).

On February 16, 2007, the District Court vacated its May 19, 2005 Final Judgment and Permanent Injunction consistent with this Court's Mandate. Ex. 8 (Dkt. # 447). Plaintiffs timely filed a petition for writ of certiorari, which was denied by the U.S. Supreme Court on October 1, 2007. *OKAAP v. Fogarty*, 552 U.S. 813 (2007).

On January 14, 2010, OHCA issued a press release announcing that it had approved a 3.25% reduction in rates for Oklahoma Medicaid providers, effective April 1, 2010. Ex. 9 (OHCA Press Release, 1/14/2010). In the press release, Defendant Fogarty is quoted as saying, “[o]ur board and agency have been on a mission with state leaders for the past seven years to bring provider rates to a responsible level...[h]owever, we knew if cuts continued that provider rates would have to be reduced.” *Id.*

On March 23, 2010, the PPACA was enacted, clarifying that “medical assistance” as used in the Medicaid Act includes “care and services.” Pub. L. No. 111-148, § 2304.

D. Discussion

1. Under Rule 60(b)(6) and This Court's Inherent Powers, a Judgment or Mandate May Be Modified Where There Has Been a Change of Law

Generally, federal appellate courts have the inherent “power to set aside at any time a mandate ... to prevent an injustice or to preserve the integrity of the judicial process.” *Ute Indian Tribe of the Uintah and Ouray Reservation v. State of Utah*, 114 F.3d 1513, 1522 (10th Cir. 1997) (Tacha, J.) (quoting *Coleman v. Turpen*, 827 F.2d 667, 671 (10th Cir. 1987)).

Under Rule 60(b), courts have broad discretion to relieve a party from a final judgment, order, or proceeding for the specific reasons outlined in the rule, as well as, under Rule 60(b)(6), for “any other reason that justifies relief.” Rule 60(b)(6) gives courts a “grand reservoir of equitable power to do justice in a particular case.” *Pierce v. Cook & Co.*, 518 F.2d 720, 722 (10th Cir. 1975) (internal quotations omitted). The Tenth Circuit has held that “in extraordinary situations, relief from final judgments may be had under Rule 60(b)(6), when such action is appropriate to accomplish justice...” *Pierce*, 518 F.2d at 723 (quoting *Collins v. City of Wichita*, 254 F.2d 837, 839 (10th Cir. 1958)). It is also well-established in the Tenth Circuit that Rule 60(b)(6) “should be liberally construed when substantial justice will thus be served.” *McGraw v. Barnhart*, 450 F.3d 493, 505 (10th Cir. 2006) (quoting *Pierce*, 518 F.2d at 722).

The Tenth Circuit has previously granted Rule 60(b)(6) relief in instances

where there was an intervening change in relevant *decisional* law. *See Pierce*, 518 F.2d at 723-24; *Adams v. Merrill Lynch Pierce Fenner & Smith*, 888 F.2d 696, 702 (10th Cir. 1989) (“In this circuit, a change in relevant case law by the United States Supreme Court warrants relief under Fed.R.Civ.P. 60(b)(6)”)⁸.

Additionally, in *Ute Indian Tribe*, the Tenth Circuit exercised its inherent power to modify a mandate based upon a change in decisional law. *See Ute Indian Tribe*, 114 F.3d at 1527. The *Ute Indian Tribe* Court distinguished between a change in law that threatens a damage award and judgments that are “continuing in nature.” *Id.* at 1526. As the Court explained, “[w]here a prior erroneous judgment necessarily affects continuing conduct, the interests of uniformity may demand departure from the prior judgment to bring a Court’s view of law into line with the prevailing view.” *Id.* (citations omitted).

Clearly, there is precedent in this Circuit for post-judgment relief from a mandate where there has been an intervening change in the law. And, under *Ute Indian Tribe*, the concerns about finality of judgments are not as strong in cases such as this where the judgment enjoins conduct that is “continuing in nature”. The pertinent question for the Court is whether the particular circumstances underlying this Motion are sufficiently “extraordinary” to warrant relief. As

⁸ Moreover, other courts have granted Rule 60(b)(6) relief where there was a change in decisional law. *See, e.g., Marrero Pichardo v. Ashcroft*, 374 F.3d 46, 55 (2nd Cir. 2004); *Empresa Cubana Del Tabaco v. Culbro Corporation*, 587 F.Supp.2d 622, 628-30 (S.D.N.Y. 2008).

demonstrated *infra*, the case at bar involves such “extraordinary circumstances” and Rule 60(b)(6) relief is justified.

2. “Extraordinary Circumstances” Exist in the Case at Bar Warranting Rule 60(b)(6) Relief

There are extraordinary circumstances warranting relief in the case at bar. First, there has been a post-judgment *clarification* of the discrete issue of law decided by this Court in *OKAAP II* and the clarification makes it apparent that the Court’s decision was based upon a misunderstanding which contravenes the intent of Congress. The Tenth Circuit has yet to confront a Rule 60(b)(6) motion under exact circumstances present here -- where there has been a *clarification* of *statutory* law as opposed to an alteration of decisional law. Yet, the unique posture of the case at bar only strengthens Plaintiffs’ Rule 60(b)(6) arguments. In *In re Abdur’Rahman*, 392 F.3d 174, 185 (6th Cir. 2004) (en banc), *judgment vacated*, 545 U.S. 1151 (2005)⁹, the Sixth Circuit found the distinction between a clarification of the law and a change in decisional law to be important. In *Abdur’Rahman*, the trial court dismissed the petitioner’s habeas claims as procedurally defaulted for failure to seek discretionary review in the Tennessee Supreme Court. *Abdur’Rahman*, 392 F.3d at 177. Subsequently, the Tennessee Supreme Court promulgated Tennessee Supreme Court Rule 39 (“TSCR 39”)

