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.

ELIZABETH DUDEK, et al.,

Defendants.
_____/

NOTICE OF FILING [PROPOSED] DECLARATORY JUDGMENT

Plaintiffs Florida Pediatric Society, *et al.*, hereby submit the attached proposed declaratory judgment.

Pursuant to 28 U.S.C. § 2202, a court may issue a declaratory judgment while retaining jurisdiction to grant supplemental relief. "The purpose of [28 U.S.C. § 2202] . . . is to allow the district court to retain jurisdiction in order to grant the relief necessary to effectuate its prior judgment." *Burford Equip. Co., Inc. v. Centennial Ins. Co.*, 857 F. Supp. 1499, 1502 (M.D. Ala. 1994); *see also In re Bicoastal Corp.*, 156 B.R. 327, 331 (Bankr. M.D. Fla. 1993) ("the further relief permitted by 28 U.S.C. § 2202 was designed to carry out the principle that every court, with few exceptions, has inherent power to enforce its own decrees and make such orders as may be necessary to render them effective.) Such supplemental relief includes the issuing of an injunction. *Powell v. McCormack*, 395 U.S. 486, 499 (1969) ("A declaratory judgment can then be used as a predicate to further relief, including an injunction.").

Dated: May 1, 2015

Respectfully Submitted,

By: /s/ Stuart H. Singer

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 1, 2015, I electronically filed the foregoing document with the Clerk of the Court by using the CM/ECF system and that the foregoing document is being served this day on all counsel of record identified below via transmission of Notice of Electronic Filing generated by CM/ECF.

/s/ Stuart H. Singer
Stuart H. Singer

SERVICE LIST

Florida Pediatric Society/The Florida Chapter of The American Academy of Pediatrics; Florida Academy of Pediatric Dentistry, Inc., et al. v. Elizabeth Dudek in her official capacity as Secretary of the Florida Agency for Health Care Administration, et al.

Case No. 05-23037-CIV-JORDAN/O'SULLIVAN
United States District Court, Southern District of Florida

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

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

Plaintiffs,

vs.

ELIZABETH DUDEK, et al.,

Defendants.
_____/

[PROPOSED] DECLARATORY JUDGMENT

This is a class and representative action in which Plaintiffs, on behalf of the children eligible for the Florida Medicaid program, seek declaratory and injunctive relief from Florida officials responsible for the Medicaid program. Plaintiffs contend that the Florida Medicaid program has failed and continues to fail to provide Florida children with access to medical and dental care in accordance with the EPSDT, Reasonable Promptness, and Outreach and Treatment requirements under the Medicaid Act, 42 U.S.C. § 1396 *et seq.* After having reviewed submissions and arguments from counsel, the Court finds that there is a concrete and ongoing controversy between the parties, that the Medicaid program violates and continues to violate children's rights under the Medicaid Act, and that, based on its Amended Findings and Conclusions of Law, it is appropriate at this time to enter a Declaratory Judgment.

On December 31, 2014, this Court issued findings of fact and conclusions of law following a 90-plus day bench trial. *See* D.E. 1294. This Court later amended those findings and conclusions, D.E. 1314, and subsequently dismissed Count II of the operative complaint and

stated it would amend its findings of fact and conclusions of law accordingly in light of the Supreme Court's ruling in *Armstrong v. Exceptional Child Care Center, Inc.*, 135 S. Ct. 1378 (2015), D.E. 1331. These Amended Findings are fully incorporated herein.

Given the mootness concerns raised by Defendants, this Court reserved entry of a declaratory judgment when it issued its initial findings of fact and conclusions of law. *See* D.E. 1294 at 153. This followed from the requirement that a case present "a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Steffel v. Thompson*, 415 U.S. 452, 460 (1974) (quoting *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941)). The Court subsequently held a status conference on January 30, 2015 and on March 25, 2015 ordered the parties to submit proffers supported by declarations on the issue of whether "there is an ongoing controversy (in whole or in part). " D.E. 1311 at 1. The parties filed such proffers and declarations in accordance with this Order.

