UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 05-23037-CIV-JORDAN/MCALILEY

FLORIDA PEDIATRIC SOCIETY/ THE FLORIDA CHAPTER OF THE AMERICAN ACADEMY OF PEDIATRICS, et al.,

Plaintiffs,

vs.

ELIZABETH DUDEK, in her official capacity as the Secretary of the Agency for Health Care Administration, et al.,

Defendants.
_____/

DCF'S SUGGESTION OF MOOTNESS, OR IN THE ALTERNATIVE, MOTION TO REOPEN RECORD ON LIABILITY

The interim Secretary of the Department of Children and Families (DCF), sued in his official capacity, moves to dismiss all claims against him as moot. In the alternative, Defendant Carroll moves this Court to reopen the factual record in this case to allow new evidence to be presented regarding the substantial changes that have been made in the process of applying for and determining Medicaid eligibility, which should result in a finding of no liability on all of Plaintiffs' claims.[1] Defendants further state:

BACKGROUND

Only in the past year, there have been many significant changes in how Medicaid eligibility determinations are performed by DCF, driven largely by implementation of the Patient

[1] / In a separate motion filed on this date, the official capacity agency heads of the Department of Health and the Agency for Health Care Administration have separately filed a Motion to Reopen Record on Liability, based on substantial changes that have occurred in how Medicaid services are delivered to children since the factual record in this case closed on February 2, 2012.

Protection and Affordable Care Act (Pub. L. 111-148, enacted on March 23, 2010), as amended by the Health Care and Education Reconciliation Act of 2010 (Pub. L. 111-152, enacted on March 30, 2010), and together referred to as the Affordable Care Act of 2010 (ACA). Those changes include, but are not limited to:

1. DCF has procured a new Medicaid Eligibility System (MES), a computer system, which makes eligibility determinations based on new ACA income eligibility standards that took effect January 1, 2014.

2. The Department of Health and Human Services Centers for Medicare and Medicaid Services (federal CMS) has significantly reduced the number and type of Medicaid coverage categories, from what CMS characterized as "many different mandatory and optional eligibility categories for children," Medicaid Program; Eligibility Changes Under the Affordable Care Act of 2010, 76 FR 51148-01, 51154 (Aug. 17, 2012), to five primary categories for children whose eligibility is based on family income. Having fewer family-related coverage categories based on income reduces the opportunity for children's coverage categories to change during eligibility determination processes, and this should minimize the possibility that communications between MES and the Florida Medicaid Management Information System (FMMIS) about changes in coverage categories lead to initiation of plan assignment processes.

3. DCF has adopted a streamlined Medicaid application, which has been approved by federal CMS pursuant to a change made in federal regulations since the close of the trial on liability. 42. C.F.R. §435.907(b). That application is available when applying through the federal Marketplace, at DCF, or through the KidCare program. It is also available via mail, in

person at a variety of locations, or through the Internet self service portal at DCF.[2] Additionally, DCF has greatly simplified its online application process.

4. Imminently, DCF will go live with Phase 2 of the MES development, which will include a feature that allows the computer system to set the continuous eligibility period for each household member, at the particular financial assistance type level. A worker will not be able to terminate a child's eligibility sooner than the end of the continuous eligibility period unless they have an allowable reason to do so (such as death of the child, the child has moved out of state, or the child was never eligible for Medicaid). These changes are now in customer acceptance testing, and on target to "go live" on November 10, 2014.

The named Plaintiffs are exemplars of how MMA is working, and how the simplified Medicaid eligibility rules are also succeeding in maintaining continuous eligibility. The two named Plaintiffs who are enrolled in the Department of Health's Children's Medical Services (state CMS) also show how state CMS is helping to provide needed care for Medicaid enrolled children.

I. DCF's implementation of the ACA, and other changes it has made because of its implementation of the ACA, have greatly changed the way that Medicaid eligibility determinations and renewals are made.

