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' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO TAKE LIMITED DISCOVERY IN SUPPORT OF REQUEST FOR INJUNCTIVE RELIEF

Defendants, the official capacity agency heads of the AGENCY FOR HEALTH CARE ADMINISTRATION, DEPARTMENT OF CHILDREN AND FAMILIES, and DEPARTMENT OF HEALTH, submit the following response in opposition to Plaintiffs' Motion for Leave to Take Limited Discovery in Support of Request for Injunctive Relief (D.E. 1346). Defendants further state:

A. PLAINTIFFS' MOTION IS PREMATURE.

Plaintiffs' request to take any discovery on the issue of injunctive relief is premature because, as Plaintiffs acknowledge, the Court has not yet issued an order in favor of plaintiffs on liability. D.E. 1346 p. 1 ("[t]he parties recently completed briefing on whether the Court should issue a declaratory judgment"). As Plaintiffs are well aware, there are three steps that the Court announced that it is taking which all bear on liability. They are as follows:

1. The Court is considering the extent to which Plaintiffs' claims of inadequate reimbursements and lack of equal access continue to be relevant in light of a recent decision by the Supreme Court. 4/24/2015 Transcript, p. 65:10-17. On March 31, 2015, the Supreme Court issued an opinion in *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378 (2015), and found that 42 U.S.C. § 1396a(a)(30)(A) did not authorize providers a private action for injunctive relief regarding Medicaid reimbursement rates. This statute is the basis for Plaintiffs' Second Cause of Action in the Second Amended Complaint. D.E. 220-2, pp. 31-32. 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. *Id.*, at 1385 (emphasis added). The Court cited two reasons for the determination that § 30(A) does not create enforceable rights: (1) Congress provided a single remedy for a State's failure to comply with Medicaid requirements, the withholding of federal funds, 42 U.S.C. § 1396c; and (2) the judicially unadministrable nature of § 30(A). Regarding the latter reason, the Court further stated:

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

135 S. Ct. at 1385, *citing Gonzaga Univ. v. Doe*, 536 U.S. 273, 292 (2002) (BREYER, J., concurring in judgment).

In his concurring opinion to *Armstrong*, Justice Breyer noted that, when it comes to rate setting in the Medicaid context, § 30(A) provides only broad and nonspecific standards. He further stated that the history of ratemaking generally demonstrates that the task of determining rates (i.e., what rate should be paid for a service) is better suited to an administrative agency than a judge. 135 S. Ct. at 1388. He went on to state:

> Reading § 30(A) underscores the complexity and nonjudicial nature of the rate-setting task. That provision requires State Medicaid plans to "assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers" to assure "care and services" equivalent to that "available to the general population in the geographic area." § 1396a(a)(30)(A). The methods that a state agency, such as Idaho's Department of Health and Welfare, uses to make this kind of determination may involve subsidiary determinations of, for example, the actual cost of providing quality services, including personnel and total operating expenses; changes in public expectations with respect to delivery of services; inflation; a comparison of rates paid in neighboring States for comparable services; and a comparison of any rates paid for comparable services in other public or private capacities.

135 S. Ct. 1378 at 1388. Justice Breyer also 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).

135 S. Ct. 1378 at 1389.

Neither the majority opinion nor the concurring opinion of Justice Breyer in *Armstrong* left any room for doubt that the enforcement of § 30(A) is best left to administrative agencies and not the Courts. Nonetheless, Plaintiffs stubbornly insist that they may pursue claims of

inadequate reimbursement rates in this proceeding. D.E. 1318, pp. 4, 6-7, 10-11, 14, D.E. 1341 pp. 11-16.

While the Court has acknowledged that Count II, brought pursuant to § 30(A) must be dismissed, D.E. 1331, it determined that "deeper study" was necessary to determine whether the adequacy of reimbursement rates or equal access has any relevance in this matter going forward. Tr. 4/24/2015 hearing, pp. 66:23-67:3. The Court has not yet made that determination.

2. The second issue that the Court has announced it will address is further amending the findings of fact and conclusions of law in light of the dismissal of Plaintiffs' claims brought under § 30(A). This was to be done in "the near future." Tr. 4/24/2015 hearing, p. 66:6-8; D.E. 1331. These further amended findings of fact and conclusions of law will presumably address whether adequacy of reimbursement rates or equal access remain issues going forward (by, for example, potentially eliminating all references to such issues in the findings of fact and conclusions of law). The Court has not yet issued the further amended findings of fact and conclusions of law.

3. The third issue presently under consideration by the Court (and one which follows logically after the two issues mentioned above) is whether a declaratory judgment is appropriate. This will be the Court's finding on liability, and it will determine in large part the issues that remain for further discovery on remedy. The Court is approaching these issues logically and in order, and as such the declaratory judgment has not yet been issued to date.

B. <u>COURT ACTION IS ESSENTIAL FOR DISCOVERY TO BE FOCUSED.</u>

It is essential for the Court to issue the further amended findings of fact and conclusions of law, determine whether claims that reimbursement rates and claims of unequal access (when measured against an insured population) are relevant going forward, and determine whether a

declaratory judgment on liability is appropriate, if Plaintiffs truly seek to proceed with focused discovery. Discovery should be focused on the issues about which the Court finds liability, if any, and not on other irrelevant issues (such as the adequacy of reimbursement rates).

