UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 05-23037-CIV-JORDAN/O'SULLIVAN

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.
_____/

DEFENDANTS' MEMORANDUM OF LAW ADDRESSING THE IMPACT OF ARMSTRONG v. EXCEPTIONAL CHILD CARE CENTER, INC.

Defendants, the official capacity agency heads of the AGENCY FOR HEALTH CARE ADMINISTRATION (AHCA), the DEPARTMENT OF CHILDREN AND FAMILIES (DCF), and the DEPARTMENT OF HEALTH (DOH), pursuant to the Court's Order Requiring the Filing of Memoranda of Law, D.E. 1313, submit the following memorandum of law regarding the impact of *Armstrong v. Exceptional Child Care Center, Inc.*, 135 S.Ct. 1378, 1385 (2015), on Plaintiffs' claims. Based on *Armstrong*, all of the Plaintiffs' claims must be dismissed with prejudice.

PLAINTIFFS' CLAIMS

Plaintiffs' Second Amended Complaint contains three Claims that survived Defendants' Motion to Dismiss and summary judgment. Compare D.E. 220-2, D.E. 476 & D.E. 541. Those claims include the following:

Count I - That the official capacity defendant agency heads of all three agencies have failed to provide required "medical assistance" with reasonable promptness, pursuant to 42 U.S.C. § 1396a(a)(8); and that the official capacity defendant agency heads of DOH and AHCA have also violated § 1396a(a)(10) by failing to provide required "medical assistance" with reasonable promptness. Plaintiffs claim that "medical assistance" means:

> regular check-ups at intervals determined by the state after consultation with medical and dental organizations involved in children's healthcare, which check-ups must include a comprehensive health and development history (including assessments of physical and mental health), a comprehensive unclothed physical examination, laboratory tests, including lead blood level assessment, age-appropriate immunizations according to the schedule of the Advisory Committee on Immunization Practices, "anticipatory guidance" for children and their caretakers as part of the basic child healthcare examination, and vision, dental, and hearing examinations. 42 U.S.C. § 1396d(a) and (r).

D.E. 220-2, ¶86.

Plaintiffs further claim that "medical assistance" means "diagnoses, then treatment or other measures to correct or ameliorate Plaintiffs' defects and physical, dental and mental illnesses and conditions, whether or not such services are covered under Florida's Medical Assistance program for adults. 42 U.S.C. § 1396d(r)." D.E. 220-2, ¶87.

Plaintiffs allege three principle reasons exist for the purported failure to provide "medical assistance" with reasonable promptness: (1) inadequate reimbursement rates, D.E. 220-2, ¶77; (2) so called administrative barriers, such as reassignment of a child from one primary care provider to another, and incorrect termination of the child's Medicaid eligibility, D.E. 220-2, ¶78; and (3) the failure of Defendants [Plaintiffs do not specify which Defendants] to adequately monitor Medicaid Health Maintenance Organizations and particularly to monitor the adequacy of their provider panels, D.E. 220-2, ¶81-82.

As discussed below, Count I must be dismissed with prejudice, because the statutes on which Plaintiffs rely do not create privately enforceable rights and the statutes cannot be enforced through the Court's equitable powers. Further, even if they did create enforceable rights (which they do not), Plaintiffs' claim that §§ 1396a(a)(8) and (10) cover challenges to the adequacy of reimbursement rates impermissibly expands the reach of these statutes beyond what Congress intended.

Count II - That Defendants DOH and AHCA fail to pay sufficient reimbursement rates to medical and dental providers to ensure that there are enough providers so that care and services are available under Medicaid at least to the extent that such care and services are available to the general population in the geographic area, in violation of 42 U.S.C. § 1396a(a)(30)(A). However, as the Supreme Court has stated: "In our view the Medicaid Act implicitly precludes private enforcement of §30(A), and respondents cannot, by invoking our equitable powers, circumvent Congress's exclusion of private enforcement." *Armstrong*, 135 S.Ct. at 1385. Therefore, Count II should be dismissed with prejudice against DOH and AHCA.

