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' OFFER OF PROOF IN SUPPORT OF DECLARATORY AND INJUNCTIVE RELIEF

Pursuant to this Court's Order Following Scheduling Conference, D.E. 1311, Plaintiffs hereby submit the following offer of proof, along with accompanying declarations.[1]

I. Introduction

After nearly ten years of litigation – including more than ninety days of trial that spanned three years – the time has finally come for this Court to enter declaratory and injunctive relief that will end Defendants' ongoing and systematic violation of federal law. This Court has entered a comprehensive, 153-page ruling that details the systemic defects with the Florida Medicaid system and concludes that Defendants are violating their legal obligations to Plaintiffs. *See* D.E. 1314, Amended Findings at 145–53. These defects have not been cured since the close

[1] Several declarations are being filed electronically in redacted form while the unredacted versions, which contain potentially sensitive financial data, are being filed under seal.

of trial. Rather, Florida's Medicaid-eligible children face an ongoing violation of their federal rights under the Medicaid statutes. As explained in the accompanying declarations, provider shortages and administrative barriers persist, resulting in hundreds of thousands of children not receiving the EPSDT services to which they are entitled, either at all or at least without reasonable promptness.

Far from taking steps necessary to fix the Florida Medicaid system, Defendants have, if anything, made it worse. In fact, the CMS-416 report for 2013 shows that the number of Florida children on Medicaid not receiving any required healthy kid check-ups now exceeds 700,000.[2] *See* Exh. 23, Darling Decl. at ¶ 2.

Defendants' proposed solution to Florida Medicaid's problems is to double down on a failed strategy: moving almost all children into managed care organizations while doing nothing to meaningfully increase reimbursement rates or make other structural reforms necessary to increase children's access to Medicaid services. This Court has already examined Florida's use of managed care, which covered nearly half of the Florida's Medicaid-enrolled children by October 2009, *see* D.E. 1294, Amended Findings at ¶ 313 (noting that approximately 770,000 children were enrolled in managed care plans by that time), and concluded that:

- "[c]hildren enrolled in Medicaid HMOs suffer from the same lack of access to care as children in MediPass or fee for service Medicaid," *id*. at ¶ 322;

[2] Defendants objected to the Court viewing this evidence when Plaintiffs attempted to offer it at during January's conference. As Dr. Darling explains, it is not clear whether the worsening trend lines since the trial reflect the Florida Medicaid system not keeping up with demand, or correction of a methodological problem that overstated the participation rate previously, or a combination. The 2013 CMS-416 Report is the most current presently available, although the 2014 report is due to be issued any day.

- "the same problems that plague fee-for-service Medicaid – failure to provide well-child check-ups, a scarcity of specialists, excessive wait times and travel distances for specialty care, and a lack of dental care – infect the Medicaid HMOS," *id*. at 151;
- "ACHA's HMO system fails to meet the federal requirements for providing EPSDT care, in violation of (a)(10) [and] do not provide care with reasonable promptness, as required by (a)(8)," *id*.; and
- "Defendants responsible for Florida's Medicaid program have failed to assure that [the] plaintiff class received the preventative care required under the EPSDT Requirements[, and] [t]his is true for children on fee-for-service as well as in managed care, where screening rates are potentially lower," *id*. at 146.

These problems existed even though the prior Medicaid HMOs included network adequacy requirements and other contractual obligations. *See, e.g.*, 11/10/10 Trial Tr. (Rough) at 70:24–71:1 (Brown-Woofter testifying about the HMOs' required attestations as to network adequacy); 10/18/11 Trial Tr. at 9092:13-18 (Brown-Woofter testifying about "standards that are in place" for the Medicaid HMOs); *see also* Exh. 24, Flint Decl. at ¶ 11. These paper assurances of adequate care are illusory in practice.

The transition to managed care – a system that this Court has already deemed inadequate – is little more than a repackaging of the problems that were established at trial. [redacted]

By Defendants' own admission, there is no evidentiary basis on which to conclude that the Court's Amended Findings of Fact and Conclusions of Law have become moot. *See* 1/30/15 Hearing Tr. at 23:13-16 ("THE COURT: You're not prepared to prove mootness in the next two weeks or so, in other words? MR. BOWDEN: Oh, no, of course not. Oh, no."). By contrast, as detailed below, Plaintiffs are prepared to show that there remains an ongoing controversy such that declaratory and injunctive relief should issue without further delay.

