

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
CASE NO. 05-23037-CIV-JORDAN/O’SULLIVAN

FLORIDA PEDIATRIC SOCIETY/THE)
FLORIDA CHAPTER OF THE AMERICAN)
ACADEMY OF PEDIATRICS; FLORIDA)
ACADEMY OF PEDIATRIC DENTISTRY,)
INC., et al.,)
)
Plaintiffs,)
vs.)
)
LIZ DUDEK, et. al.,)
)
Defendants.)
_____)

ORDER DISMISSING COUNT II WITH PREJUDICE

I agree with the parties, *see* D.E. 1325 at 4-5 and D.E. 1326 at 4, that the plaintiffs’ claim under 42 U.S.C. § 1396a(a)(30)(A) cannot survive the Supreme Court’s recent decision in *Armstrong v. Exceptional Child Care Center, Inc.*, 135 S. Ct. 1378, 1385 (2015). Accordingly, Count II of the plaintiffs’ operative complaint is dismissed with prejudice, and I will issue amended findings of fact and conclusions of law shortly.

I reject the defendants’ arguments that *Armstrong* also requires dismissal of the plaintiffs’ other claims.

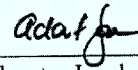
First, Count I is based on §§ 1396a(a)(8) and 1396a(a)(10). The Eleventh Circuit has expressly held that § 1396a(a)(8) creates a privately enforceable right of action, *see Doe v. Chiles*, 136 F.3d 709 (11th Cir. 1998), and it is not my prerogative to overrule an Eleventh Circuit case which is directly on point on the ground that it has been eroded by later decisions. *See United States v. Valladares*, 544 F.3d 1257, 1264-65 (11th Cir. 2008). As for § 1396a(a)(10), circuit courts have held, after *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002), that this provision is privately enforceable. *See Sabree ex rel. Sabree v. Richman*, 367 F.3d 180, 193-94 (3d Cir. 2004); *S.D. ex rel. Dickson v. Hood*, 391 F.3d 581, 602-03 (5th Cir. 2004); *Bontrager v.*

Ind. Family & Soc. Serv. Admin., 697 F.3d 604, 607 (7th Cir. 2012); *Watson v. Weeks*, 436 F.3d 1152, 1159-60 (9th Cir. 2006).¹

Second, Count IV is based on 42 U.S.C. § 1396a(a)(43), and all post-*Gonzaga* decisions on the issue have held that this provision is privately enforceable. *See, e.g., Westside Mothers v. Olszewski*, 454 F.3d 532, 539-41 (6th Cir. 2006).²

DONE and ORDERED in chambers in Miami, Florida, this 27th day of April, 2015.

30K



Adalberto Jordan
United States District Judge

Copy to: All counsel of record

¹ *Armstrong*, 135 S. Ct. at 1386 n.*, confirmed that *Gonzaga* sets out the appropriate standard for determining whether a statute creates privately enforceable rights.

² On reflection, I am going to reserve ruling, for the time being, on whether the plaintiffs can seek to pursue the increase of rates through their remaining claims.