Count IV - This claim is labeled as an "outreach" claim.[1] Plaintiffs claim that AHCA has failed to "effectively" inform Plaintiffs of the medical assistance available to them under the Medicaid program, and has failed to inform uninsured but eligible children about the Medicaid Program, in violation of 42 U.S.C. § 1396a(a)(43). D.E. 220-2, pp. 34-36. The Court previously dismissed this claim as to the Surgeon General of DOH. D.E. 541, p. 19. More recently, the Court also dismissed this claim against the Secretary of DCF, based on the repeal of section 409.9122, Florida Statutes, which eliminated any argument that DCF had a statutory

[1] / Plaintiffs also claim that Defendants have a duty to "monitor the provision and quality of services and ensure appropriate coordination of services received from different providers, and agencies." However, nowhere do they explain what statute gives rise to such a duty. D.E. 220-2, ¶ 112.

responsibility to provide any outreach to Medicaid enrolled children.[2] Now, this claim is pending only against AHCA, and it should likewise be dismissed because § 1396a(a)(43) does not create enforceable rights and is not enforceable through the Court's equitable powers.

ARGUMENT

While Count II is subject to dismissal with prejudice, Counts I and IV must be dismissed as well because Congress has indicated its intention to foreclose private enforcement of these statutes by providing only a limited remedial scheme for the enforcement of the Medicaid state plan requirements contained in § 1396a. Stated otherwise, Congress has not unambiguously stated its intention that these statutes be privately enforceable. This combined with the judicially unadministrable nature of the referenced statutes leads to the inescapable reason that they are not enforceable by this Court in the exercise of its equitable powers.

I. Armstrong, Gonzaga, and Wilder.

To understand *Armstrong*, it is important to understand the case itself, and the evolution of the Court's cases discussing when statutes create enforceable rights. Similar to the instant case, *Armstrong* involved a lawsuit by providers challenging the failure of the Idaho Department of Health and Welfare (IDHW) to amend certain Medicaid reimbursement rates. The district court entered summary judgment for the providers under § 1396a(a)(30)(A). While the instant suit includes recipients also, this is immaterial to the applicability of the case to the facts in this matter. The Ninth Circuit affirmed the decision of the district court, based on a conclusion that the providers could sue under the Supremacy Clause to seek injunctive relief. *Exceptional Child*

[2] / Previously, Plaintiffs persuaded the Court that a statutory duty (described in the now repealed section 409.90122(2)(c), Florida Statutes) on the part of DCF and AHCA to "cooperate to ensure that each Medicaid recipient receives clear and easily understandable information" about certain aspects of managed care detailed in the statute, equated to an unfettered duty on the part of DCF to provide outreach to the uninsured about Medicaid and to Medicaid enrollees about the child health check up program. D.E. 375 p. 9 & 541.

Center, Inc. v. Armstrong, No. 12-35382, 567 Fed. Appx. 496 (9th Cir. Dec. 12, 2013). On certiorari review, the Supreme Court determined that the Supremacy Clause of the United States Constitution did not confer a right of action under § 1396a(a)(30)(A). The Court further held that apart from the Supremacy Clause, the suit could not proceed in equity.

The Court stated: "In our view the Medicaid Act implicitly precludes private enforcement of §30(A), and respondents cannot by invoking our equitable powers, circumvent Congress's exclusion of private enforcement." *Armstrong*, 135 S.Ct. at 1385. The Court looked at two different aspects of § 1396a(a)(30)(A) as establishing "Congress's intent to foreclose equitable relief." The first was that "the sole remedy Congress provided for a State's failure to comply with Medicaid's requirements—for the State's 'breach' of the Spending Clause contract—is the withholding of Medicaid funds by the Secretary of Health and Human Services." *Id.* (citing 42 U.S.C. § 1396c).[3] The second aspect was what the Court characterized as the "unadministrable nature of §30(A)'s text":

> ***It is difficult to imagine a requirement broader and less specific*** **than § 30(A)'s mandate that** ***state plans provide for payments that are "consistent with efficiency, economy, and quality of care,"*** all the while **"*safeguard[ing] against unnecessary utilization of ... care and services.*"** Explicitly conferring enforcement of this judgment-laden standard upon the Secretary alone establishes, we think, that ***Congress "wanted to make the agency remedy that it provided exclusive,"*** thereby ***achieving "the expertise, uniformity, widespread consultation, and resulting administrative guidance that can accompany agency decisionmaking,"*** and ***avoiding "the comparative risk of inconsistent***

[3] / The Court stated: "The provision for the Secretary's enforcement by withholding funds might not, by itself, preclude the availability of equitable relief." *Armstrong*, 135 S.Ct. at 1385 (citing *Virginia Office for Protection and Advocacy v. Stewart*, 563 U.S. 247, __ n. 3, 131 S.Ct. 1632, 1638–1639, n. 3, 179 L.Ed.2d 675 (2011) (VOPA)). However, the footnote referenced by the Court in VOPA made it clear that where an alternative congressionally-established remedial scheme would be undermined by permitting *Ex Parte Young* suits, Congress has foreclosed recourse to the doctrine. In this case, by establishing the remedial scheme in § 1396c, and for the reasons discussed herein, allowing enforcement of provisions of § 1396a by injunctive relief would undermine the purposes of the statutes on which Plaintiffs rely.