II. Legal Standard

Plaintiffs seek a declaration stating that Defendants are violating the Medicaid Act's requirements.[3] The Declaratory Judgment Act, 28 U.S.C. § 2201 ("DJA"), provides that "[i]n a case of actual controversy within its jurisdiction, . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201(a). The issue now before the Court is whether an "actual controversy" still exists such that declaratory relief may issue. "An 'actual controversy' exists where there is a substantial continuing controversy between parties having adverse legal interests." *GEICO General Ins. Co. v. Farag*, No. 14–10978, 2015 WL 304082 (11th Cir. 2015) (internal quotation marks and citation omitted). A declaratory judgment is appropriate when a plaintiff has shown that the State is engaged in a violation of federal Medicaid law. *See, e.g., Tallahassee Memorial Regional Medical Center v. Cook,* 109 F.3d 693, 705 (11th Cir. 1997) ("Plaintiffs are entitled to a declaratory judgment holding the State of Florida's Medicaid reimbursement system to be deficient[.]"); *K.G. ex rel. Garrido v. Dudek*, 981 F.Supp.2d 1275, 1289 (S.D. Fla. 2013) (entering declaratory judgment stating that AHCA must provide certain autism services under the

[3] Plaintiffs' April 17 briefing will address the scope and nature of these requirements since the Supreme Court's decision in *Armstrong v. Exceptional Child Care Ctr., Inc.*, No. 14-15, 2015 WL 1419423 (U.S. Mar. 31, 2015). *See* D.E. 1313, Order Requesting Briefing on *Armstrong*.

Medicaid Act's EPSDT requirements); *Smith v. Benson*, 703 F.Supp.2d 1262, 1268 (S.D. Fla. 2010) (entering declaratory judgment stating that AHCA must provide diapers under Medicaid Act).

Plaintiffs also ask this Court to enter an injunction requiring Defendants to bring the Florida Medicaid system into compliance with the Medicaid Act. "[T]o obtain a permanent injunction, a party must show: (1) success on the merits of the party's legal claim; (2) that no adequate remedy at law exists; and (3) that irreparable harm will result if the court does not grant injunctive relief." See *U.S. v. Kaplowitz*, 201 Fed. Appx. 659, 661 (11th Cir.2006) (citing *Alabama v. U.S. Army Corps of Engineers*, 424 F.3d 1117, 1128 (11th Cir.2005)); *Keener v. Convergys Corp*., 342 F.3d 1264, 1269 (11th Cir.2003). Here, Plaintiffs have prevailed on the merits of their claims, and there is no question that the only adequate relief available is equitable in nature. The only question that remains is whether irreparable harm will result absent an injunction, or, alternatively, as Defendants content, that there is no risk of harm because the Florida Medicaid system purportedly has been fixed. This court has noted that, "[i]n cases alleging that a state law violates the federal Medicaid statute and requesting injunctive relief, irreparable harm nearly always follows a finding of success on the merits." *Smith*, 703 F. Supp. 2d at 1278.

Thus, with respect to both declaratory and injunctive relief, Plaintiffs' legal burden at this point is very low: it is, in effect, the inverse of Defendants' "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) (internal quotation marks omitted). Although the propriety of declaratory and injunctive relief follows directly from this Court's Amended Findings of Fact and Conclusions of law, Plaintiffs are prepared to show that the

problems central to the Court's findings are ongoing and that Defendants' non-compliance with the law persists unabated to this day, leaving hundreds of thousands of Florida children without their federally assured rights to access to health care.

III. Proffered Testimony

The Addendum to this memorandum contains a list of witnesses whose testimony Plaintiffs are prepared to offer, together with such testimony as may be required to be procured by deposition because the information rests with either state employees (as in the case of CMS directors) or third-parties, or which is necessary with respect to any proffers or declarations offered by the Defendants.

