UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. 05-23037-CIV-JORDAN

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

Plaintiffs

vs.

HOLLY BENSON, in her official capacity as Secretary of the Florida Agency for Health Care Administration, et al.,

Defendants

ORDER DENYING THE DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

For the reasons stated below, the defendants' motions for summary judgment [D.E. 549, 560] are DENIED.

I. LEGAL STANDARD

A motion for summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Where the non-moving party fails to prove an essential element of its case for which it has the burden of proof at trial, summary judgment is warranted. *See Celotex Corp.*, 477 U.S. at 323. That is, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (*quoting First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968)). In making this assessment, the court "must view all the evidence and all factual inferences reasonably drawn from the evidence in the light most favorable to the nonmoving party," *see Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1285 (11th Cir. 1997), and "resolve all

reasonable doubts about the facts in favor of the nonmovant." *See United of Omaha Life Ins. v. Sun Life Ins. Co.*, 894 F.2d 1555, 1558 (11th Cir. 1990). I therefore review the facts in the light most favorable to the plaintiffs.

II. Facts & Procedural History

This case concerns the defendants' allegedly unlawful failure to provide Florida children enrolled in (and eligible for) Medicaid with essential medical and dental services as required by the Social Security Act. Specifically, Title XIX of the Social Security Act mandates that children enrolled in Medicaid be furnished with the primary, preventative, acute, and specialty care and services which are necessary to their good health and development. The plaintiffs allege, in part, that more than 500,000 Medicaid-enrolled children were not furnished with preventative healthcare in violation of federal law. The plaintiffs seek declaratory and injunctive relief to compel the defendants to meet their alleged obligations under the Medicaid Act on an going-forward basis.[1]

The defendants urge me to grant summary judgment because (1) the plaintiffs lack a private right of action to sue under the Medicaid provisions at issue, including 42 U.S.C. §§ 1396a(a)(8), (a)(10), (a)(30), and (a)(43); and (2) even if the plaintiffs have a private right of action, the term "medical assistance," included in §§ 1396a(a)(8) and (a)(10), is narrowly defined and precludes relief for failure to provide medical services.[2]

III. Discussion

A. Whether 42 U.S.C. §§ 1396a(a)(8), (a)(10), and (a)(30) Confer Individually Enforceable Rights

[1]The plaintiffs do not seek any damages arising from the defendants' alleged continued and systematic violations of federal law.

[2]The defendants also contend that the plaintiffs lack standing. I reject this argument, and find that one individual plaintiff has standing to pursue the remaining three counts, as explained in the order on class certification. Additionally, I do not address the defendants' argument, presented for the first time in their reply brief, that Secretary Sheldon is entitled to summary judgment on Count 4 because DCF is not alleged to have outreach obligations under § 1396a(a)(43). I cannot, and should not, consider new arguments raised for the first time in a reply brief. *See Powell v. Carey Intern., Inc.*, 490 F. Supp. 2d 1202, 1204 n.4 (S.D. Fla. 2006).

The defendants assert that there is no private right of action under §§ 1396a(a)(8), (a)(10), and (a)(30). The Supreme Court has explained that to determine whether a federal statute creates an enforceable right against a state a court must analyze three factors:

> First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms.

Blessing v. Freestone, 520 U.S. 329, 340-41 (1997) (citations omitted). For statutory language to satisfy the first factor, it must be "rights-creating" and clearly impart an "individual entitlement" on the plaintiff with an "unmistakable focus on the benefitted class." *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 287 (2002). The defendants' contentions fail because the provisions at issue in this case meet the three-prong test established in *Blessing*, as refined by *Gonzaga*.