> ***interpretations and misincentives that can arise out of an occasional inappropriate application of the statute in a private action."***

Id. (citing *Gonzaga Univ. v. Doe*, 536 U.S. 273, 292 (2002) (BREYER, J., concurring in judgment)) (emphasis added).

The majority opinion (consisting of Parts I-III) reflects the Court's concern that statutory provisions which require enforcement of "judgment-laden" standards be appropriately enforced by the Secretary of the U.S. Department of Health and Human Services (HHS) as Congress intended and not through private actions. This would ensure that HHS's "expertise, uniformity, widespread consultation, and resulting administrative guidance could be brought to bear on these issues." *Id*. It would likewise avoid inconsistent interpretations of statute and avoid unintended consequences which may result. *Id*.

Significant to the issues in this case, the Court made it clear that its "later opinions plainly repudiate the ready implication of a § 1983 action that *Wilder* [*v. Virginia Hospital Assn*., 496 U.S. 498 (1990)] exemplified." *Id.* at 1387 n. (citing *Gonzaga Univ.*, 536 U.S. at 283). *Wilder* involved a challenge brought by a hospital association to the reimbursement rates for hospitals. Plaintiffs sought to enforce the so-called Boren Amendment (which has long since been repealed). The Court in *Wilder* found that the Boren Amendment created rights enforceable by the plaintiffs under § 1983. In *Wilder*, in determining whether the Boren Amendment created enforceable rights within the meaning of § 1983, the Court found that the inquiry "turns on whether "the provision in question was intend[ed] to benefit the putative plaintiff." *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 509 (1990).

In *Gonzaga Univ.*, cited favorably by the Court in *Armstrong*, the Court considered the issue of whether the student privacy provisions in the Family Educational Rights and Privacy Act

of 1974 (FERPA), 88 Stat. 571, 20 U.S.C. § 1232g, created rights enforceable under § 1983. The Court made it clear that post *Wilder* (and a companion case, *Wilder v. Virginia Hospital Assn.*, 496 U.S. 498 (1990)), the Court's "more recent decisions, however, have rejected attempts to infer enforceable rights from Spending Clause statutes":

> ***Some language in our opinions might be read to suggest that something less than an unambiguously conferred right is enforceable by § 1983***. *Blessing*, for example, ***set forth three "factors" to guide judicial inquiry into whether or not a statute confers a right: "Congress must have intended that the provision in question benefit the plaintiff***," "the plaintiff must demonstrate that the right assertedly protected by the statute is not so 'vague and amorphous' that its enforcement would strain judicial competence," and "the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms."
>
> ***This confusion has led some courts to interpret Blessing as allowing plaintiffs to enforce a statute under § 1983 so long as the plaintiff falls within the general zone of interest that the statute is intended to protect; something less than what is required for a statute to create rights enforceable directly from the statute itself under an implied private right of action***. Fueling this uncertainty is the notion that our implied private right of action cases have no bearing on the standards for discerning whether a statute creates rights enforceable by § 1983. ***Wilder* appears to support this notion**, 496 U.S., at 508–509, n. 9, 110 S.Ct. 2510, while *Suter*, 503 U.S., at 363–364, 112 S.Ct. 1360, and *Pennhurst*, 451 U.S., at 28, n. 21, 101 S.Ct. 1531, appear to disavow it.

Gonzaga Univ., 536 U.S. at 282 (emphasis added). The Court went on to expressly " reject the notion that our cases permit *anything short of an unambiguously conferred right* to support a cause of action brought under § 1983. Section 1983 provides a remedy." *Id.* at 283 (emphasis added).

Consequently, "where the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit, whether under § 1983 or under an implied right of action." *Id.* at 286. In determining that FERPA did not create enforceable rights, the Court noted that it lacked "the sort of 'rights-creating' language critical to showing the requisite congressional intent to create new rights." *Id.* at 287.