A. Doctors

Plaintiffs offer the testimony of medical providers who will explain that the Florida Medicaid system continues to suffer from the problems this Court identified in its Amended Findings of Fact and Conclusions of Law. These providers, many of whom testified at trial, come from across the State, participate in different managed care plans, and have varied practices, but they will present a common narrative: children remain unable to access the EPSDT services to which they are entitled.

These doctors will explain that Florida's move to managed care has not solved Medicaid's problems. *See, e.g.*, Exh. 6, Richards-Rowley Decl. at ¶ 15 ("In my experience and observations of patients, children's access to care has not improved since the roll out of Managed Medical Assistance."); Exh. 5, Robinson Decl. at ¶ 17 (same); Exh. 2, Cheek Decl. at ¶ 9 (same); Exh. 12, Phillips Decl. at ¶ 10 ("If anything, access to care for Medicaid patients has worsened, because there are more kids in the system without a sufficient increase in the number of providers to compensate."). Instead, provider shortages persist because the Medicaid HMOs'

reimbursement rates are generally driven by and reflective of the Medicaid fee-for-service rates. *See, e.g.*, Exh. 3, Jimenez Decl. at ¶ 3; Exh. 1, Fox-Levine Decl. at ¶ 4; Exh. 2, Cheek Decl. at ¶ 4; Exh. 6, Richards-Rowley Decl. at ¶ 5; Exh. 7 Schechtman Decl. at Appx. 1 (providing analysis of reimbursement rates under Medicaid fee-for-service, the ACA, and Medicaid HMOs); *id*. at ¶ 5.[4] A recent GAO study confirms that Florida's Medicaid managed care rates are about 60% lower than private insurance rates. *See* Exh. 24, Flint Decl. at ¶ 6(c) (discussing GAO Report 14-533).

As a result of these ongoing problems with Florida Medicaid, many providers continue to limit their Medicaid practices or have imposed new limits on those Medicaid practices. *See, e.g.*, Exh. 9, Fenichel Decl. at ¶¶ 3, 4 (stating that, although he accepted some Medicaid patients at the time he testified at trial, he has "not accepted any Medicaid patients for at least three years" because "the payment for treating children on Medicaid is dismal"); Exh. 4, Cosgrove Decl. at ¶ 5 ("I have attempted to limit the number of Medicaid patients I treat. I have to do this because if I cannot limit the number of Medicaid appointments, my practice would likely go bankrupt."); Exh. 3, Jimenez Decl. at ¶ 6 ("I am considering further ways to reduce my exposure to Medicaid, such as by reducing my numbers of existing Medicaid patients or by refusing to treat new Medicaid patients."); Exh. 1, Fox-Levine Decl. at ¶ 5 (same); Exh. 5, Robinson Decl. at ¶ 3 ("In

[4] If Defendants argue that they have changed Florida Medicaid's rate structure, which is the primary determinant of whether providers participate in the Medicaid system, *see, e.g.* D.E. 1294, Amended Findings at ¶¶ 182, 257, 304, then Plaintiffs reserve the right to take discovery to confirm providers' testimony that Medicaid HMOs pay rates that approximate the traditional fee-for-service rates. For example, Plaintiffs would seek to depose Justin Senior, the current Deputy Secretary for Florida Medicaid, about matters relating to the "Overview of Medicaid Rate Setting" that he presented to the Florida House of Representatives on February 10, 2015. The slide deck distributed during that presentation states that HMOs are paid on a capitated basis that "reflect[s] historical utilization and spending for covered services[,]" which is consistent with Plaintiffs' position.

September of 2014, my practice group made the decision to stop accepting new Medicaid patients."); Exh. 6, Richards-Rowley Decl. at ¶ 5 ("Since the expiration of the Affordable Care Act's enhanced rates, it has become increasingly difficult for me financially to treat so many Medicaid patients").