Defendants have spent considerable time briefing the Court on the impact that the ACA has had on reimbursements for eligible services provided by eligible providers, *see* D.E. 1213-2, 1230, 1250, and 1260, but the ACA has also had an impact on how Medicaid eligibility is determined that affects Plaintiffs' claims against DCF. Additionally, because DCF needed a new computer system to process eligibility in the manner required by the ACA, it was able to leverage the new system to include a much desired "computer fix" to the issue of continuous

[2] / 42 C.F.R. § 435.907(a) requires that DCF allow individuals to apply and submit any documentation required to establish liability by the internet, by telephone, by mail, in person, and through other commonly acceptable electronic means.

eligibility. In light of these significant changes, Plaintiffs' claims against DCF are moot, and the record on liability is stale. Plaintiffs' claims must either be dismissed or, at a minimum, the factual record should be reopened to address these significant and substantial changes.

Effective 2014, the ACA required that Medicaid eligibility based on family income be determined using a new standard, the modified adjusted gross income (MAGI) standard. Pub. L. 111-148, § 2001 (codified at 42 U.S.C. § 1396a(e)). In order to process Medicaid eligibility determinations using the new standard, DCF procured a new computer system, MES, which went live effective December 16, 2013. In addition to processing Medicaid eligibility determinations using the MAGI standard, MES also had to be capable of connecting to the "Exchange," also known as the federal Marketplace, to receive files on applicants for health insurance who appeared to be eligible for Medicaid based on a review by the Exchange. *See* 45 C.F.R. § 155.20 for a definition of the Exchange. *See also* 42 C.F.R. § 435.907(h). MES also has to be capable of connecting to the Federal Data Sharing Hub (FDSH).[3] It is able to perform all of this functionality. Dec. of N. Lewis, pp. 3-4.

The MES system also enables DCF to assign each member in a family their own coverage group. For example, if there is a mom and three children in a household, each child can be assigned his or her own Medicaid coverage group and dealt with separately in a manner which is to their best advantage. And, the system functionality to assign each child in a family to their own coverage group is an essential part of the ground work that leads to a further enhancement being implemented in MES effective November 10, 2014. On that date, Phase 2 of MES will go live, and, among other things, it will allow the computer system to set the Medicaid review period for each member of the household separately, applying the pertinent rules on

[3] / The Secretary of the Department of Health and Human Services has established the FDSH through which States may verify certain information with, or obtain information from various federal agencies and other data sources as part of the Medicaid eligibility determination process. 42 C.F.R. § 435.949.

continuous eligibility. The computer will establish the beginning and ending dates for the period of continuous eligibility. Then, modifications have been made to a screen where the DCF worker authorizes changes in eligibility for services. If, in that screen, the worker tries to terminate Medicaid eligibility before the continuous eligibility period ends, he or she will not be able to do so unless they provide an allowable reason for the early termination (such as the death of the child, the child has moved out of state, or the child was never eligible for Medicaid). *See* Dec. of N. Lewis, dated 10/16/2013, p. 6.

Phase 2 is currently in user acceptance testing (this phase of testing started in September) and is going extremely well. There is nothing which should affect the November 10th implementation date for Phase 2.[4] With this change, workers will not be able to terminate eligibility prior to the end of the continuous eligibility period, unless they have an allowable reason. See Dec. of N. Lewis, pg. 6. With the Phase 2 implementation, **the maintenance of continuous eligibility becomes a systems-driven function**. Dec. of N. Lewis, p. 6.

Another change that occurred as part of the implementation of the ACA, was federal CMS' modification to Medicaid coverage categories. Federal CMS has moved from many different mandatory and optional coverage categories to five primary coverage groups for families whose eligibility is based on income: children, pregnant women, parents or caretakers, and a new group for young adults who were covered by Medicaid at the time they aged out of foster care.[5] Children whose eligibility is based on family income are generally assigned to an

[4] / MES is being and has been developed by Deloitte, LLP ("Deloitte"). The implementation of Phase 1 was on time and within budget. There were an extraordinarily small number of systems issues that had to be addressed as part of the implementation. The implementation of Phase 2 is likewise consistent with the timeline developed for implementation and is within budget. Based on prior experience, no issues are anticipated with implementation of Phase 2. Dec. of S. Poirier.