Specifically, the language of FERPA was "two steps removed" from the type of rights creating language which was present for example in Titles VI and IX ("No person . . . shall . . . be subject to discrimination"). *Id.* Instead, the statute prohibited the Secretary of the Department of Education from making funding available to institutions which had prohibited policies or practices. *Id.* The statute had an aggregate and not an individual focus, because educational institutions receiving federal funding could avoid termination of funding so long as they substantially complied with FERPA. *Id.* at 288.

The Court's opinion in *Armstrong*, along with the decisions favorably cited by the Court in Part III of the opinion, require dismissal of Plaintiffs' remaining claims under §§ 1396a(a)(8), (10), and (43) because these statutes do not create enforceable rights and they are not enforceable by this Court using its equitable powers.

II. <u>The text and structure of the statutes</u>.

All of the statutes on which Plaintiffs rely are part of the "contents" of a State Plan for medical assistance. Section 1396a describes the provisions that must be included in a state plan for medical assistance. Relevant to Plaintiffs' claims, the state plan must, as part of its contents:

> (8) provide that all individuals wishing to make application for medical assistance under the plan shall have opportunity to do so, and that such 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), (21), and (28) of section 1396d(a) of this title, to--
>
> [specified individuals]
>
> ****

> (43) provide for
>
> (A) informing all persons in the State who are under the age of 21 and who have been determined to be eligible for medical assistance including services described in section 1396d(a)(4)(B) of this title, of the availability of early and periodic screening, diagnostic, and treatment services as described in section 1396d(r) of this title and the need for age-appropriate immunizations against vaccine-preventable diseases,
>
> ****

42 U.S.C. § 1396a (2014).

These statutes merely describe the necessary contents of a Medicaid State Plan and are several "steps removed from the type of rights creating language" necessary to confer a right enforceable under § 1983. *See Gonzaga*, 536 U.S. at 287. Further, Congress has established the method by which the provisions of § 1396a may be enforced in § 1396c. The Secretary, after reasonable notice and an opportunity for hearing, may withhold federal funds if the Secretary finds that, "in the administration of the plan there is a failure to *comply substantially* with any such provision," or "that the plan has been so changed that it no longer complies with the provisions of section 1396a." *Id.* Congress only intended that states suffer adverse consequences if they were not in substantial compliance with the requirements of §1396a, and Congress expressly left the determination of such substantial compliance to the Secretary of HHS, and not the courts. The yardstick of "substantial compliance" suggests an aggregate rather than an individual focus. *Gonzaga*, 536 U.S. at 288; and *Blessing v. Freestone*, 520 U.S. 329, 343-44. *Cf. 31 Foster Children v. Bush*, 329 F.3d 1255, 1272 (11th Cir. 2003).

Further, the phrase "reasonable promptness" is no more susceptible to judicial determination than the phrase "reasonable efforts" found by the Court to be unenforceable in a private action in *Suter v. Artist M.*, 503 U.S. 347 (1992). *Suter*, which was favorably cited in

Gonzaga, dealt with a provision of the Adoption Assistance and Child Welfare Act of 1980 (another provision of the Social Security Act) that is strikingly parallel to the provisions at issue here:

> As relevant here, the Act provides: "(a) ***Requisite features of State plan***
>
> "In order for a State to be eligible for payments under this part, ***it shall have a plan approved by the Secretary which***— . . . .
>
> "(3) provides that the plan shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them; . . . . .
>
> "(15) effective October 1, 1983, provides that, in each case, ***reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his hom***e, and (B) to make it possible for the child to return to his home...." §§ 671(a)(3), (15).

Suter, 503 U.S. at 351 (citing 42 U.S.C. §671(a)(3), (15)) (emphasis added). In *Suter*, the Court found that no statutory guidance was provided by Congress as to how "reasonable efforts" was to be measured, and that its meaning would "obviously vary with the circumstances of each individual case." *Id.* at 360. It further noted that other provisions of the Act provided enforcement mechanisms, via the Secretary of HHS's authority to reduce or eliminate payments to a state on the finding that the plan no longer complies with the statute or there is a substantial failure in the administration of the plan, such that the state is not complying with its plan. *Id.*

In summary, the text of §§ 1396a(a)(8), (10), and (43) do not establish any "unambiguously conferred rights" sufficient to either support enforcement under § 1983 or through this Court's authority in equity. *Cf. 31 Foster Children v. Bush*, 329 F.3d at 1269. They are part of a spending clause statute and merely describe some of the contents of a Medicaid State Plan. They do not have the requisite rights creating language needed to render them privately enforceable. Further, they have an aggregate rather than an individual focus as

evidenced by the enforcement mechanisms set forth in § 1396c. Consequently, Plaintiffs have no privately enforceable right under §1983 to enforce §§ 1396a(a)(8), (10), or (43).