Providers' ongoing reluctance to accept Medicaid patients has also resulted in continuing difficulty finding specialist referrals for Medicaid patients. *See, e.g.*, Exh. 7, Schechtman Decl. at ¶ 14 ("During trial, I testified about the challenges that my practice faced when seeking specialty referrals for our Medicaid patients[.] . . . Those problems are ongoing."); Exh. 4, Cosgrove Decl. at ¶ 13 ("Access to specialist care has not improved for children on Medicaid since the rollout of Managed Medical Assistance. If anything, I have found it more difficult to refer Medicaid children to some specialists."); Exh. 3, Jimenez Decl. at ¶ 8 ("I experience difficulty referring Medicaid patients to specialists. The rollout of Managed Medical Assistance in my area . . . did not improve this problem."); Exh. 6, Richards-Rowley Decl. at ¶ 8 ("It is almost impossible for me to find adequate referrals for subspecialties, including occupational therapy; physical therapy; and psychologists."); Exh. 5, Robinson Decl. at ¶ 6 ("The rollout of Managed Medical Assistance (on May 1, 2014) in no way improved these problems with referring Medicaid patients to specialists. Medicaid patients continue to face long delays or inability to locate a specialist after my referral."); Exh. 8, Castro Decl. at ¶ 6 ("Since the rollout of Managed Medical Assistance in my area, I experience even greater difficulty in referring Medicaid patients to specialists than before.").

Moreover, these doctors will testify that bureaucratic and administrative obstacles identified by the Court in its Amended Findings, including switching, continue to prevent children from accessing EPSDT services. *See, e.g.*, Exh. 3, Jimenez Decl. at ¶ 17 ("Roughly

once or twice per week, I am temporarily unable to treat an existing patient because they have been switched, without their knowledge, from one HMO to another, or to a different doctor within the same HMO."); Exh. 1, Fox-Levine Decl. at ¶ 11 ("This switching problem continues to this day and is the same, if not worse, than it had been prior to . . . the privatization of Medicaid."); Exh. 6, Richards-Rowley Decl. at ¶ 13 ("I have patients for whom the online system shows enrollment on one HMO on the day of the patient's visit, but sometime later the patient is switched retroactively and the billed HMO then denies reimbursement for my services.").

With respect to the Medicaid application, Plaintiffs recognize that Florida has made genuine progress in improving the paper Medicaid application from the time of trial. The on-line application, however, still runs over 50 pages, remains unduly complicated, and Florida still fails to provide adequate assistance for individuals to complete and properly submit it. *See* Exh. 26, St. Petery Decl. at ¶ 20.

Finally, outreach has not improved, and there is no reason for this Court to depart from its previous conclusion that "Defendants have failed to provide for a combination of written and oral methods designed to inform effectively all EPSDT eligible individuals (or their families) about the EPSDT program[.]" D.E. 1314, Amended Findings at 153 (internal quotation marks and alterations omitted). The outreach program that was eliminated in 2003 has not been restored, and even the more limited funding from 2007-08 has now also been eliminated, despite the KidCare Coordinating Council's repeated recommendations, without any dissent, that Florida restore funding for outreach. *See* Exh. 26, St. Petery Decl. at ¶¶ 13, 14, 15. As a result, hundreds of thousands of children remain eligible for, but not enrolled in, the Florida Medicaid system. *See id.* at ¶ 16. Others are enrolled but do not know the full range of services which

EPSDT provides. At the time of trial, undisputed evidence showed that over 250,000 Florida children were eligible for, but not enrolled in, Medicaid, whereas more recent evidence shows that approximately 381,000 Florida children are eligible for, but not enrolled in, Medicaid or CHIP. *Compare* D.E. 1314, Amended Findings at ¶ 329 *with* Exh. 26, St. Petery Decl. at ¶ 13 (discussing 2014 KidCare Coordinating Council Report).[5] Of the twenty counties in the nation with the highest number of uninsured children, five are in Florida: Miami-Date, Broward, Hillsborough, Palm Beach, and Orange. *See* Exh. 26, St. Petery Decl. at ¶ 13 (discussing KidCare Coordinating Council Report).

B. Dentists

In its Findings of Fact and Conclusions of Law, this Court concluded that "Medicaid children in Florida are not receiving dental services with reasonable promptness." D.E. 1314, Amended Findings at 149. That remains true today with delivery of dental care through managed care plans, because the plans continue to pay dentists at the same totally inadequate and shameful rates that led Florida to be the worst in the nation with respect to dental care for children on Medicaid.