B. 42 U.S.C. §§ 1396a(a)(8) & (a)(10)

Count 1 alleges a violation of the "reasonable promptness" clause of the Social Security Act, 42 U.S.C.§ 1396a(a)(8). As stated in my order on the motion to dismiss, the Eleventh Circuit in *Doe v. Chiles*, 136 F.3d 709, 719 (11th Cir. 1998), expressly held that § 1396a(a)(8) meets all three requirements of the *Blessing* test. It is for the Eleventh Circuit to decide whether *Doe* has been so eroded by *Gonzaga* that it should be overruled. My job, as a district judge, is to follow *Doe* at this time. *See, e.g.*, *United States v. Baxter*, 2009 WL 106649, *1 (11th Cir. 2009) ("Because *Moore* [a prior Eleventh Circuit decision] has not been overruled by this Court sitting *en banc* or the Supreme Court, the district court was bound to follow its holding"). In any event, I do not believe that *Doe* has been called into doubt by *Gonzaga*. My prior decision is supported by several post-*Gonzaga* opinions which agreed with the opinion in *Doe*. *See Bryson v. Shumway*, 308 F.3d 79, 89 (1st Cir. 2002); *Newark Parents Ass'n v. Newark Pub. Sch.*, 547 F.3d 199, 208 (3d Cir. 2008); *Sabree ex. rel. Sabree v. Richman*, 367 F.3d 180, 194 (3d Cir. 2004); *Doe v. Kidd*, 501 F.3d 348, 356 (4th Cir. 2007); *Westside Mothers v. Olszewski*, 454 F.3d 532, 536-37 (6th Cir. 2006).

Count 1 also alleges a violation of § 1396a(a)(10), which provides that a state plan for medical assistance must "provide for making medical assistance available." Consistent with my decision on the motion to dismiss, and with the seven courts of appeal that have squarely addressed this issue post-*Gonzaga*, I hold that § 1396a(a)(10) confers enforceable rights on the plaintiffs. *See Newark Parents Ass'n*, 547 F.3d at 208; *Sabree*, 367 F.3d at 190; *S.D. ex rel. Dickson v. Hood*, 391 F.3d 581, 607 (5th Cir. 2004); *Westside Mothers*, 454 F.3d at 536-37; *Katie A. ex rel. Ludin v. L.A. County*, 481 F.3d 1150, 1153 n.7 (9th Cir. 2007); *Watson v. Weeks*, 436 F.3d 1152, 1154 (9th Cir. 2006).

C. 42 U.S.C. § 1396a(a)(30)(A)

The defendants also argue that § 1396a(a)(30)(A) -- the equal access provision -- has an aggregate focus and does not confer enforceable rights on the plaintiffs. Because of the similarity of the statutory language in § 1396a(a)(30)(A) and the language of the Boren Amendment, which the Supreme Court found sufficient to confer a private right of action, I conclude that the individual plaintiffs may bring an action under § 1396a(a)(30)(A) in light of *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 519-20 (1990).

In *Wilder*, the Supreme Court held that health care providers could sue to enforce the Boren Amendment because they were the "intended beneficiaries" of a provision that imposed a "binding obligation" on states to adopt reasonable rates. *See id.* at 509-510. The text of the Boren Amendment required states to:

> "[P]rovide . . . for payment . . . of the hospital services, nursing facility services, and services in an intermediate care facility for the mentally retarded provided under the plan through the use of rates (determined in accordance with methods and standards developed by the State . . .) *which the State finds, and makes assurances satisfactory to the Secretary, are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities* in order to provide care and services in conformity with applicable State and Federal laws, regulations, and quality and safety standards and to assure that individuals eligible for medical assistance have reasonable access . . . to inpatient hospital services of adequate quality.

Id. at 502-03. The judiciary was competent to enforce the requirement that a state adopt rates that were "reasonable and adequate to meet the costs" of medical facilities because "[w]hile there may be a range of reasonable rates, there certainly are *some* rates that no State could ever find to be reasonable and adequate." *Id.* at 519-20.

The Supreme Court in *Wilder* applied a less stringent three-prong test than the one adopted by *Gonzaga* to determine whether the Boren Amendment conferred a private right of action. The *Wilder* Court's analysis, however, was expressly preserved by *Gonzaga*, which stated that the language of the Boren Amendment "left no doubt of its intent for private enforcement . . . because the provision required States to pay an 'objective' monetary entitlement to individual health care providers." *See Gonzaga*, 536 U.S. at 281. *Wilder*, then, remains good law.