Plaintiffs' claims of ongoing violation of their rights under federal law, and thus a live controversy, are supported, *inter alia*, by the following:

- Florida's CMS 416 report for the federal fiscal year ending September 30, 2013, the most recent Florida CMS 416 report available, shows that more than 700,000 children on Medicaid who should have received at least one EPSDT screen did not receive any in that federal fiscal year. Pls. Proffer, Exh. 23, Darling Report at Exh. F.
- Florida's most recent, available CMS 416 report shows that more than 900,000 children on Medicaid over the age of two did not receive any dental care in the federal fiscal year ending on Sept. 30, 2013. *Id.*

- Florida's most recent, available CMS 416 report that shows that while there has been an increase in the number of lead blood screens only about 25% of the children in the 1-2 and 3-5 age categories receive one. Pls. Proffer, Exh. 23, Darling Report. at 20-21 and Exh. F.
- Approximately 381,000 Florida children are eligible for, but not enrolled in, Medicaid or SCHIP. Pls. Proffer, Exh. 26, St. Petery Decl. at ¶ 13 (discussing 2014 KidCare Coordinating Council Report).

Defendants have asserted that changes in the Florida Medicaid program, including a move to a managed care system for delivery of care, have resolved the violations of federal law proven at trial and identified in this Court's findings, and thus, mooted the claims in the case. Defendants, however, have failed to meet the high bar for showing mootness.

"A defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.'" *Already, LLC. v. Nike, Inc.*, 133 S. Ct. 721, 727 (2013) (quoting *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs., Inc.*, 528 U.S. 167, 190 (2000); *see also National Ass'n of Bds. of Pharmacy v. Bd. of Regents of the Univ. Syst. of Ga.*, 633 F.3d 1297, 1310 (11th Cir. 2011) ("Generally, the party asserting mootness bears the heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again." (internal quotation marks omitted)). The moving party has the burden of showing that the case is moot, not that there is a possibility that the case might become moot at some future date. *See Fanin v. U.S. Dep't of Veterans Affairs*, 572 F.3d 868, 875-76 (11th Cir. 2009) ("[C]urrent efforts by the VA to remedy its many alleged violations of various statutes [don't] matter if it has not yet achieved full compliance.")

At the hearing on January 25, 2015, Defendants' counsel admitted in response to questions from the Court that Defendants could not demonstrate at that time that the claims against AHCA were moot. *See* Jan. 30, 2015 Tr. at 20: 14-18; *id.* at 20:25 to 21:4; *id.* at 23: 13-16; *id.* 31:1-4. This is consistent with testimony from Defendants' declarant who acknowledged that "Florida does not have performance measure reporting yet that will prove the effectiveness of the many quality changes that have been made in the Florida Medicaid Program with the implementation of MMA. … AHCA has reconciled itself to the fact that the first year of HEDIS measure reporting to show the effectiveness of the MMA will come in July 2016, as CY 2015 is the first full year of MMA operations." Defs.' Proffer, Exh.8., Lacroix Decl. ¶ 13; *see also* Exh. 17, Vergeson Decl. ¶ 9 ("Unfortunately, it will not be until July 2016 before audited data is available for a full years' worth of services under MMA.")[1]

What the Eleventh Circuit said about injunctive relief, is equally applicable to declaratory relief. "We have recognized that subsequent events, such as improvements in the allegedly infirm conditions of confinement, while potentially relevant, are not determinative of whether injunctive relief is no longer warranted. … the defendants have not established that they have eradicated the effects of the constitutional violations found by the district court." *Thomas v. Bryant*, 614 F.3d 1288, 1320-21 (11th Cir. 2010). Further, Defendants' continuing insistence that they have not violated the Medicaid Act weighs heavily in favoring of issuing declaratory relief. *See Sheely v. MRI Radiology Network P.A.*, 505 F.3d 1173, 1187 (11th Cir. 2007) ("[A] defendant's failure to acknowledge wrongdoing . . . ensures that a live dispute between the parties remains."); *see also* D.E. 1293 at 3, n. 1 ("[R]efusal on the part of defendants to

[1] Similarly, with respect to DCF, this Court previously found, in denying an earlier suggestion of mootness by DCF, that "no aspect of this case is moot." D.E. 1293 at 2. "The changes discussed by DCF have only recently been implemented, and at this time no once can know whether or not they will effectively solve the issues raised by the plaintiffs." *Id.* This remains the case.

acknowledge that any systemic problem exists (or existed) with respect to the issue of continuous eligibility suggests that a live dispute between the parties remains.")