⁹ While the *In re Abdur’Rahman* judgment was vacated by the Supreme Court, the “rationale behind [the] finding in *Abdur’Rahman*...remains valid.” *Thompson v. Bell*, 580 F.3d 423, 443 (6th Cir. 2010) (en banc).

which clarified that litigants need not appeal criminal convictions or post-conviction relief actions to the Tennessee Supreme Court to exhaust their state court appellate remedies. The petitioner filed a Rule 60(b)(6) motion, which the trial court denied as amounting to an impermissible second habeas petition. *Id.* at 178.

On appeal, the Sixth Circuit described the petitioner's Rule 60(b)(6) motion as “[a]sking the district court to reconsider its judgment, which was based on a *defective foundation*: namely, an unclear state of the law, which was later *clarified*.” *Abdur’Rahman*, 392 F.3d at 185 (emphasis added). In finding the existence of “extraordinary circumstances” and granting Rule 60(b)(6) relief, the *Abdur’Rahman* Court reasoned:

...pursuant to TSCR 39, Abdur’Rahman was never required to raise his claims before the Tennessee Supreme Court for exhaustion purposes. Accordingly, the speculation supporting the district court’s default finding crumbles. It then becomes impossible to see how the State of Tennessee, the federal court, or the dissent here has any interest in upholding the district court’s ruling in this case, which contravenes the State of Tennessee’s express policy concerning the exhaustion of state remedies.

Abdur’Rahman, 392 F.3d at 187.

Similarly, here, Plaintiffs *always* had an enforceable right to receive medical care and services with reasonable promptness under the Medicaid Act. Now that this has been unmistakably clarified by Congress, neither Defendants nor the Court should have any interest in upholding the Circuit’s ruling which contravenes

Congressional intent. Because it has now been clarified by Congress that “medical assistance” was *never* intended to mean only “financial assistance,” it is apparent that the Tenth Circuit’s decision in *OKAAP II* was based on something of a legal fiction -- or “defective foundation” -- which is contrary to the intent of Congress. This constitutes an “extraordinary circumstance” warranting relief under Rule 60(b)(6). *See also Heirs-at-Law and Beneficiaries of Gilbert v. Dresser Industries, Inc.*, 158 F.R.D. 89, 93-95 (N.D. Miss. 1993) (finding “extraordinary circumstances” and granting Rule 60(b)(6) relief where law was clarified and applied as law existed prior to the cause of action accruing; and concluding that such a clarification of the law is analogous to a post-judgment change in the law having retroactive application).

Second, based on the Tenth Circuit’s analysis in *Ute Indian Tribe*, the subsequent Congressional clarification to the law and the request for prospective relief, extraordinary circumstances are presented here that warrant relief from the *OKAAP II* Court’s Mandate. Although there is a final judgment in this case, under *Ute Indian Tribe*, the issue of finality is not strong because the relief sought is prospective only. *Ute Indian Tribe*, 114 F.3d at 1526. Moreover, in modifying the mandate at issue there, the *Ute Indian Tribe* Court reasoned that “uniformity in application of principles and in decision-making might constitute a ‘special reason for disturbing [the] repose and finality ...’ of an earlier adjudication.” *Id.* at 1525

(quoting *American Iron & Steel Inst. v. EPA*, 560 F.2d 589, 597 (3rd Cir. 1977)). Modification of the Court's Mandate here will serve the purpose of promoting uniformity among the Circuits regarding the prevailing view of the meaning of "medical assistance." *Id.* Indeed, the very impetus for Congress's clarification of the law was to resolve a conflict among the Circuits regarding this point.¹⁰ This fact renders this case unique and extraordinary. To leave the District Court bound by an appellate decision that is inconsistent with both other Circuits and Congress' clarification would not only be confusing but unjust to Oklahoma's children who have been denied their federal rights to medical services.

Finally, the fact that the clarification at issue involved a statutory amendment is an extraordinary circumstance. Appellate courts have held that a change in *statutory* law can constitute an "extraordinary circumstance" for the purposes of Rule 60(b)(6). *See In re Pacific Far East Lines, Inc.*, 889 F.2d 242, 250 (9th Cir. 1989); *McGrath v. Potash*, 199 F.2d 166 (D.C.Cir. 1952). Congress has passed a statute removing the basis -- or more precisely, clarifying that there

¹⁰ *See Bryson v. Shumway*, 308 F.3d 79, 88-9 (1st Cir. 2002) (held that disabled plaintiffs had an enforceable right under §1396a(a)(8) to receive home- and community-based services with reasonable promptness); *Doe v. Chiles*, 136 F.3d 709, 719 (11th Cir. 1998) (§ 1396a(a)(8) creates a federal right in Medicaid-eligible plaintiffs to reasonably prompt provision of ICF/MR services); *but see OKAAP II*, 472 F.3d at 1215 ("medical assistance" limited to "financial assistance"); *Mandy R.*, 464 F.3d at 1143 (same); *Westside Mothers v. Olszewski*, 454 F.3d 532, 540-41 (6th Cir. 2006) (same); *Bruggeman*, 324 F.3d at 910 (dicta, same).

never was any basis -- for vacation of the Final Judgment and Permanent Injunction against Defendants. This, in and of itself, is an “extraordinary circumstance” warranting relief under Rule 60(b)(6).