In this case, § 1396a(a)(30)(A) requires a state program to:

> [P]rovide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan . . . as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care and *are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area . . .*

§ 1396a(a)(30)(A) (emphasis added). In my view, § 1396a(a)(30)(A) imposes a mandate on states that mimics the Boren Amendment and contains similar "rights-creating language." *See Gonzaga*, 536 U.S. at 290. The Boren Amendment required states to create programs that provided reasonable payment to provide access to adequate medical assistance, while § 1396a(a)(30)(A) requires states to create programs that provides sufficient payment to ensure that adequate access to medical assistance is "available under the plan."[3] The only distinction between the two provisions is that § 1396a(a)(30)(A)'s beneficiaries are Medicaid enrolled individuals who utilize the care and services "available under the plan" and the Boren Amendment's beneficiaries are medical providers. *See Penn. Pharm. Ass'n v. Houstoun*, 283 F.3d 531, 543-44 (3d Cir. 2002) (*en banc*) (Alito, J.) (holding that § 1396a(a)(30)(A)'s provisions for quality of care and adequate access were "draft[ed] . . . with an unmistakable focus on Medicaid beneficiaries"). But the fact that health care providers are mentioned in the text of the Boren Amendment and plan participants are not explicitly discussed in

[3]Private enforcement of a provision is not unavailable merely because the statutory provision discusses the requirements of a state Medicaid plan. *See* 42 U.S.C. § 1320a-2 ("In an action brought to enforce a provision of this chapter, such provision is not deemed unenforceable because of its inclusion in a section of this chapter requiring a State plan or specifying the required contents of a State plan.").

the text of § 1396a(a)(30)(A) does not compel a different result: plan participants are given a right of enforcement through the language requiring states to make available services "under the plan."[4]

I acknowledge that several circuits have determined, post-*Gonzaga*, that § 1396a(a)(30)(A) does not expressly create an enforceable individual right. *See Long Term Care Pharm. Alliance v. Ferguson*, 362 F.3d 50, 59 (1st Cir. 2004); *Equal Access for El Paso v. Hawkins*, 509 F.3d 697, 703 (5th Cir. 2007); *Westside Mothers*, 454 F.3d at 542; *Sanchez v. Johnson*, 416 F.3d 1051, 1060 (9th Cir. 2005); *OKAAP v. Fogarty*, 472 F.3d 1208, 1210, 1215 (10th Cir. 2007); *Mandy R. ex rel. Mr. and Mrs. R. v. Owens*, 464 F.3d 1139, 1148 (10th Cir. 2006). With the exception of *Long Term Care* and *Mandy R.*, however, none of the cases distinguish *Wilder* and are therefore not very persuasive. *Long Term Care* evaluates only whether § 1396a(a)(30)(A) provides a private right of action for providers, and though the First Circuit acknowledges that "the Boren Amendment and subsection (30)(A) contain[] nearly identical substantive requirements," it dismisses the similarity and concludes that "*Gonzaga* requires clear statutory language for the create of private rights enforceable under 1983." *See* 362 F.3d at 58.[5] *Mandy R.* similarly expressed credulity that *Gonzaga* preserved *Wilder* and found that *Gonzaga* "tightened the first requirement" of finding a private right to enforce statutory violations and therefore no relief was available. *See Mandy R.*, 464 F.3d at 1147.

I admit that, if I were to apply the *Gonzaga* test to § 1396a(a)(30)(A) on a blank slate, it might be difficult to find sufficient "rights creating language" to allow for private enforcement. But it is not for the lower courts to decide that a Supreme Court case on point has been eroded to the point of no longer being binding precedent. *See, e.g., Hohn v. United States*, 524 U.S. 236, 252-53 (1998); *Powell v. Barrett*, 541 F.3d 1298, 1302 (11th Cir. 2008). The First and Tenth Circuits, in my opinion, gave too little deference and weight to *Wilder*.