[5] / The reduction in the number of available coverage categories for Medicaid based on family income is significant because one of the actions which triggered plan assignments at AHCA was changes in coverage categories - as the Florida Medicaid Management Information System (FMMIS) construed certain communications about these

age based coverage category. Children under the age of 1 are in the MMI category (unless they are presumptively eligible newborns, discussed further below). Children who are at least one year old but less than 19 years of age are in the MMC category. Children between 19 and 21 years of age are in the MO Y category. Dec. of N. Lewis, p. 2-3, Dec. of D. Laffey, p. 2.

A newborn, whose mother has applied for, has been determined eligible, and is receiving Medicaid on the date of the child's birth, is eligible for Medicaid. The infant is deemed to have applied for and been determined eligible for Medicaid on the date of birth and remains eligible for one year so long as the mother remains eligible (or would remain eligible if pregnant). 42 C.F.R. §435.117(a). This is also referred to as a presumptively eligible newborn and the coverage category is PEN. This coverage has not changed since the trial. However, infants will now be in one of two coverage categories if their Medicaid coverage is based on income, either the MMI coverage category already mentioned, or the PEN coverage category. In either event, their period of continuous eligibility is at least one year. Dec. of D. Laffey, p. 2.

Another change that has occurred with the implementation of the ACA has been that DCF is able to perform passive renewals. DCF is able to take the information available to it from the original application, any updates in the system, and through data verification through the FDSH and other sources, and, if the information is sufficient to confirm continued eligibility, DCF may renew Medicaid without the need for any application on behalf of the child. Dec. of N. Lewis, p. 6. This too is a new requirement adopted by federal CMS. *See* 42 C.F.R. § 435.916(a)(2).

In two important respects, the application process for Medicaid has been simplified. First, DCF has adopted a single, streamlined paper application, which has been approved by

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coverage category changes as signaling that a child was newly eligible for Medicaid. S.M. is an example of a child who had such changes in coverage categories.

federal CMS. That application may be used to apply for services either through the KidCare Program or through DCF. Dec. of N. Lewis, p. 3-4. The requirement of a single, streamlined application approved by federal CMS is new. 42 C.F.R. § 435.907(b)(2). Second, part of the work by the MES vendor has been to develop a new user driven self-service portal. Dec. of S. Poirier, p. 2; Dec. of J. Glisson. The information sought for a Medicaid application through the self-service portal is consistent with what is required by the single, streamlined application. DCF is making even more efforts to streamline the Medicaid only application (including the self-service portal) with changes that will be implemented November 10, 2014. Dec. of N. Lewis, pp. 3-4, Dec. of J. Glisson; Dec. of S. Poirier, p. 3.

II. The post-trial experiences of the individual plaintiffs support the mootness of Plaintiffs' claims.

All of the named Plaintiffs remain eligible for Medicaid, with the implementation of the changes required by the ACA. N.R. is eligible in an adoption assistance category, as is L.C. Nathaniel Gorenflo and N.V. are eligible for Medicaid because they receive S.S.I. The remaining children are eligible for Medicaid based on family income using the MAGI standard. K.K., J.S., and S.M. are eligible in the MM C category. J.W., who is now over 18 is eligible in the MO Y category. Since the implementation of the MES system and the changes in eligibility coverage categories, K.K., J.S., S.M. and J.W. have experienced no breaks in their Medicaid eligibility. Dec. of D. Laffey, p. 1.

There are two named plaintiffs for whom additional information is provided to explain changes in their Medicaid. Although J.W. was previously eligible for full Medicaid, he was determined to be eligible for Medicaid in the medically needy category (NO Y) on December 1, 2013, because his grandmother's income was considered in determining his Medicaid eligibility, putting him over the income threshold for full Medicaid. A recent review determined that the

consideration of J.W.'s grandmother's income was optional in determining his eligibility. Therefore, his Medicaid eligibility was re-determined without considering his grandmother's income, and he was found to be eligible for full Medicaid in the MO Y coverage group. He remains in that coverage group. Dec. of D. Laffey, pp. 4-5.