3. Substantial Justice Will Be Served by Granting this Motion

The underlying facts of this case are themselves extraordinary such that “substantial justice” will be served and a “manifest injustice” would be prevented by granting Rule 60(b)(6) relief. In *Marrero Pichardo v. Ashcroft*, 374 F.3d 46, 55 (2nd Cir. 2004), the Second Circuit granted relief where reconsideration based on a subsequent change of law would prevent “manifest injustice.” This is consistent with the Tenth Circuit’s rule that Rule 60(b)(6) ““should be liberally construed when substantial justice will thus be served.”” *McGraw*, 450 F.3d at 505 (quoting *Pierce*, 518 F.2d at 722).

Under this Court’s ruling in *OKAAP II*, hundreds of thousands of children in Oklahoma now have no effective means to assure that they receive mandated health care services with reasonable promptness. As the District Court’s Findings of Fact show in chilling detail, children with serious health care needs have been put at grave risk of harm by unreasonable delays in treatment -- and by the non-delivery of treatment altogether. As the District Court’s Findings of Fact show, too often Medicaid-eligible children simply have not received EPSDT services at all, or in the manner required by the Medicaid Act. The District Court attributed a

great many of these problems to low provider reimbursement rates and the consequential refusal of many providers to treat Medicaid patients.¹¹ Nonetheless, Defendants have recently approved a Medicaid provider rate cut of 3.25 %. With the vacation of the May 19, 2005 Final Judgment and Permanent Injunction, there was nothing to prevent this rate cut and there is nothing to prevent additional rate cuts in the future. Without an enforceable right to receive health care services, and the injunctive power of the federal court, Plaintiffs have been left powerless to protect themselves. And, because there is a split of authority on the issue, Plaintiffs are in an unequal and inequitable position compared with children in other parts of the country who do enjoy an enforceable right to receive medical services. In light of Congress's clarification of the meaning of "medical assistance," and all of the surrounding circumstances, "substantial justice" will be served and a "manifest injustice" will be prevented by granting Plaintiffs' Rule 60(b)(6) Motion.

WHEREFORE, premises considered, Plaintiffs respectfully request that the Court grant this Motion.

¹¹ This Court surmised that the District Court was "perhaps" correct in concluding that low rates of Medicaid provider reimbursement had caused delays in the provision of health care services. *OKAAP II*, 472 F.3d at 1214.

Respectfully submitted,

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**ATTORNEYS FOR
PLAINTIFFS-APPELLANTS/
CROSS-APPELLEES**

**CERTIFICATE OF COMPLIANCE
WITH FORMATTING REQUIREMENTS**

In compliance with Federal Rules of Appellate Procedure 27(d), I hereby certify that this Motion does not exceed 20 pages, exclusive accompanying documents, and that this Motion complies with all paper size, line spacing, margin, typeface and type style requirements.

/s/ Louis W. Bullock

CERTIFICATE OF DIGITAL SUBMISSION

Pursuant to the Court's General Order of August 10, 2007, regarding digital submissions, I hereby certify that (1) no privacy redactions were made as none were necessary and the document submitted herewith are exact copies of the written documents filed with the clerk; and (2) the digital submissions have been scanned with Kaspersky Internet Security 2010 and, according to the program, is free of viruses.

/s/ Louis W. Bullock

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of June, 2010, I mailed a true and correct copy of the above and foregoing document, by U.S. Mail, postage prepaid, to:

Howard J. Pallotta
Lynn Rambo Jones
Litigation Division
Oklahoma Health Care Authority
P.O. Box 18497
Oklahoma City, Oklahoma 73105

I hereby certify that on the 8th day of June, 2010, I emailed the attached document to:

Howard J. Pallotta
Lynn Rambo Jones

Howard.Pallotta@okhca.org
Lynn.Rambo-Jones@okhca.org

/s/ Louis W. Bullock
Louis W. Bullock

ATTACHMENT:

Mandate filed in N.D. Okla.
OKAAP et al. v. OHCA,
No. 01-CV-187- CVE-SAJ
on 02-15-07, Dkt 446-2

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

OKLAHOMA CHAPTER OF THE AMERICAN ACADEMY OF PEDIATRICS (OKAAP); COMMUNITY ACTION PROJECT OF TULSA COUNTY, OKLAHOMA, (CAPTC); TRACY T., as mother and next friend of Katelyn M. Wilbanks; LISA P., as mother and next friend of Joshua Lee O'Neal, Eric Harman Cammiso, Melissa Ann Padelford and Mathew Scott Padelford; ROWENA T., as parent and next friend of Christy A. Towler, Katherine P. Towler and Jacob W. Towler; KEVIN T., as parent and next friend of Christy A. Towler, Katherine P. Towler and Jacob W. Towler; JANICE G., as parent and next friend of Charles A. Scanlan and Robert M. Garvin; THEODORE G., as parent and next friend of Charles A. Scanlan and Robert M. Garvin; REGINA H., as parent and next friend of Jacob W. Hercules and Everett L. Hercules; GUS H., as parent and next friend of Jacob W. Hercules and Everett L. Hercules; HEATHER R., as parent and next friend of Stephanie Moncrief,

Plaintiffs - Appellants -
Cross-Appellees,

v.