I find further support for the conclusion that § 1396a(a)(30)(A) allows for private enforcement in the analysis of another district court case which holds that the "structure and

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[4]Although it is unclear whether the judiciary has sufficient competence to determine if a state has assured sufficient payments to enlist enough providers as it does to determine if a state has made reasonable payment to meet the costs of facilities (as in *Wilder*), the defendants have not argued that § 1396a(a)(30)(A) does not allow for enforcement because it is too vague and amorphous.

[5]*Long Term Care* cites the repeal of the Boren Amendment in 1997 as a reason to ignore *Wilder*. *See* 362 F.3d at 58. That makes no sense. The subsequent repeal of an amendment to increase "the flexibility of the states" may shed light as to Congress' later views as to private enforcement of the Boren Amendment, but does not alter the Supreme Court's analysis that the text of the Boren Amendment was sufficient to confer private enforcement.

language of [the Boren Amendment and § 1396a(a)(30)(A)] are nearly identical, and each focuses on mandatory obligations [that] a state plan must meet" there is "no principled basis to say that a private right of action is unavailable in this case." *See Memisovski v. Maram*, 2004 WL 1878332, at *8 (N.D. Ill. 2004). *See also Clark v. Richman*, 339 F. Supp. 2d 631, 639-40 (M.D. Pa. 2004) (applying the reasoning of *Memisovski* to find that § 1396a(a)(30)(A) confers privately enforceable rights); *Pediatric Specialty Care, Inc. v. Ark. Dept. of Human Servs.*, 443 F.3d 1005, 1014-16 (8th Cir. 2007) (finding that § 1396a(a)(30)(A) confers a privately enforceable right to Medicaid recipients), *cert. granted and order vacated as to individual defendants only*, 551 U.S. 1142 (2007).

D. 42 U.S.C. § 1396a(a)(43)(A)

I decline the defendants' invitation (contained in a footnote in their argument on standing) to reconsider my decision that § 1396a(a)(43)(A) created enforceable rights. The defendants identify no cases to contradict my prior ruling, and various courts have found that the provision creates enforceable rights. *See Bonnie L. v. Bush*, 180 F. Supp. 2d 1321, 1346 (S.D. Fla. 2001), *aff'd on other grounds and vacated in part, 31 Foster Children v. Bush*, 329 F.3d 1255 (11th Cir. 2003); *Westside Mothers*, 454 F.3d at 543-44; *Clark*, 339 F. Supp. 2d at 638-40; *Memisovski*, 2004 WL at *8-11, *Health Care for All v. Romney*, 2005 WL 1660677, at *13 (D. Mass. 2005); *A.M.H. v. Hayes*, 2004 U.S. Dist. Lexis 27387, at *19 (S.D. Ohio 2004).

E. DEFINITION OF MEDICAL SERVICES

The defendants argue that, even if I find that §§ 1396a(a)(8) and (a)(10) contain enforceable rights, relief under Count 1 is precluded because the term "medical assistance" in each of the statutory provisions is narrowly defined by the Medicaid Act to include only payment for medical services. In *Doe*, however, the Eleventh Circuit followed *Sobky v. Smoley*, 855 F. Supp. 1123, 1145 (E.D. Cal. 1994), which held that "medical assistance under the plan . . . can only mean medical services." *See* 136 F.3d 709, 716 n.13. Based on this understanding, *Doe* upheld a claim that the Florida Department of Health & Rehabilitative Services violated § 1396a(a)(8) by failing to provide medical assistance, which consisted of the "therapies, training and other active treatment to which [the plan participants were] entitled." *Id.* at 711. The Eleventh Circuit in *Doe*, then, considered and rejected the argument that the term "medical assistance" is limited to payment alone. Indeed, the state had argued that it had "no obligation to place individuals in facilities; but were obligated only to reimburse the ICF providers with reasonable promptness." *See* Brief of Appellee at 17-18, *Doe v. Chiles*, No. 96-5144 (11th Cir. Apr. 9, 1997). Furthermore, the Eleventh Circuit's broad interpretation of "medical assistance" as including medical services is supported by decisions of the