J.W.'s Medicaid coverage categories changed several times between April 1, 2012, and December 1, 2013, because of changes in his household. On April 20, 2012, on release from a facility, he was placed in his grandmother's household in a coverage category which applied to a caretaker or parent with one or more children in the household. On May 7, 2012, his aunt applied for him to be on Medicaid in her household, but only he would be covered by Medicaid. This caused him to be placed in a different Medicaid coverage category. He remained in this coverage category until July 31, 2013, when his grandmother applied for him to be on Medicaid as part of her household (in a category involving a caretaker and one or more children). These changes in coverage categories were driven by the old Medicaid eligibility rules. Under the new coverage categories, so long as his income does not exceed established thresholds, he will remain eligible in the MO Y category until he reaches 22 years of age. Dec. of D. Laffey, pp. 3-6.

Regarding S.M., he also experienced changes in coverage categories before implementation of the ACA, dictated by changes in his household. These were not errors, but the result of application of the old Medicaid coverage categories. Additionally, there was a circumstance in 2012 where his Medicaid coverage did not "build" properly because, even though he was living with his father, the eligibility system was counting child support from the father (which he was not receiving) as income. While the problem was fixed, and he was given coverage for the entire time period, that same problem and the changes in coverage categories could not recur for S.M. after January 1, 2014 for two reasons. First, to the extent that S.M.'s

eligibility for Medicaid is based on his family's income, he will remain in a single coverage category, the MM C category, until he turns 19 (so long as the family income is not higher than 133% of the Federal Poverty Level). More importantly, child support is not considered income (or considered in Medicaid eligibility) now, because of the new MAGI eligibility standard (implemented effective January 1, 2014). MAGI considers taxable income in determining eligibility, and since child support is not considered taxable income, it is not considered at all in determining Medicaid eligibility. Dec. of D. Laffey, pp. 6-7.

All of these changes render the claims against DCF moot. However, should the Court determine that the claims are not moot, then the record on liability is so stale, that it should be reopened to consider this new evidence.

MEMORANDUM OF LAW

I. The claims against DCF are moot.

"A case becomes moot—and therefore no longer a 'case' or 'controversy' for purposes of Article III—'when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.'" *Already, LLC v. Nike, Inc.*, 133 S.Ct. 721, 726-27 (2013), *citing Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (per curiam) (some internal quotation marks omitted). As is the case here, mootness may affect some claims while other live claims remain, supplying the constitutional requirement of a case or controversy, *Powell v. McCormack*, 395 U.S. 486, 497 (1969), but this Court has a live case or controversy only with respect to the non-moot claims. Dismissal is warranted on mooted issues, even if the entire case is not moot. *See e.g., BankWest, Inc. v. Baker*, 446 F.3d 1358, 1368 (11th Cir. 2006) (addressing what to do when an issue becomes moot on appeal).

In general terms, "so long as the controversy is still live with respect to some members of the class at the time the appellate court reviews the case, and the named plaintiff had a personal stake in the action at the time the class was properly certified, a class action is not moot." *Rocky v. King*, 900 F.2d 864, 867 (5th Cir. 1990). This means that if none of the class members, including the named Plaintiffs, have a personal stake in the action, a class action will be moot. Likewise, if none of the class members, including the named Plaintiffs have a personal stake in some of the same claims in the case, those claims are moot. *See also Franks v. Bowman Transp. Co., Inc.*, 424 U.S. 747, 755-56 (1976) ("Given a properly certified class action, *Sosna* contemplates that mootness turns on whether, in the specific circumstances of the given case at the time it is before this Court, an adversary relationship sufficient to fulfill [the requirement of concrete adversity] exists").

"[I]f, . . . events transpire that make it impossible for this court to provide meaningful relief, the matter is no longer justiciable." *Rich v. Secretary, Florida Dept. of Corr.*, 716 F.3d 525, 531 (11th Cir. 2013), *citing Beta Upsilon Chi Upsilon Chapter at the Univ. of Fla. v. Machen*, 586 F.3d 908, 915 (11th Cir. 2009).