III. The intervening decision in Armstrong has effectively overruled Doe 1-13 v. Chiles and cases like it which rely on Wilder.

The case which Plaintiffs are likely to rely on in arguing that §1396a(a)(8) continues to create enforceable rights is *Doe 1-13 v. Chiles*, 136 F.3d 709 (11th Cir. 1998) (*Doe v. Chiles*). In that case, the Eleventh Circuit, relying heavily on the decision of the Supreme Court in *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990), and without the benefit of the Supreme Court's decision in *Gonzaga* —determined that § 1396a(a)(8) created an enforceable right to reasonably prompt provision of assistance that was further defined in regulations. Now that *Wilder* has been repudiated by the Supreme Court, *Armstrong*, 135 S.Ct. at 1387 ("our later opinions plainly repudiate the ready implication of a § 1983 action that *Wilder* exemplified"), the reasoning in *Doe v. Chiles* is "clearly irreconcilable" with the reasoning of the Supreme Court in both *Gonzaga* and *Armstrong*. As such, it has been effectively overruled.

For example, in determining whether § 1396a(a)(8) creates enforceable rights, the court in *Doe v. Chiles* applies as one key factor the issue of whether Congress has "intended that the provision in question benefit the plaintiff". *Doe v. Chiles*, 136 F.3d at 716 (citing *Blessing* and *Wilder*). This factor stems from language in prior Supreme Court opinions that "might be read to suggest that something less than an unambiguously conferred right is enforceable." *Gonzaga*, 536 U.S. at 282. This is but one example of why *Doe v. Chiles*, which relies heavily on *Wilder*, is effectively overruled.

The other cases on which Plaintiffs might rely in arguing that § 1396a(a)(8) creates enforceable rights also heavily rely on *Wilder*, which is no longer good law. *Romano v.*

Greenstein, 721 F.3d 373 (5th Cir. 2013); *Doe v. Kidd*, 501 F.3d 348 (4th Cir. 2007); *Bertrand ex rel. Bertrand v. Maram*, 495 F.3d 452 (7th Cir. 2007); *Sabree ex rel. Sabree v. Richman*, 367 F.3d 180 (3d Cir. 2004); *Harris v. Olszewski*, 442 F.3d 456 (6th Cir. 2006).

"When the reasoning of prior circuit authority is clearly irreconcilable with the reasoning or theory of an intervening higher authority, the Court should reject the prior circuit opinion as having been effectively overruled." *Lair v. Bullock*, 697 F.3d 1200, 1206 (9th Cir. 2012), (citing *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003)). Further, those issues need not be identical to be controlling. *Id.* (citing *Miller v. Gammie*, 335 F.3d at 900). Consequently, Plaintiffs have no legally cognizable private right of action under §1983 to enforce § 1396a(a)(8) and prior appellate court decisions to the contrary are no longer good law.

IV. Likewise, the cases finding that 42 U.S.C. § 1396a(a)(10) creates enforceable rights are effectively overruled, as they also heavily rely on Wilder.

There is no Eleventh Circuit case determining that § 1396a(a)(10) creates enforceable rights. All the authorities on this issue come from other circuits. Again these other circuits rely heavily on *Wilder* in determining that the statute creates enforceable rights. *Rodriguez ex rel. Rodriguez v. DeBuono*, 175 F.3d 227, 233 (2nd Cir. 1998); *Watson v. Weeks*, 436 F.3d 1152 (9th Cir. 2006); *Sabree ex rel. Sabree v. Richman*, 367 F.3d 180; *S.D. ex rel. Dickson v. Hood*, 391 F.3d 581 (5th Cir. 2004). As such, these decisions have been effectively overruled and Plaintiffs have no private right of action under §1983 to enforce § 1396a(a)(10).

V. The revision by Congress of the definition of medical assistance in 42 U.S.C. § 1396d in 2010 does not reflect an unambiguous intention that §§ 1396a(a)(8) and (10) create enforceable rights.