C. DETERMINATIONS ABOUT ALLOWABLE DISCOVERY SHOULD BE BASED ON CONCRETE DISCOVERY REQUESTS AFTER AN APPROPRIATE "MEET AND CONFER."

After the Court completes the actions necessary to determine the scope of Defendants' liability and whether claims regarding the adequacy of reimbursement rates is relevant post-*Armstrong*, the parties should exchange proposed discovery, including draft deposition notices, and then meet and confer in an effort to reach an agreement on the scope of discovery to occur thereafter on remedy. If the parties are unable to reach an agreement on the scope of discovery at that time, they may then bring those concrete issues to the Court for resolution.

D. PLAINTIFFS' PROPOSED DISCOVERY PLACES THE DEFENDANTS AT A DISADVANTAGE.

Plaintiffs' proposal that they be permitted to take 5 depositions and propound 10 requests for production and 10 interrogatories self-evidently advantages Plaintiffs and does not realistically limit discovery against Defendants (which is their stated goal). Plaintiffs could take Rule 30(b)(6), Federal Rules of Civil Procedure, depositions of AHCA, DOH, and DCF. Without being able to review a draft notice of taking deposition, Defendants (and the Court) do not know the scope of any topics that would be included in such notices. However, the representative deposition could be used to gather the factual basis for many of Defendants' employee depositions, and thus dramatically expand the scope of the discovery and the burden to

Defendants.[1] Defendants don't have the benefit of this type of device to secure discovery relating to any groups of Plaintiffs' provider witnesses. Further, Plaintiffs' could seek all documentation relating to each of the MMA plans, resulting in significant production, and minimizing the need on Plaintiffs' part for discovery of the plans. Interrogatories could be used to supplement the information about the plans, and to require Defendants to perform extensive data analysis. In sum, what Plaintiffs claim is "focused" discovery, has the potential to be just the opposite. This important issue about the volume of discovery should not be through Plaintiffs' vague motion, but, rather, with the benefit of review of concrete discovery requests (and any objections thereto).

E. THE DEFENDANTS SHOULD NOT BE PRECLUDED FROM DISCOVERY AS TO THE NAMED PLAINTIFFS.

Also, there is no reasoned basis on which to preclude Defendants from taking any discovery of the named Plaintiffs on remedy. While Plaintiffs may correctly argue that, absent decertification, the class has an independent legal status separate from the interest asserted by Plaintiff, D.E. 1346 p. 2, this does not render the experiences of the named Plaintiffs with MMA completely irrelevant. None of the cases cited by Plaintiffs stand for that proposition. Rather, the MMA-related harms or injuries of the named Plaintiffs (or lack thereof) are highly relevant on remedy. Plaintiffs must demonstrate harm to the named Plaintiffs from the particular

[1] / Plaintiffs have long taken the position, consistent with the comments to Rule 30, Fed. R. Civ. P., that the deposition duration limits established in Rule 30(d)(1), Federal Rules of Civil Procedure, apply separately to each individual designated by defendants for deposition. This means that each person designated to testify in response to a single Rule 30(b)(6) deposition notice might be subject to a 7 hour deposition - all as part of the single corporate representative deposition. See e.g., *I/P Engine, Inc. v. AOL, Inc.*, 283 F.R.D. 322, 326 (E.D. Va. 2012), citing Fed.R.Civ.P. 30(d) advisory committee's note (2000); *Sabre v. First Dominion Capital, LLC*, No. 01CIV2145BSJHBP, 2001 WL 1590544, at *1 (S.D.N.Y. Dec. 12, 2001).

inadequacies about which they seek a remedy. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 (2006) (emphasis in original; quoting *Lewis v. Casey*, 518 U.S. 343, 357 (1996).

By their Offer of Proof, Plaintiffs have signaled an intention to pursue issues for which there has been no showing that any named Plaintiffs has suffered harm. For example, Plaintiffs bring a broad-based attack on Managed Medical Assistance (MMA). D.E. 1318 & D.E. 1318-1-1318-27. Discovery would be appropriate to determine whether any named Plaintiff has suffered an injury as a result of their participation in MMA. This would be highly relevant to any remedy in this case. Plaintiffs' continued insistence that Defendants not be permitted to take any discovery of the named Plaintiffs is highly suspect. A determination regarding the discovery permitted of the named Plaintiffs should not be made based on the abstract arguments made by Plaintiffs, but rather in the context of discrete discovery requests.

For all of the foregoing reasons, Plaintiffs' Motion for Leave to Take Limited Discovery in Support of Request for Injunctive Relief should be denied as premature. Further, should the issue of discovery become ripe (after issuance of a ruling on the relevance of claims of inadequate reimbursement rates, further amended findings of fact and conclusions of law, and a declaratory judgment, if any), the parties should be directed to first exchange draft discovery in an attempt to reach an agreement on what discovery should be permitted. Only if the parties do not reach an agreement should the relevant discovery issue be brought to the Court.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Leave to Take Limited Discovery in Support of Request for Injunctive Relief should be denied.

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, Florida 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, Pennsylvania 19103; and by United States Mail on Louis

W. Bullock, Esq., Bullock, Bullock, & Blakemore, 110 W. 7th Street, Tulsa, Oklahoma 74112, on July 24th, 2015.

/s/ Stephanie A. Daniel
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