> Justiciability is the term of art employed to give expression to this ... limitation placed upon federal courts by the case-and-controversy doctrine. A claim is justiciable if it is definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character .... The justiciability doctrines define the judicial role; they determine when it is appropriate for the federal courts to review a matter and when it is necessary to defer to the other branches of government.

United States v. Rivera, 613 F.3d 1046, 1049-50 (11th Cir. 2010) (internal citations omitted) (Court found no justiciability over Appellant's challenge to a finding of fact in an order, because the appeal would not remedy a tangible injury to Appellant, and would not affect the

government). Thus, this Court has no Article III jurisdiction over claims for which the Court can offer no meaningful relief.

Here DCF has acquired a computer system to address the changes in eligibility determination required under the ACA, but has also leveraged the purchase to include a computer fix to continuous eligibility. This provides Plaintiffs with the relief they sought in this action (a fix to the issue of continuous eligibility - even though Defendants dispute that the problem was ever a systemic issue). And there is a simplified Medicaid-only application, approved by federal CMS which addresses Plaintiffs' concerns about any complexity to the application. The self-service portal has been modified to make it more user friendly, all in response to ACA changes.

The genesis for the changes was a change in federal law (a change which is not temporary, and therefore, not subject to termination effective December 31, 2014). There is no evidence that any individual plaintiff has experienced an interruption in Medicaid eligibility at all since the implementation of the ACA changes. None of the exceptions to the Mootness Doctrine apply. Because these changes have made it impossible to award any meaningful relief, Plaintiffs' claims against DCF must be dismissed.

II. Alternatively, the Court should exercise its discretion to reopen the record on liability to allow presentation of evidence regarding the changes in the Medicaid application and eligibility process, to allow DCF to prove that no finding of liability should be made.

This Court has the authority to reopen the record after the parties have rested, when new evidence exists, even in the absence of a rule expressly authorizing this. *See, e.g., Caracci v. Brother International Sewing Machine Corp. of La.*, 222 F. Supp. 769 (E.D. La. 1963), *aff'd by*

341 F.2d 377 (5th Cir. 1965).[6] In *Caracci*, after the close of the trial but before a decision was rendered, defendant argued that there was no evidence to support compensatory damages. The plaintiff moved to reopen the case, and the court agreed to allow submission of the missing evidence. The court noted that a motion to reopen the record made before any indication of the court's decision would be considered more favorably than would be the case if a decision has been rendered (even if findings of fact and conclusions of law had not been formally entered). Regarding the lack of any rule authority, the court stated:

> Even though there is no express statutory provision of substantive law specifically allowing the reopening of a trial, the court finds that such has become a rule of law supplied by jurisprudence. It appears to be a cannibalization of those qualities found in Rules 59 and 60, Federal Rules of Civil Procedure . . . .

Caracci, 222 F. Supp. 771. The Court further noted that "the purpose of [a motion to reopen the record] is to seek the right to offer additional evidence before the Court has reached a final decision thereon, so that the Court may have all of the facts upon which it can render full justice on the merits of the plaintiff's cause of action." *Id*.

In *In re United Refuse L.L.C.*, No. 04-11503-RGM, 2007 WL 1695332 (E.D. Va. Bankruptcy Jun., 7, 2007), the court applied similar standards as would govern a motion brought under Rule 59, Fed. R. Civ. P., stating:

> A motion to reopen a case to present additional evidence considers similar factors. A court should consider the diligence of the movant. The proffered evidence should not be cumulative. It should affect the outcome of the case by, for example, offering a new theory of liability or present a significant alteration of the evidence presented at trial. The prejudice to the opposite party resulting from the delay in discovering the proffered evidence should be considered. The court should consider whether the decision has been announced.

In re United Refuse L.L.C., 2007 WL 1695332 *3 (internal citations omitted).

[6] / In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981), the Eleventh Circuit adopted as binding precedent all decisions handed down by the former Fifth Circuit before October 1, 1981.