Plaintiffs may argue that the definition of "medical assistance" contained in 42 U.S.C. § 1396d somehow suggests Congress's intention that §§ 1396a(a)(8) and (10) create enforceable rights. Again, they would be in error. The term "medical assistance" (as referenced in § 1396a(a)(8) and (10)) has long been defined by statute. Prior to 2010, the statutory definition of the term was in relevant part: "The term 'medical assistance' means payment of part or all of the cost of" specified care and services. 42 U.S.C. § 1396d (2009). In 2010, Congress modified the definition so that it now reads: "The term "medical assistance" means payment of part or all of the cost of [specified] care and services or the care and services themselves, or both." 42 U.S.C. § 1396d (2014). While Congress clarified the definition in 2010, the revised definition provides no guidance as to when the term will mean payment of part or all of the cost of services or when it will mean actual provision of services. This is left to HHS to determine.

In clarifying the definition of "medical assistance," the House Report discussing the change indicated that it was modifying the definition because the meaning was consistent with "[f]our decades of regulations and guidance from the program's administering agency, the Department of Health and Human Services," and that Congress had never indicated a contrary meaning. HR Rep. 111-299 at 649 (2010). The House Report further indicated that various courts had interpreted the statute in a manner that was inconsistent. Some interpreted the phrase in light of the preexisting definition in § 1396d, while others interpreted the phrase as meaning actual provision of services. HR Rep. 111-299 at 650. At no point did the House express an intention that the phrase be privately enforceable. *Id.*

The House Report, which provides the only guidance about why the definitional change was made, more strongly supports the conclusion that enforcement (and interpretation) of §§ 1396a(a)(8) and (10) is best left to the Secretary of HHS. Per the House, HHS consistently

correctly interpreted the statute, while the courts did not. Enforcement of these statutes pursuant to the Secretary's authority under 42 U.S.C. § 1396c ensures that HHS expertise, as well as uniformity, widespread consultation, and resulting administrative guidance that can accompany agency decisionmaking are brought to bear on enforcement decisions. And HHS has provided guidance to states on its interpretation of "medical assistance," by providing time standards for eligibility determinations, 42 C.F.R. § 435.912 (time standards which have not been shown to be exceeded in this case), and by providing time standards for claims payment, 42 C.F.R. § 447.45. Likewise, it has provided guidance to states on timeliness in the context of EPSDT services, requiring that state Medicaid agencies "set standards for provision of EPSDT services which meet reasonable standards of medical and dental services." Further, state Medicaid agencies must ensure initiation of any required treatment within 6 months after a request for screening services. 42 C.F.R. § 441.56(e). However, these regulations are not enforceable in absence of a statute which creates enforceable rights. The detail provided in a regulation does not make an otherwise unenforceable statute enforceable. *Alexander v. Sandoval*, 532 U.S. 275, 284 (2001) (noting that authoritative interpretations of a statute are only enforceable if Congress intends that the statute itself be enforceable).

The decision whether a state Medicaid agency is substantially complying with these time standards in the administration of the state plan is best left to expertise of HHS, and not the Courts—particularly where the determination of whether medical assistance is provided with reasonable promptness will vary with the "circumstances of each individual case." *Suter v. Artist M.*, 503 U.S. 347, 360 (1992). Additionally, it is up to HHS to determine whether and in what context "medical assistance" will mean prompt payment, when it will mean prompt Medicaid eligibility determinations, and when it will mean prompt provision of services, and

what prompt means in each circumstance. For all these reasons, the revision to the definition of "medical assistance" in §1396d does not help Plaintiffs' argument that § 1396a(a)(8) and (10) are enforceable.

VI. Even if §§ 1396a(a)(8) and (10) created enforceable rights, which they do not, those rights would not afford Plaintiffs a right to challenge the adequacy of provider reimbursement rates.

It is clear from a review of Plaintiffs' declarations filed on April 8, 2015, that they do not view the posture of this case to have changed at all with the *Armstrong* decision. Their declarations both discuss perceived inadequacy of reimbursement rates and compare access to services in the commercial realm. *See, e.g.*, D.E. 1318-1, 1318-2, etc. Notwithstanding the clear statement that § 1396a(a)(30)(A) does not create enforceable rights, *see Armstrong*, 135 S.Ct. at 1385, Plaintiffs appear to believe that they may simply continue to challenge the adequacy of reimbursement rates under §1396a(a)(8) and (10). **But that would require this Court to ignore *Armstrong***, and the difficulties of making the judgment-laden determinations about adequacy of provider rates, which even *Doe 1-13* acknowledged was an onerous task. *Doe v. Chiles*, 136 F.3d at 717. Moreover, relying on these statutes to challenge the adequacy of provider payments would "broaden § 1396a(a)(8) far beyond its intended scope." *Oklahoma Chapter of Am. Acad. of Pediatrics v. Fogarty*, 472 F.3d 1208, 1214-15 (10th Cir. 2007).