These dentists will testify that reimbursement rates remain woefully inadequate, resulting in provider shortages, long wait times to receive care, and a limited number of spots for Medicaid patients in several dentists' practices. *See, e.g.*, Exh. 18, Matos Decl. at ¶ 9 ("Since the transition last year to Managed Medical Assistance, it has become increasingly difficult for [our practice] to break even when treating Medicaid patients. As a result, we have scaled back on

[5] Plaintiffs recognize that this comparison between data sources is not precise, as one includes CHIP-eligible children and the other does not, but CHIP participants generally are only a small percentage of the total Medicaid and CHIP population. See Exh. 26, St. Petery Decl. at ¶ 13 (citing KidCare Coordinating Council Report, which discussing Medicaid and CHIP enrollment at 7).

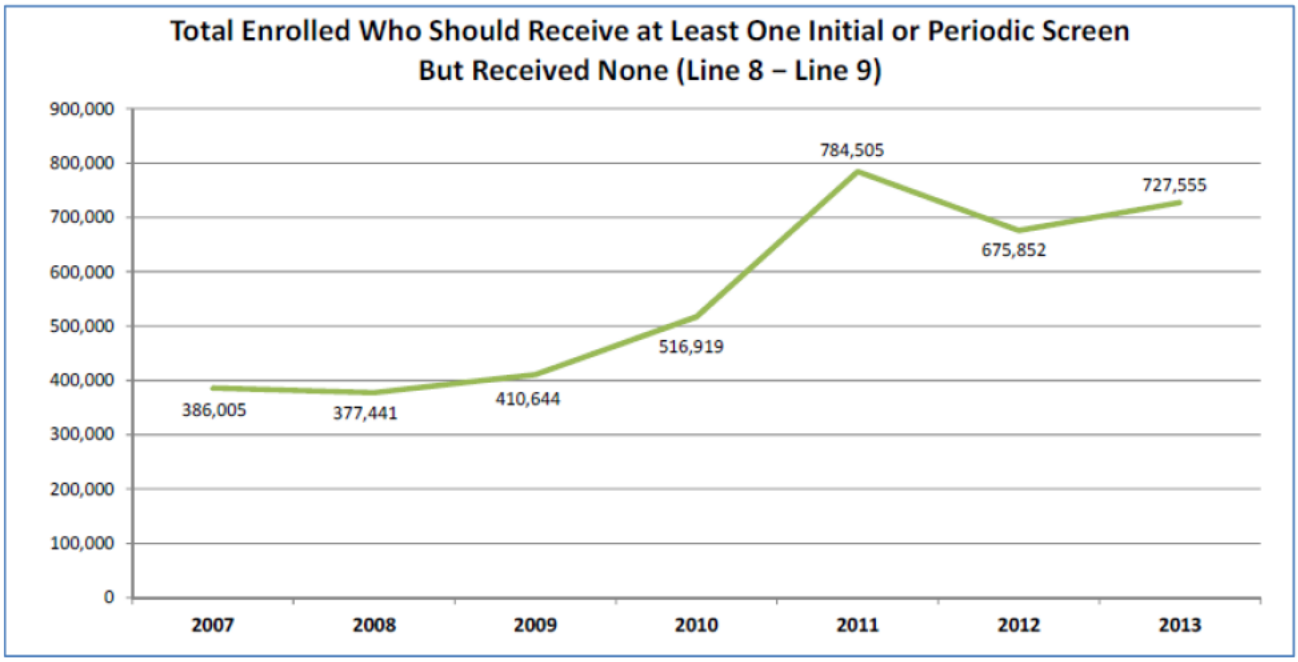
accepting new Medicaid patients, and we are considering no longer accepting any new Medicaid patients."); Exh. 19, Aina Decl. at ¶ 10 (discussing decision to withdraw from Medicaid because of inadequate reimbursement rates); Exh. 16, Mellado at ¶ 10; Exh. 21, Johnson Decl. at ¶ 6 ("The demand for new patient appointments greatly exceeds our supply."); Exh. 17, Governale Decl. at ¶ 4 ("There is an overwhelming demand for the clinic's [Medicaid] services.").