MICHAEL FOGARTY, Chief Executive Officer of the Oklahoma Health Care Authority (OHCA); LYNN MITCHELL, State Medicaid Director; CHARLES ED MCFALL, Chairman of the OHCA Board of Directors; T. J. BRICKNER,

A true copy

Teste

Elisabeth A. Shumaker
Clerk, U.S. Court of
Appeals, Tenth Circuit

By 

Deputy Clerk

Nos. 05-5100 & 05-5107
(D.C. No. 01-CV-0187-CVE-SAJ)
(Northern District of Oklahoma)

JR., Vice-Chair of the OHCA Board of Directors; WAYNE HOFFMAN, JERRY HENLEE, RONALD ROUNDS, O.D., GEORGE MILLER, LYLE ROGGOW, and JERRY HUMBLE, Members of the OHCA Board of Directors; OKLAHOMA HEALTH CARE AUTHORITY,

Defendants - Appellees -
Cross-Appellants,

AMERICAN ACADEMY OF PEDIATRICS; AMERICAN MEDICAL ASSOCIATION, and OKLAHOMA STATE MEDICAL ASSOCIATION,

Amici Curiae.

JUDGMENT

Filed January 3, 2007

Before **TACHA**, Chief Circuit Judge, **BRISCOE**, and **HARTZ**, Circuit Judges.

This case originated in the District of Northern Oklahoma and was argued by counsel.

The judgment of that court is reversed. The case is remanded to the United States District Court for the District of Northern Oklahoma for further proceedings in accordance with the opinion of this court.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk

by: *EL*
Deputy Clerk

FILED
United States Court of Appeals
Tenth Circuit

January 3, 2007

PUBLISH
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Elisabeth A. Shumaker
Clerk of Court

OKLAHOMA CHAPTER OF THE AMERICAN ACADEMY OF PEDIATRICS (OKAAP); COMMUNITY ACTION PROJECT OF TULSA COUNTY, OKLAHOMA (CAPTC); TRACY T., as mother and next friend of Katelyn M. Wilbanks; LISA P., as mother and next friend of Joshua Lee O'Neal, Eric Harman Cammiso, Melissa Ann Padelford and Mathew Scott Padelford; ROWENA T., as parent and next friend of Christy A. Towler, Katherine P. Towler and Jacob W. Towler; KEVIN T., as parent and next friend of Christy A. Towler, Katherine P. Towler and Jacob W. Towler; JANICE G., as parent and next friend of Charles A. Scanlan and Robert M. Garvin; THEODORE G., as parent and next friend of Charles A. Scanlan and Robert M. Garvin; REGINA H., as parent and next friend of Jacob W. Hercules and Everett L. Hercules; GUS H., as parent and next friend of Jacob W. Hercules and Everett L. Hercules; HEATHER R., as parent and next friend of Stephanie Moncrief,

Plaintiffs-Appellants/Cross-Appellees,

v.

A true copy

Teste

Elisabeth A. Shumaker
Clerk, U.S. Court of
Appeals, Tenth Circuit

By 

Deputy Clerk

Nos. 05-5100 & 05-5107

MICHAEL FOGARTY, Chief Executive Officer of the Oklahoma Health Care Authority (OHCA); LYNN MITCHELL, State Medicaid Director; CHARLES ED McFALL, Chairman of the OHCA Board of Directors; T. J. BRICKNER, JR., Vice-Chair of the OHCA Board of Directors; WAYNE HOFFMAN, JERRY HENLEE, RONALD ROUNDS, O.D., GEORGE MILLER, LYLE ROGGOW and JERRY HUMBLE, Members of the OCHA Board of Directors; OKLAHOMA HEALTH CARE AUTHORITY,

Defendants-Appellees/Cross-Appellants.

AMERICAN ACADEMY OF PEDIATRICS; AMERICAN MEDICAL ASSOCIATION, and OKLAHOMA STATE MEDICAL ASSOCIATION,

Amici Curiae.

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OKLAHOMA
(D.C. No. 01-CV-0187-CVE-SAJ)**

Louis W. Bullock, Miller, Keffer & Bullock, LLC, Tulsa, Oklahoma (Robert M. Blakemore, Miller, Keffer & Bullock, LLC, Tulsa, Oklahoma; Thomas K. Gilhool and James Eiseman, Jr., Public Interest Law Center, Philadelphia, Pennsylvania, with him on the briefs), for Plaintiffs-Appellants/Cross-Appellees.

Howard J. Pallotta, (Lynn Rambo-Jones with him on the briefs) Oklahoma Health Care Authority, Legal Division, Oklahoma City, Oklahoma, for Defendants-Appellees/Cross-Appellants.

Jonathan S. Franklin and Jessica L. Ellsworth, Hogan & Hartson, L.L.P., Washington,

D.C., filed an amicus curiae brief for the American Academy of Pediatrics, the American Medication Association, and the Oklahoma State Medical Association.

Before **TACHA, BRISCOE, and HARTZ**, Circuit Judges.

BRISCOE, Circuit Judge.