Yet another authority concludes that the standards applicable to Rule 59 or Rule 60(b) motions do not fully apply to a motion to reopen the factual record made on other grounds. "Although similar to a Rule 59 or Rule 60(b) motion based on newly discovered evidence, a motion to reopen does not require that the evidence be newly discovered or that it could not have been discovered during the pendency of the trial by a party acting with due diligence." 12 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, § 59.13(3)(c) (3d Ed. 2013). "Further, the Court must decide the motion in the interests of fairness and justice." *Id*.

This Court should exercise its discretion to reopen the record to allow submission of the substantial and significant new evidence described herein. Here, the evidence at issue is such that it could not have been presented prior to the close of trial, because the evidence is about events that have occurred since trial. Also, many of the events were the result of changes in federal law (the ACA), changes in state law, and the need for federal approval before implementing a section 1115 Waiver (as amended).[7] While Plaintiffs may be expected to argue that the delay in presentation of this evidence prejudices them (because they continue to wait for increased reimbursement rates), there is no evidence of a delay on the part of Defendants in discovering the proffered evidence. Rather, this is a circumstance where evidence has only become available through the changes in law and action by federal CMS. Therefore, this factor should not weigh against reopening the record. Finally, the Court has not announced a decision. For all of these reasons, the Court should exercise its discretion to reopen the record on liability.

WHEREFORE Defendant moves this Court to dismiss Plaintiffs' claims as moot. In the alternative, Defendant moves this Court to reopen the record to allow Defendant to present evidence about the significant and substantial changes which have occurred to the application

[7] / The reference to the section 1115 Waiver is to a provision of the Social Security Act codified at 42 U.S.C. § 1315.

and Medicaid eligibility determination process which should result in a determination of no liability to support prospective relief in this cause.

CERTIFICATE OF CONFERRING WITH OPPOSING COUNSEL

Regarding the request for dismissal, no conferral with opposing counsel is required. Regarding the alternative request to reopen the record, the undersigned emailed Plaintiffs' counsel on October 22, 2014, seeking their position on this motion. The same day, Mr. Singer emailed the undersigned stating: "Please send us the motion if you would like us to take a position as we have no idea based on your email as to the alleged grounds." The undersigned emailed Mr. Singer in return, providing a brief summary of the grounds for both this motion and the accompanying motion filed by the official capacity agency heads of the Department of Health and the Agency for Health Care Administration as follows: "

> The basis for the motion is the substantial and significant changes across all three state agencies in the way Medicaid services are delivered and eligibility is determined, due to implementation of the 1115 waiver and the ACA (as it relates to Medicaid eligibility.

On October 23, 2014, Mr. Singer responded, advising that Plaintiffs could not consent to this motion for two reasons. Mr. Singer contended that Defendants had not provided any meaningful information regarding the substantive basis for the request (which Defendants dispute), and Mr. Singer objected to the timing of the motion, one week before the Court indicated it would issue findings. As to Mr. Singer's latter objection, Defendants have been working diligently to compile all of the affidavits and evidence filed with this motion, and believe that this record will support Defendants' diligence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been served by Notice of Electronic Filing on Stuart H. Singer, Esq., Carl E. Goldfarb, Esq., Damien J. Marshall, Esq., and Sashi Bach Boruchow, Esq., Boies, Schiller & Flexner LLP, 401 East Las Olas Blvd., Suite 1200, Fort Lauderdale, FL 33301, and Robert D.W. Landon, III, Esquire, Kenny Nachwalter, P.A., 201 South Biscayne Boulevard, 1100 Miami Center, Miami, Florida 33131-4327; and by United States Mail on Benjamin D. Geffin, Esq., Public Interest Law Center of Philadelphia, 1709 Benjamin Franklin Parkway, Second Floor, Philadelphia, PA 19103; and Louis W. Bullock, Esq., Bullock, Bullock, & Blakemore, 110 W. 7th Street, Tulsa, Oklahoma 74112, on October 23, 2014.

/s/ Stephanie A. Daniel
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