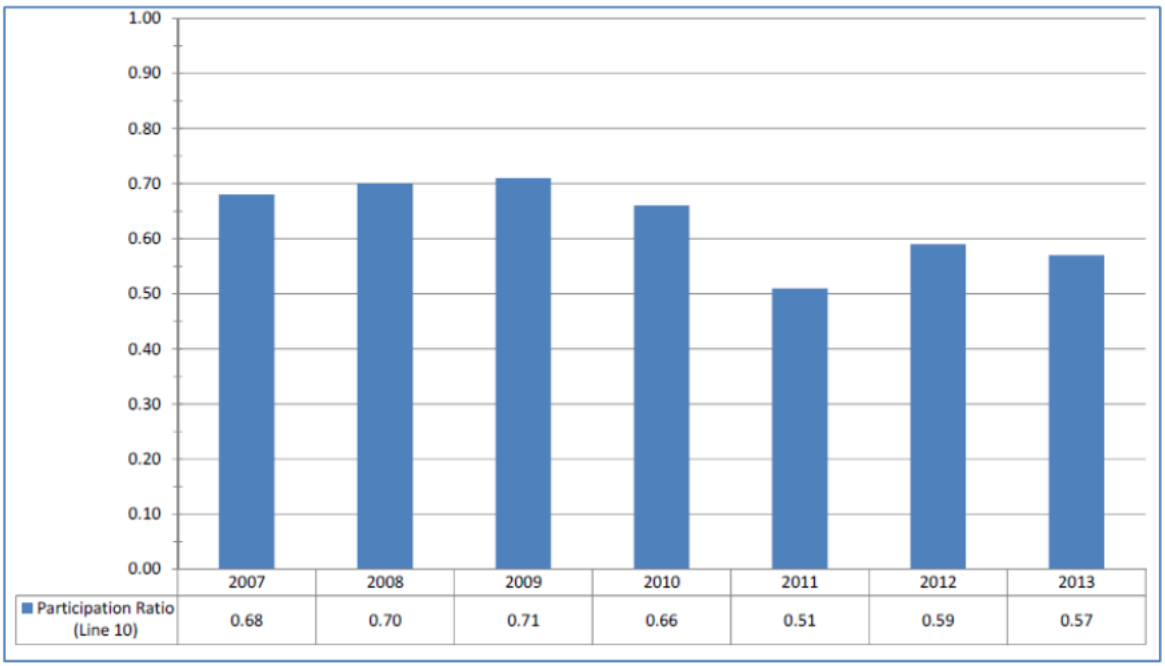
Dentists will also testify that they continue to face difficulties locating Medicaid specialists for referrals. *See, e.g.*, Exh. 15, Berry Decl. at ¶ 12 ("When children need[ ] root canals, I tell them that they will either have to pay out-of-pocket or travel to Shands Hospital in Gainesville (4 hours away) because there are no nearby endodontists who accept Medicaid."); Exh. 20, Hughes Decl. at ¶ 11 ("Since the transition [to managed care], it has become more difficult [to make specialist referrals]."); Exh. 18, Matos Decl. at ¶ 14 (discussing difficulties locating referals); *see also* Exh. 17, Governale Decl. at ¶ 5 ("We are the only major dental center in Southwest Florida providing specialty care services for at-risk children. As a result, many families drive for hours in order to access care at our clinic.").

Florida's move to managed care has only made matters worse, as the dentists now must deal with new bureaucratic and administrative disincentives to participation in the Medicaid system. *See, e.g.*, Exh. 19, Aina Decl. at ¶ 10 ("We made the difficult decision to withdraw from [our practice] from Medicaid because the reimbursement rates are too low to cover [our] overhead, and because of the administrative burdens associated with the Medicaid managed care program, such as complicated claims processing procedures and delays in receiving reimbursements."); Exh. 16, Mellado Decl. at ¶ 9 ("To operate under the Statewide Medicaid Managed Care program, [my practice] has had to hire three additional full-time staffers. This has significantly increased our costs of doing business.").