As Justice Breyer acknowledged in his concurring opinion in *Armstrong*, § 30(A) "underscores the complexity and nonjudicial nature of the rate setting task." *Armstrong*, 135 S.Ct. at 1388. Justice Breyer further stated:

> To find in the law a basis for courts to engage in such direct rate-setting could set a precedent for allowing other similar actions, potentially resulting in rates set by federal judges (of whom there are several hundred) outside the ordinary channel of federal judicial review of agency decisionmaking. The consequence, I fear, would

> be increased litigation, inconsistent results, and disorderly administration of highly complex federal programs that demand public consultation, administrative guidance and coherence for their success. I do not believe Congress intended to allow a statute-based injunctive action that poses such risks (and that has the other features I mention).

Id. at 1389 (Justice Breyer, concurring opinion).

Any argument that Congress intended to allow Plaintiffs to challenge the adequacy of reimbursement rates via statutes which make absolutely no mention of rates is not just highly suspect but fatally flawed, particularly in the context of a Spending Clause statute, which is much in the nature of a contract between the state and the federal government. "The legitimacy of Congress's exercise of the spending power 'thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2602 (2012) (citing *Pennhurst State School and Hospital v. Halderman,* 451 U.S. 1, 17 (1981)).

Therefore, Plaintiffs can make no reasoned argument that any of the remaining statutes afford them an opportunity to challenge the adequacy of reimbursement rates or "access to care similar to that of the commercial population," another vague and undefined standard contained in § 1396a(a)(30)(A).

VII. Section 1396a(a)(43) has not been determined to create enforceable rights in any Eleventh Circuit case.

While the text and structure of § 1396a(a)(43) do not support a conclusion that the statute creates enforceable rights, Plaintiffs may argue that the issue of whether the statute creates enforceable rights was decided by the Eleventh Circuit in *31 Foster Children v. Bush*, 329 F.3d 1255. *See* D.E. 40, pg. 6. However, the posture of *31 Foster Children* on appeal was that "all the Medicaid Act claims [had] been settled and dismissed." 329 F.3d at 1262.

Notably, the district court case in *31 Foster Children* did not deal with outreach or § 1396a(a)(43)(A). *31 Foster Children v. Bush*, 329 F.3d at 1261 (describing one of the counts in the amended complaint as being brought pursuant 42 U.S.C. §§ 1396a(a)(43)(B), 1396(a)(43)(C), and 1396d(r)). The opinion does not analyze whether any provision of § 1396a(43) creates enforceable rights. There is simply no basis on which to argue that *31 Foster Children* is dispositive of whether § 1396a(43)(A) creates enforceable rights.

That leaves a single case, which the Sixth Circuit has stated "implicitly determined" that § 1396a(a)(43)(A) (and not subsections (B) or (C)) created enforceable rights. *John B. v. Goetz*, 626 F.3d 356, 362 (6th Cir. 2010), referring to *Westside Mothers v. Olszewski*, 454 F.3d 532, 544 (6th Cir. 2006). However, *Westside Mothers*, a non-binding case from another Circuit, contains no discussion of the basis for any determination that §1396a(a)(43)(A) might create enforceable rights. It is not dispositive on the issues here. Thus, there is no prior law upon which the Court can rely to permit the private Plaintiffs in this case to move forward with a private cause of action under § 1983 to enforce § 1396a(a)(43).

VIII. <u>This suit is barred by the Eleventh Amendment and must be dismissed for lack of jurisdiction because Ex Parte Young is inapplicable to Plaintiffs' suit against the official capacity defendants</u>.

"The power of the federal courts of equity to enjoin unlawful executive action is subject to express and implied statutory limitations." *Armstrong*, 135 S.Ct. at 1385. *Armstrong* also forecloses an action to enforce any other provision of § 1396a for the reasons described below.