Plaintiffs, two organizations and thirteen children and their parents representing a class of individuals, filed suit under 42 U.S.C. § 1983 claiming that defendants, officials of the State of Oklahoma and the Oklahoma Health Care Authority, violated various provisions of the Medicaid Act by failing to provide Medicaid-eligible children in the State of Oklahoma with necessary health care services, including early and periodic screening, diagnosis, and treatment services. After conducting a bench trial, the district court found in favor of plaintiffs on some, but not all, of their claims, and issued a permanent injunction requiring defendants to, in pertinent part, conduct a study to determine the provider reimbursement rates necessary to ensure reasonably prompt access to health care for Medicaid-eligible children, and to revise their fee schedule in accordance with that study. Both sides have now appealed, challenging various aspects of the district court’s decision.

We exercise jurisdiction pursuant to 28 U.S.C. § 1291, reverse the judgment of the district court, and remand with directions to enter judgment in favor of defendants. In doing so, we conclude, contrary to the district court, that the defendants did not violate 42 U.S.C. § 1396a(a)(8)’s “reasonable promptness” requirement by allowing system-wide

delays in treatment of Medicaid beneficiaries or by paying providers insufficient rates for services rendered to Medicaid beneficiaries. We further conclude that 42 U.S.C. § 1396a(a)(10) requires a state Medicaid plan to pay for, but not to directly provide, the specific medical services listed in the Medicaid Act. We also conclude, consistent with our recent decision in Mandy R. ex rel. Mr. and Mrs. R. v. Owens, 464 F.3d 1139 (10th Cir. 2006), that 42 U.S.C. § 1396a(a)(30) does not create a private right of action enforceable by plaintiffs. Finally, we decline to consider plaintiffs' assertion of a private right of action pursuant to 42 U.S.C. § 1397a(a)(43) because the arguments now made on appeal by plaintiffs were neither asserted nor addressed below.

I.

Plaintiff Oklahoma Chapter of the American Academy of Pediatrics (OKAAP) is a non-profit professional organization of pediatricians and pediatric specialists. Plaintiff Community Action Project of Tulsa County, Inc. (CAPTC) is a non-profit organization located in Tulsa, Oklahoma. The individually-named plaintiffs are thirteen children and their parents, all of whom have been designated as representatives of the class certified by the district court. Defendants are officials of the State of Oklahoma and the Oklahoma Health Care Authority (OHCA), the designated agency responsible for implementing and administering Oklahoma's Medicaid program.

Plaintiffs filed this action in March 2001, alleging that defendants' policies and procedures denied or deprived eligible children in the State of Oklahoma of the health and medical care to which they were entitled under federal law. In particular, plaintiffs

asserted claims under 42 U.S.C. § 1983 to enforce (a) their alleged right pursuant to 42 U.S.C. §§ 1396a(a)(8), 1396a(10)(A), 1396d(a)(4)(B)(2), and 1336d(r) to receive early and periodic screening, diagnostic, and treatment services (EPSDT), (b) their alleged right pursuant to 42 U.S.C. § 1396a(a)(8) to receive necessary care and services with reasonable promptness, and (c) their alleged right pursuant to 42 U.S.C. § 1396a(a)(30)(A) to have provider reimbursement rates set at a sufficient level to assure Medicaid recipients of equal access to quality health care.

The district court, at plaintiffs' request, defined and certified a plaintiff class of children on May 30, 2003. The district court then conducted a bench trial on plaintiffs' claims in April and May 2004. On March 22, 2005, the district court issued lengthy findings of fact and conclusions of law. In its order, the district court dismissed plaintiff OKAAP for lack of standing. The district court also concluded, in pertinent part, that:

- defendants violated 42 U.S.C. § 1396a(a)(30)(A) by failing to assure that payments were sufficient to enlist enough providers so that care and services were available to Medicaid-eligible children to the extent that such care and services were available to the general population in the geographic areas served by the OHCA; and
- defendants violated 42 U.S.C. § 1396a(a)(8) by failing to furnish medical assistance with reasonable promptness to all Medicaid-eligible individuals.

At the conclusion of its order, the district court directed the parties to meet and confer with the magistrate judge "in order to reach an agreed proposed injunctive order to be submitted" to the court "consistent with [its] Findings of Fact and Conclusions of Law." Aplt. App. at 396.

On May 19, 2005, after the parties submitted the agreed proposed injunctive order, the district court issued a Final Judgment and Permanent Injunction. Therein, the district court reiterated its legal conclusions and, based upon the two alleged violations outlined above, directed defendants to:

- “institute a fee schedule for fee-for-service physician . . . reimbursement for covered, medically necessary physician services provided to minor children” under the Medicaid program “at the rate for each Current Procedural Terminology . . . Code that equals one hundred percent (100%) of the rate paid by Medicare for physician services as soon as possible within the strictures of” state and federal law;
- “authorize OHCA administrative staff to negotiate a contract . . . with a nationally recognized economic consulting firm to conduct a study to determine the fee-for-service reimbursement rate necessary to assure reasonably prompt access to health care for minor children in the Oklahoma Medicaid Program while also complying with the utilization and efficiency requirements of 42 U.S.C. § 1396a(a)(30)(a)”;
- “institute a fee-for-service schedule determined by the consulting firm as necessary to assure reasonably prompt access to health care for minor children in the Oklahoma Medicaid program”;
- “[i]n the event that OHCA is unable in good faith to negotiate the contract contemplated by the Final Judgment and Permanent Injunction by August 15, 2005, or if the study contemplated by [the district court] is not completed within six months of the date the contract is executed by the parties, the OHCA shall adjust all Medicaid rates paid to providers so that the rates for covered, medically necessary physician services provided to minor children under the Oklahoma Medicaid Program are sufficient to ensure equal and reasonably prompt access to health care for such minor children”;
- “use [their] best efforts to attempt to obtain increased funding from the Oklahoma Legislature for the reimbursement changes mentioned herein; however, a lack of such funding shall not excuse compliance with this Permanent Injunction”; and