C. Expert Witnesses

Plaintiffs proffer testimony from three expert witnesses, each of whom testified at trial. First, Dr. Thomas Darling, whose analysis demonstrates that the Florida Medicaid system has not improved since the close of trial, and, in fact, may have deteriorated in key respects. *See* Exh. 23, Darling Decl. For example, Dr. Darling will provide analysis showing that hundreds of thousands of children still do not receive the Medicaid services to which they are entitled and that the participation ration remains low, as illustrated in the following charts included in his declaration:





Id. at ¶¶ 1, 5.

Second, Dr. Samuel Flint, will testify that Florida Medicaid remains a non-competitive purchaser for children's health care services and that Florida's Medicaid-eligible children still do not receive EPSDT services as a result. *See* Exh. 24, Flint Decl. at ¶ 3 ("I reaffirm that the reimbursement rates that Florida pays to Medicaid physicians are grossly inadequate, leading do provider shortages and a lack of access to care for children. In fact, my reassessment of the situation leads me to believe that the current circumstances have likely worsened since I submitted my expert report and testified in this case.").

This is due to the fact that now, with the expiration of the Affordable Care Act temporary rate increases, managed care plans pay Florida doctors at rates predicated on the pre-ACA Medicaid fee-for-service rates that this Court has thoroughly examined at trial and found to be inadequate to assure reasonably prompt access to care or to provide for access to EPSDT

services. Dr. Flint will testify that Florida is falling even farther behind other states, many of which, unlike Florida, have maintained recent rate increases under the Affordable Care Act. *See id*. at ¶ 6. He will also discuss a recent GAO study, which shows that Florida Medicaid's managed care reimbursement rates are approximately 60% less than commercial rates. *See id*. at ¶ 6(c).

Third, Dr. James Crall, will testify that a 2014 study shows Florida ranks last in the nation in the percentage of Medicaid-enrolled children receiving any dental treatment services and that Florida ranks last in the nation in the percentage of Medicaid-enrolled children receiving any preventative services. *See* Exh. 25, Crall Decl. at ¶ 14. He will explain that a major reason that Florida performs so poorly in this area is that very few dentists participate in the Medicaid system. *See id.* at ¶ 10 (discussing data from a recent DOH workforce survey, which indicates that fewer than 14% of Florida's dentists participate in Medicaid, a decrease from previous years). He stands by his previous testimony that dental reimbursement rates are inadequate; that dental provider participation in the Florida Medicaid system, even through managed care, is insufficient; and that children do not receive Medicaid dental services as a result. *See id.* at ¶ 9 ("I have seen no evidence or other data that causes me to doubt these previous conclusions, and I believe that Florida continues to suffer from a shortage of dentists who are willing to treat children on Medicaid.").

IV. Conclusion

The Court's exhaustive Amended Findings of Fact and Conclusions of Law do not describe a program that, as the State asserted publicly in response to that filing, no longer exists. Those Findings remain relevant and probative, and they require declaratory and injunctive relief

to assure children of their federal rights of access to care under several provisions of the Medicaid Act providing for such enforceable rights.

Dated: April 8, 2015

Respectfully Submitted,

By: /s/ Stuart H. Singer

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Addendum: List of Plaintiffs' Proffered Witnesses

Exhibit	Witness
1	Fox-Levine
2	James Cheek
3	Jose Jimenez
4	Lisa Cosgrove
5	Paul Robinson
6	Toni Richards-Rowley
7	Tommy Schechtman
8	Adriana Castro[1]
9	Adam Fenichel
10	Allan Greissman
11	Brett Baynham
12	Jonathan Phillips
13	Daniel Brodtman
14	Barry Setzer
15	Eric Berry
16	Jose Mellado
17	Lauren Governale
18	Monica Matos
19	Olubisi Aina
20	Bertram Hughes
21	Stephanie Johnson
22	Laban Bontrager
23	Thomas Darling
24	Samuel Flint
25	James Crall
26	Louis St. Petery

[1] Dr. Castro is receiving medical treatment, and was not able to execute her declaration in time for this filing. She has affirmed the statements made in her declaration. We will supplement this filing with her executed declaration upon receipt.

SERVICE LIST

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

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

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