As noted above, when Congress passed § 1396a, it crafted a remedial scheme in the event that a state failed to comply with the requirements of the State Plan provisions contained in that statute. That remedial scheme provided for withholding of federal funds by the Secretary of the

United States Department of Health and Humans Services if, after reasonable notice and an opportunity for hearing to the state Medicaid agency, the Secretary finds:

> (1) that the plan has been so changed that it no longer complies with the provisions of section 1396a of this title; or
>
> (2) that in the administration of the plan there is a failure to comply substantially with any such provision . . .

42 U.S.C. § 1396c. Under these circumstances where Congress has prescribed a detailed remedial scheme for the enforcement against a State of § 1396a, this "court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex Parte Young*, 209 U.S. 123 (1907)]." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 1132, 134 L.Ed.2d 252 (1996) (*Seminole Tribe*).

In *Seminole Tribe*, the Court resolved the issue of whether the doctrine of *Ex Parte Young* could be used to bring suit under the Indian Gaming Regulatory Act (IGRA) against a state official. The Court concluded that *Ex Parte Young* was inapplicable to the suit against the Governor of Florida brought under IGRA. As a result, the Eleventh Amendment barred the suit and required dismissal for lack of jurisdiction. The Court noted that, in IGRA, Congress provided for a remedial scheme allowing a court to only issue an order directing the State and the Indian tribe to conclude a compact within 60 days. If the parties disregard the Court's order, the only sanction was that a proposed gambling compact must be submitted by each party to a mediator who must select the compact which best embodies the terms of the Act. If the State fails to accept the compact selected by the mediator, then the only sanction against the state is that the mediator shall notify the Secretary of the Interior who must then prescribe regulations governing class III gaming on the tribal lands at issue. The Court further found that if the

relevant provision of IGRA could be enforced under *Ex Parte Young*, then the provision would be superfluous.

The Court further noted that "the fact that Congress chose to impose upon the State a liability that is significantly more limited than would be the liability imposed upon the state officer under *Ex Parte Young* strongly indicates that Congress had no wish to create" that liability under *Ex Parte Young*. 116 S.Ct. at 1133. In *Armstrong*, the Supreme Court once again noted the continuing applicability of these principles regarding *Ex Parte Young*, stating: "We have no warrant to revise Congress's scheme simply because it did not 'affirmatively' preclude the availability of a judge-made action at equity." *Armstrong*, 135 S.Ct. at 1386, citing to *Seminole Tribe*, 417 U.S., at 75.

Here, where Congress has expressly provided one method of enforcing the provisions of § 1396a, and where the challenged provisions are "difficult to manage" and "judgment laden" for the reasons already described above, Congress cannot have intended that the statutes be enforceable in equity. In fact, judicial involvement will impede Congress's purposes here. This Court is ill equipped to determine whether Florida Medicaid is in substantial compliance with the requirements of § 1396a, based on extremely limited anecdotal evidence (without any scientifically reliable evidence of issues regarding access). It is ill equipped to (and has no jurisdiction to) determine whether reimbursement rates should be modified, and, if so, by how much, so that rates also meet the judgment laden standards set forth in § 1396a(a)(30)(A). For all of these reasons, the Court should find that these statutes are not enforceable in equity.

CONCLUSION

This Court should dismiss with prejudice Plaintiffs' claims against Defendants, because the statutes on which Plaintiffs rely do not create privately enforceable rights or rights which

may otherwise be enforced through an exercise of the Court's equitable power. Alternatively, *Armstrong* requires the Court to determine that Plaintiffs may no longer pursue claims of inadequate reimbursement rates or seek as a judicial remedy in this case any change in reimbursement rates and those claims must be dismissed with prejudice.

REQUEST FOR HEARING

Defendants request that the Court schedule oral argument on the issues presented herein, as they are complex and outcome determinative. Many of the issues are matters of first impression after the Supreme Court's decision in *Armstrong*, and Defendants strongly believe that oral argument will be useful to the Court. Defendants estimate that the argument will take 2 hours.

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; Robert D.W. Landon, III, Esquire, Kenny Nachwalter, P.A., 201 South Biscayne Boulevard, 1100 Miami Center, Miami, Florida 33131-4327; and Benjamin D. Geffin, Esq., Public Interest Law Center of Philadelphia, 1709 Benjamin Franklin Parkway, Second Floor, Philadelphia, PA 19103; and by United States Mail on Louis W. Bullock, Esq., Bullock, Bullock, & Blakemore, 110 W. 7th Street, Tulsa, Oklahoma 74112, on April 17, 2015.

/s/ Stephanie A. Daniel
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