- “assure that OHCA immediately adopts and implements new periodicity schedules (for periodic comprehensive medical screening examinations, dental screening examinations and vision screening examinations) after consulting with recognized medical and dental organizations involved in child health care, including OKAAP, Oklahoma State Medical Association, and the Oklahoma Dental Association. In this regard, the OHCA Board of Directors shall invite OKAAP, the Oklahoma State Medical Association, the Oklahoma Dental Association and/or other recognized medical and dental organizations involved in child health care to appoint members to an advisory committee that will meet with the OHCA EPSDT Unit (recently renamed Child Health) staff at least annually to consult on a periodicity schedule for EPSDT services. This advisory committee shall meet no later than forty-five days after the date of this Permanent Injunction.”

Aplt. App. at 422-425.

On June 14, 2005, plaintiffs filed a notice of appeal from the district court’s Final Judgment and Permanent Injunction, and from the district court’s April 20, 2005 Order denying plaintiffs’ motion to alter or amend judgment. On June 27, 2005, defendants filed a notice of cross appeal from the district court’s Final Judgment and Permanent Injunction, as well as the district court’s Findings of Fact and Conclusions of Law.

II.

A. Plaintiffs’ claims under 42 U.S.C. § 1983

1) 42 U.S.C. §§ 1396a(a)(8) and (a)(10)(A), 1396d(a)(4)(B) and (r)

Plaintiffs challenge the district court’s ruling on the merits of their claims under § 1983 for alleged violations of 42 U.S.C. §§ 1396a(a)(8), 1396a(a)(10)(A), 1396d(a)(4)(B), and 1396d(r).¹ In particular, plaintiffs contend the district court erred in

¹ “We . . . assume without deciding that § 1983 gives the plaintiffs a right of action to enforce” these provisions. Mandy R., 464 F.3d at 1143.

applying a “substantial compliance” standard in determining whether defendants met what plaintiffs allege, and the district court agreed, were defendants’ obligations under these statutes to furnish comprehensive medical screening examinations, preventive dental services and necessary medical treatment to members of the class of individual plaintiffs. Because this issue hinges on the interpretation of these federal statutes, we apply a de novo standard of review. Shivwits Band of Paiute Indians v. Utah, 428 F.3d 966, 978 (10th Cir. 2005).

Sections 1396a(a)(8) and (a)(10)(A) of Title 42 provide, in pertinent part, as follows:

(a) A State plan for medical assistance must –

* * *

(8) provide . . . that such [medical] assistance shall be furnished with reasonable promptness to all eligible individuals;

* * *

(10) provide –

(A) for making medical assistance available, including at least the care and services listed in paragraphs (1) through (5), (17) and (21) of section 1396d(a) of this title, to . . . all individuals . . . who are receiving aid or assistance under any [approved State Medicaid] plan

42 U.S.C. § 1396a(a)(8), (10)(A).

In turn, sections 1396d(a)(4)(B) and (r) provide as follows:

For purposes of this subchapter --

(a) Medical assistance

The term “medical assistance” means payment of part or all of the cost of the following care and services . . . for individuals . . .

(4) . . . (B) early and periodic screening, diagnostic, and treatment services (as defined in subsection (r) of this section) for individuals

who are eligible under the plan and are under the age of 21

* * *

(r) Early and periodic screening, diagnostic, and treatment services

The term “early and periodic screening, diagnostic, and treatment services” means the following items and services:

(1) Screening services—

(A) are provided—

(i) at intervals which meet reasonable standards of medical and dental practice, as determined by the State after consultation with recognized medical and dental organizations involved in child health care and, with respect to immunizations under subparagraph (B)(iii), in accordance with the schedule referred to in section 1396s(c)(2)(B)(i) of this title for pediatric vaccines, and

(ii) at such other intervals, indicated as medically necessary, to determine the existence of certain physical or mental illnesses or conditions; and

(B) which shall at a minimum include—

(i) a comprehensive health and developmental history (including assessment of both physical and mental health development),

(ii) a comprehensive unclothed physical exam,

(iii) appropriate immunizations (according to the schedule referred to in section 1396s(c)(2)(B)(i) of this title for pediatric vaccines) according to age and health history,

(iv) laboratory tests (including lead blood level assessment appropriate for age and risk factors), and

(v) health education (including anticipatory guidance).

(2) Vision services—

(A) which are provided—

(i) at intervals which meet reasonable standards of medical practice, as determined by the State after consultation with recognized medical organizations involved in child health care, and

(ii) at such other intervals, indicated as medically necessary, to determine the existence of a suspected illness or condition; and

(B) which shall at a minimum include diagnosis and treatment

for defects in vision, including eyeglasses.

(3) Dental services—

(A) which are provided—

- (i) at intervals which meet reasonable standards of dental practice, as determined by the State after consultation with recognized dental organizations involved in child health care, and
- (ii) at such other intervals, indicated as medically necessary, to determine the existence of a suspected illness or condition; and

(B) which shall at a minimum include relief of pain and infections, restoration of teeth, and maintenance of dental health.

