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.

_____/

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR LEAVE TO TAKE LIMITED DISCOVERY REGARDING INJUNCTIVE RELIEF

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August 3, 2015

INTRODUCTION

After having advocated unlimited discovery in their prior discovery report, and in open Court, Defendants now oppose the Plaintiffs' request to proceed with very limited discovery. Other than serving Defendants' interests in further delay, there is no justification for Defendants' position.

ARGUMENT

A. Plaintiffs' Motion Is Not Premature

Defendants submit that discovery is now premature—even though seven months have elapsed since this Court's findings of fact and conclusions of law. Their first reason for more delay is nothing more than a restatement of their position that, after *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378 (2015), federal courts cannot under Section 1983 enforce rights that involve consideration of the adequacy of reimbursement rates paid to medical providers. We have previously addressed this argument, *see* D.E. 1341 at 12-18, and so only brief commentary is warranted.

Defendants have not cited, now or before, any court that has ever held that a right enforceable under Section 1983 is not to be enforced if the court must consider, in designing relief, the adequacy of reimbursement rates. Plaintiffs are unaware of any court so holding. Certainly, *Armstrong* is not such a decision.[1] *Armstrong* dealt with whether Congress intended

[1] Even after *Armstrong*, courts have continued to enforce analogous statutory provisions under Section 1983, without any suggestion that *Armstrong* affects their ability to do so. *See, e.g.*, *Briggs v. Bremby*, No. 14-1328, 2015 WL 4069053, at *5 – 6 (2d Cir. July 6, 2015) ("We conclude that Congress did not impliedly preclude private enforcement of the Food Stamp Act's time limits by granting enforcement powers to the Secretary of Agriculture. And we therefore hold that the time limits for allocating food stamps provided in 7 U.S.C. § 2020(e)(3) and (9) are privately enforceable through lawsuits brought under § 1983." (Footnotes omitted.)); *Legacy Cmty. Health Services, Inc. v. Janek*, No. 4:15-CV-25, 2015 WL 4064270, at *6-7 (S.D. Tex. July 2, 2015) (finding private cause of action under Section 1983 to enforce 42 U.S.C. § 1396a(bb)(5)(A) of the Medicaid Act).

general equitable powers of a federal court to be exercised with respect to a provision of the Medicaid Act where it had been determined there was no enforceable right under Section 1983.[2] Here this Court has decided, correctly, that the right to receive ESPDT care, (a)(10); the right to reasonably prompt care, (a)(8); and the rights to effective outreach, screening, and treatment, (a)(43) (A), (B), and (C), are judicially enforceable. These provisions are enforceable, as courts throughout the country have found, notwithstanding that there is—as there has been throughout the pendency of this case and before—a federal agency with oversight responsibility for Medicaid. That has never been a basis for the courts not to enforce Medicaid rights under Section 1983, or the vast history of such cases would not exist. Defendants have not responded to Plaintiffs' invocation of the well-established principle that once rights are found to be enforceable under Section 1983, a federal court is obligated to use the full panoply of its remedial powers to effectively enforce those rights. "Federal courts, it was early and famously said, have 'no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.'" *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 590-91 (2013) (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821)). Thus, for these causes of action—(a)(8), (a)(10), (a)(43)(A), (B), and (C)—there is no basis for concluding, when a proper claim is brought, that this Court should not take measures to protect plaintiffs' legal rights, but should rather defer to federal CMS. Moreover, as Plaintiffs argued previously, *see* D.E. 1341 at 14-17, there is a stark difference between courts setting a rate and courts requiring defendants to set

[2] Defendants again quote from Justice Breyer's concurring opinion, but ignore his admonitions that he was making a decision based on the particular facts of the case rather than "a simple, fixed legal formula separating federal statutes that may underlie this kind of injunctive action from those that may not," 135 S. Ct. at 1388 (Breyer, J., concurring), as well as his acknowledgment that "courts might in particular instances be able to resolve rate-related requests for injunctive relief quite easily," *id.* at 1389. In any event, Justice Breyer did not say courts' hands should be tied when a right enforceable under Section 1983 was found to exist.

adequate rates or take other steps to provide reasonably prompt access, EPSDT care, and outreach, as required by federal law.

Defendants also claim discovery is premature because the Court will be amending its findings to implement the dismissal of Section 30(a) claims. That, of course, has no bearing on discovery as all of the Court's conclusions independently rest on other Sections of the Medicaid Act as to which the Court has rejected Defendants' argument that enforceable rights do not exist.

Defendants further say that discovery is premature because the declaratory judgment has not issued. Plaintiffs certainly would like for the declaratory judgment to be issued as expeditiously as possible, but there is no reason for discovery to be delayed until that occurs. Tellingly, in the parties' Corrected Joint Schedule Report Defendants asserted: "Defendants propose that discovery for both mootness and the remedy phases of this case proceed simultaneously and in accordance with the schedule proposed above." D.E. 1299 at 8. While the parties' schedules differed greatly, neither party suggested that discovery needed to await entry of a declaratory decree, and there is no reason that it should do so.

B. Discovery Should Not Be Delayed For A "Meet & Confer" Process

Nor is there any merit to Defendants' proposal that the parties "should exchange discovery, including draft deposition notices," meet and confer about the scope of discovery, and bring any disputes about the scope of discovery to the Court. D.E. 1347 at 5. Defendants do not provide any support for their proposal, which has no basis in the Federal Rules of Civil Procedure. Nor is there any basis for Defendants' contention that they will be disadvantaged by Plaintiffs' proposal. If Plaintiffs' requests for production are overly broad or unduly burdensome, Defendants could serve objections, the parties would meet and confer, and Plaintiffs could move to compel if necessary—following the procedure set forth in the Federal Rules of Civil Procedure. Because Defendants are amply protected under the existing Federal

Rules of Civil Procedure, there is no need to create new procedures that would only serve to delay the discovery that is required.

C. There Is No Basis For Seeking Discovery From The Named Plaintiffs

As Plaintiffs demonstrated in their initial motion, once a class is certified, the class takes on a legal status of its own, and neither mootness nor the class's entitlement to equitable relief depends on the experiences of the named Plaintiffs. *See* D.E. 1346 at 3-4, quoting *Sosna v. Iowa,* 419 U.S. 393 (1975). In their opposition, Defendants now—as opposed to their argument in open Court—concede that "the class has an independent legal status separate from the interest asserted by the [named] Plaintiff." D.E. 1347 at 6.

Yet Defendants argue that the experiences of the named Plaintiffs are not "completely irrelevant." D.E. 1347 at 6. Any potential relevance of the named Plaintiffs' post-trial experiences with the MMA system does not justify further depositions or discovery, any more than it would be appropriate to depose any of the other 2.4 million children now enrolled in Medicaid (*see* D.E. 1341 at Ex. A) about his or her individualized experience with the MMA system. Rather, discovery should focus on the systemic effects of the changes in the Florida's Medicaid program in connection with the need for injunctive relief. Defendants would like to ignore that they have had a full trial, that the Court has made extensive findings on liability, and that the post-trial discovery process should be a focused and limited process aimed at determining the appropriate scope of injunctive relief. It is a process that should now start.

CONCLUSION

For the reasons stated above and in Plaintiffs' initial motion, this Court should allow Plaintiffs to proceed with five depositions, and to serve up to ten requests for production and ten interrogatories in support of Plaintiffs' request for injunctive relief.

Dated: August 3, 2015

Respectfully Submitted,

By: /s/ Stuart H. Singer

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 3, 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.

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United States District Court, Southern District of Florida

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