For these reasons, the Court finds that entry of a declaratory judgment at this time is warranted. "[E]ven though a declaratory judgment has 'the force and effect of a final judgment,' 28 U.S.C. § 2201, it is a much milder form of relief than an injunction. Though it may be persuasive, it is not ultimately coercive; noncompliance with it may be inappropriate, but it is not contempt." *Steffel v. Thompson*, 415 U.S. at 471 (internal quotation marks and citation omitted). If the entry of declaratory relief does not suffice to redress the violations of federal law identified in the Court's findings, the Court will proceed, after further appropriate proceedings, to consider the imposition of injunctive relief.

Pursuant to 28 U.S.C. § 2202, a court may issue a declaratory judgment while retaining jurisdiction to grant supplemental relief. "The purpose of [28 U.S.C. § 2202] . . . is to allow the district court to retain jurisdiction in order to grant the relief necessary to effectuate its prior judgment." *Burford Equip. Co., Inc. v. Centennial Ins. Co.*, 857 F. Supp. 1499, 1502 (M.D. Ala. 1994); *see also In re Bicoastal Corp.*, 156 B.R. 327, 331 (Bankr. M.D. Fla. 1993) ("[T]he further relief permitted by 28 U.S.C. § 2202 was designed to carry out the principle that every court, with few exceptions, has inherent power to enforce its own decrees and make such orders as may be necessary to render them effective.") Such supplemental relief includes the issuing of an injunction. *Powell v. McCormack*, 395 U.S. 486, 499 (1969) ("A declaratory judgment can then be used as a predicate to further relief, including an injunction.").

Therefore, pursuant to 28 U.S.C. § 2201(a), the Court DECLARES:

1. I find that the certified class of Florida children who are or will be eligible for Medicaid have been and continue to be denied their legally enforceable rights under the

Medicaid Act, on the basis of the evidence and for the reasons set forth in the Court's Findings of Fact and Conclusions of Law, incorporated herein by reference, as amended.

2. I find, on the basis of the evidence and for the reasons set forth in the Court's Findings of Fact and Conclusions of Law, incorporated herein by reference, as amended, that Florida's Medicaid program violates and continues to violate 42 U.S.C. § 1396a(a)(10), which requires provision of EPSDT care.

3. I find, on the basis of the evidence and for the reasons set forth in the Court's Findings of Fact and Conclusions of Law, incorporated herein by reference, as amended, that Florida's Medicaid program violates and continues to violate 42 U.S.C. § 1396a(a)(8), which requires provision of care with reasonable promptness.

4. I find, on the basis of the evidence and for the reasons set forth in the Court's Findings of Fact and Conclusions of Law, incorporated herein by reference, as amended, that Florida's Medicaid program violates and continues to violate 42 U.S.C. § 1396a(a)(43)(A), which requires that AHCA provide effective outreach.

5. I find, on the basis of the evidence and for the reasons set forth in the Court's Findings of Fact and Conclusions of Law, incorporated herein by reference, as amended, that Florida's Medicaid program violates and continues to violate 42 U.S.C. § 1396a(a)(43)(B) and (C), which require that AHCA provide or arrange for the provision of EPSDT screening services in all cases where they are requested, and arrange for needed corrective treatment.

AHCA is the principal agency responsible under Florida law for carrying out the requirements of the Medicaid Act. Defendant Dudek, Secretary of AHCA, is thus declared, in her individual capacity, to be operating the Medicaid program in Florida in violation of the above requirements. Defendant Carroll, Secretary of DCF is declared to be in violation solely with

respect to declarations above related to eligibility determinations and switching. Defendant Dr. Armstrong, Secretary of DOH, is declared to be in violation solely with respect to the care provided to children through the CMS program, which operates under the authority of the Department of Health.

Consistent with its Findings of Fact and Conclusions of Law, as amended, the Court reserves the right to enter Injunctive Relief.

_____

Adalberto Jordan
United States District Judge

Copy to: Al1 counsel of record