(4) Hearing services—

(A) which are provided—

- (i) at intervals which meet reasonable standards of medical practice, as determined by the State after consultation with recognized medical organizations involved in child health care, and
- (ii) at such other intervals, indicated as medically necessary, to determine the existence of a suspected illness or condition; and

(B) which shall at a minimum include diagnosis and treatment for defects in hearing, including hearing aids.

(5) Such other necessary health care, diagnostic services, treatment, and other measures described in subsection (a) of this section to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, whether or not such services are covered under the State plan.

Nothing in this subchapter shall be construed as limiting providers of early and periodic screening, diagnostic, and treatment services to providers who are qualified to provide all of the items and services described in the previous sentence or as preventing a provider that is qualified under the plan to furnish one or more (but not all) of such items or services from being qualified to provide such items and services as part of early and periodic screening, diagnostic, and treatment services. The Secretary shall, not later than July 1, 1990, and every 12 months thereafter, develop and set annual participation goals for each State for participation of individuals who are covered under the State plan under this subchapter in early and periodic screening, diagnostic, and treatment services.

42 U.S.C. § 1396d(a)(4)(B), (r).

Purporting to apply § 1396a(a)(8)'s "reasonable promptness" requirement, the district court held as follows:

32. Plaintiffs have offered substantial evidence that the delays in treatment for children with specific conditions are medically inappropriate. Importantly, plaintiffs have shown that system-wide delays in treatment exist and have presented convincing evidence that those delays are not reasonable. In violation of 42 U.S.C. § 1396a(a)(8), defendants are not ensuring that medical assistance is furnished with reasonable promptness to all eligible individuals.

33. The Court is aware of Bruggeman v. Blagojevich, 324 F.3d 906, 910 (7th Cir. 2003), in which the court held that Illinois officials' failure to adopt a plan for expanding the number of intermediate care facilities for the developmentally disabled in another part of the state did not violate 42 U.S.C. § 1396a(a)(8). In so holding, the court remarked:

the statutory reference to "assistance" appears to have reference to *financial* assistance rather than to actual medical services, though the distinction was missed in Bryson v. Shumway, 308 F.3d 79, 81 (1st Cir. 2002), and Doe v. Chiles, 136 F.3d 709, 714, 717 (11th Cir. 1998). Medicaid is a payment scheme, not a scheme for state-provided medical assistance, as through state-owned hospitals. The regulations that implement the provision indicate that what is required is a prompt determination of eligibility and prompt provision of funds to eligible individuals to enable them to obtain the covered medical services that they need, see 42 C.F.R. §§ 435.91(a), .930(a)-(b); a requirement of prompt treatment would amount to a direct regulation of medical services.

Id. at 910. The Court finds that this distinction, while accurate, does not preclude a finding in this case that defendants have violated § 1396a(a)(8). Without financial assistance (provider reimbursement) sufficient to attract an adequate number of providers, reasonably prompt assistance is effectively denied.

Aplt. App. at 378.

We reject the district court's conclusions. In our recent decision in Mandy R., we agreed with the Seventh Circuit's decision in Bruggeman that the term "medical assistance," as employed in § 1396a(a)(8), refers "to financial assistance rather than to actual medical services." 464 F.3d at 1143 (quoting Bruggeman, 324 F.3d at 910). In turn, we interpreted § 1396a(a)(8) as "requir[ing] any state participating in Medicaid to pay promptly . . . for medical services when the state is presented with the bill." Id. As noted by defendants, this interpretation is clearly contrary to the plaintiffs' assertion, and the district court's apparent conclusion, that § 1396a(a)(8) makes a state Medicaid program directly responsible for ensuring that the medical services enumerated in the Medicaid Act (i.e., those that are reimbursable) are actually provided to Medicare beneficiaries in a reasonably prompt manner.

The district court also erred, given our holding in Mandy R., in concluding that defendants violated § 1396a(a)(8)'s "reasonable promptness" requirement by paying providers insufficient rates for services rendered to Medicaid beneficiaries. Although the district court apparently concluded, and perhaps correctly so, that low rates of reimbursement reduce the number of providers available to Medicaid beneficiaries, and in turn increase the time Medicaid beneficiaries must wait to receive medical services from available providers, this conclusion does not mean that defendants failed (or will fail in the future) to be reasonably prompt in paying for services actually rendered by available providers, as required by § 1396a(a)(8). Indeed, if the district court's theory were correct, it would broaden § 1396a(a)(8) far beyond its intended scope, and would require federal

courts to engage in what the Third Circuit has described as the “onerous” task of “evaluating whether a state’s Medicaid reimbursement rates are ‘reasonable and adequate.’” Chiles, 136 F.3d at 717. Thus, we agree with defendants that the district court erred when it directed defendants to conduct a study of rates, costs and services, and then to use the study to correct what the district court concluded were too-low rates of reimbursement. Likewise, we agree with defendants that the district court erred in requiring rates to be set at a level that would ensure a two-thirds “level of participation” among physicians in the State of Oklahoma.

To be sure, plaintiffs’ claims in this case differ slightly from those in Mandy R. in that, in addition to § 1396a(a)(8), they also rely on the provisions of § 1396a(a)(10)(A). Although Mandy R. did not address the meaning of § 1396a(a)(10)(A), the fact that plaintiffs have included that as a basis for their claims does nothing to change the outcome. As noted above, subsection (a)(10)(A) simply requires a state Medicaid plan to provide “medical assistance,” as that phrase is uniquely defined in the Medicaid Act, for specific medical services listed in the Medicaid Act, including EPSDT services. In other words, subsection (a)(10)(A) requires a state Medicaid plan to pay for all such medical services, not, as plaintiffs suggest, to directly provide them.

Finally, plaintiffs’ “substantial compliance” arguments are clearly wrong because they hinge on the mistaken view that the above-quoted provisions of the Medicaid Act “clearly and unambiguously require states to furnish EPSDT services to all eligible individuals under the age of 21.” Aplt. Br. at 31. As we have discussed, the term

“medical assistance,” as used throughout the Medicaid Act, refers to the payment of all or part of the cost of the care and services specifically described in the act. That is, as noted in Mandy R., the Medicaid Act requires participating states to provide beneficiaries financial assistance rather than actual medical services. Thus, not only do the statutes cited by plaintiffs not obligate defendants to ensure that EPSDT services are “fully” delivered to the plaintiff class, those statutes impose no obligation whatsoever on defendants to deliver any medical services. Rather, as we concluded in Mandy R., defendants’ obligation under these statutes is to pay promptly for the medical services outlined in the Medicaid Act, including EPSDT services.

2) *42 U.S.C. § 1396a(a)(30)(A)*

Both plaintiffs and defendants assert challenges to the district court’s final judgment granting injunctive relief based upon defendants’ alleged violation of 42 U.S.C. § 1396a(a)(30)(A). We find it unnecessary to address any of these arguments in detail, however, because we recently held in Mandy R. that § 1396a(a)(30)(A) does not give rise to an enforceable private right on behalf of Medicaid beneficiaries and providers that can be pursued under § 1983. 464 F.3d at 1148. Thus, we simply conclude that the district court erred in holding that defendants violated § 1396a(a)(30)(A), and in turn granting injunctive relief in favor of defendants based upon that purported violation.

3) *42 U.S.C. § 1396a(a)(43)*

In a supplemental brief filed after the issuance of Mandy R., plaintiffs argue for the first time on appeal that 42 U.S.C. § 1396a(a)(43) “create[s] enforceable rights” in favor

of Medicaid recipients, “including the right to receive actual [EPSDT] services.” *Aplt. Supp. Br.* at 6. Plaintiffs further argue that “[i]f, as the trial court found here, children are not *receiving* the care and services they are entitled to, then the State has failed to comply with” § 1396a(a)(43). *Id.* at 8 (*italics in original*).

We conclude these arguments are not properly before us. “Absent authorization from this court, a party is generally precluded from raising issues in a supplemental brief that were not addressed in the opening brief.” United States v. Lawrence, 405 F.3d 888, 908 n.15 (10th Cir. 2005). Moreover, we are not persuaded, after reviewing the record on appeal, that the new arguments asserted by plaintiffs were adequately raised or decided below. See United Steelworkers of Am. v. Or. Steel Mills, Inc., 322 F.3d 1222, 1228 (10th Cir. 2003) (noting that arguments not raised below will not be considered for the first time on appeal unless they are purely matters of law whose proper resolution is certain); United States v. Easter, 981 F.2d 1549, 1556 n.5 (10th Cir. 1992) (refusing to address issue not decided below because it was “a fact-dependant challenge and [there was] an insufficient record” on appeal). While § 1396a(a)(43) was cited in the first amended complaint and also referenced in the pretrial order, there is no indication in the record on appeal that the district court was asked to determine, or in fact did determine, (a) whether § 1396a(a)(43) creates an enforceable private right on behalf of Medicaid beneficiaries that can be pursued under § 1983, and (b) whether defendants violated the specific provisions of § 1396a(a)(43) that plaintiffs now assert require the provision of actual health care services.

B. Dismissal of plaintiff OKAAP for lack of standing

Plaintiff OKAAP, a non-profit professional organization of pediatricians and pediatric sub-specialists, contends the district court erred in dismissing it from the suit for lack of standing. Our conclusions on the parties' other issues, which necessitate reversal of the district court's judgment, have rendered this issue moot.

The judgment of the district court is REVERSED, and the case REMANDED to the district court with directions to enter judgment in favor of defendants on all claims.

United States Court of Appeals for the Tenth Circuit
OFFICE OF THE CLERK

Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303)844-3157

Elisabeth A. Shumaker
Clerk of Court

Douglas E. Cressler
Chief Deputy Clerk

RECEIVED

FEB 15 2007

Phil Lombardi, Clerk
U.S. DISTRICT COURT

February 13, 2007

Mr. Phil Lombardi
Clerk
United States District Court for the N. District of Oklahoma
333 W. Fourth Street
Room 411 United States Courthouse
Tulsa, OK 74103

Re: 05-5100, Oklahoma Chapter v. Fogarty
Dist/Ag docket: 01-CV-0187-CVE-SAJ,
05-5107, Oklahoma Chapter v. Fogarty
Dist/Ag docket: 01-CV-187-CVE

Dear Clerk:

Enclosed are a certified copy of the judgment and a copy of the opinion filed in this case which are issued as the mandate of this court. See Fed. R. App. P. 41(a). Please file it in records of your court or agency.

Please contact this office if you have questions.

Sincerely,

Elisabeth A. Shumaker
Clerk, Court of Appeals

By: 
Deputy Clerk

clk:jc

cc:

Louis W. Bullock
Patricia Whittaker Bullock
Robert M. Blakemore
Thomas K. Gilhool
James Eiseman
Lynn Rambo Jones
Howard J. Pallotta
Jessica L. Ellsworth
Catherine E. Stetson
Jonathan S. Franklin