First and Ninth Circuit, though there is admittedly a split in the circuits. *See Bryson v. Shumway*, 308 F.3d 79, 89 (1st Cir. 2002); *Katie A*, 481 F.3d at 1154. *But see Equal Access for El Paso, Inc. v. Hawkins*, 562 F.3d 724, 728-29 (5th Cir. 2009) (holding that medical assistance means payment for medical services); *Westside Mothers*, 454 F.3d at 540-41 (same); *Bruggeman ex rel. Bruggeman v. Blagojevich*, 324 F.3d 906, 910 (7th Cir. 2003) (same); *OKAAP*, 472 F.3d at 1210 (same).

Finally, the text and structure of the Medicaid Act support the *Doe* panel's interpretation that medical assistance includes medical services. To determine the meaning of a statutory term, a court consider the definition and context of the term. *See Wachovia Bank, N.A. v. United States*, 455 F.3d 1261, 1268 (11th Cir. 2006) ("[W]e do not read words or strings of them in isolation. We read them in context. We try to make them and their near and far kin make sense together, have them singing on the same note, as harmoniously as possible."). The Medicaid Act defines "medical assistance" as "payment of part or all of the cost of the [listed] care and services." 42 U.S.C. § 1396d(a), Additionally, § 1396a(a)(10) states that a plan must provide "for making medical assistance available, *including at least the care and services* listed" in § 1396d(a), which specifies access to hospital services and physician services. *See* § 1396a(a)(10) (emphasis added); §§ 1396a(a)(d)(1), (d)(5). Because the word "include" shows that the statute's drafters "intended to provide a non-exhaustive list of examples to clarify the meaning of a term," the structure of § 1396a(a)(10), read together with § 1396d(a), suggests that care and services are contained within the definition of medical assistance." *See Jean v. Nelson*, 863 F.2d 759, 777 (11th Cir. 1988). Several other provisions in § 1396a(a) also describe "medical assistance" as including care and services. *See, e.g.*, §§ 1396d(a)(43), 1396a(10)(C)(iii) and (C)(iv). Additionally, regulations enacted pursuant to the Medicaid Act require that a state plan "specify that" recipients are "furnished" listed "services," *see* 42 C.F.R. §§ 440.210, 440.220, and require the state agency administering EPSDT provide recipients "services" including dental care and immunizations. *See* 42 C.F.R. § 441.56(c). These regulations are consistent with the plaintiffs' definition of "medical services."[6] Given *Doe*, the language of §§ 1396a and 1396d, and the regulations discussed above, I reject the defendants' narrow definition of "medical assistance" and conclude that medical assistance includes the provision of medical services.

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[6]I reject the defendants' contention that the term "medical services" is ambiguous. Rather, the regulations discussed merely provide further support for my interpretation of the plain language of the statute. And even if the statutory language is ambiguous, the agency's interpretation is entitled to deference so long as it is reasonable. *See Friends of Everglades v. S. Fla. Water Mgt. Dist.*, 570 F.3d 1210, 1227-28 (11th Cir. 2009).

IV. CONCLUSION

The defendants' summary judgment motions are DENIED.

DONE and ORDERED in chambers in Miami, Florida, this 30th day of September, 2009.

Adalberto Jordan
United States District Judge

Copy to: All counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. 05-23037-CIV-JORDAN

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

Plaintiffs

vs.

HOLLY BENSON, in her official capacity as Secretary of the Florida Agency for Health Care Administration, et al.,

Defendants

ORDER GRANTING IN PART THE PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Following oral argument and a de novo review of the record, including the defendants' objections [D.E. 622, 625] and the plaintiffs' response [D.E. 623], I adopt the thorough and well-reasoned report and recommendation ("R&R") issued by Magistrate Judge McAliley. Accordingly, the plaintiffs' motion for class certification [D.E. 281] is GRANTED IN PART.

I. LEGAL STANDARD

To certify a class action, "the named plaintiffs must have standing, and the putative class must meet each of the requirements specified in Federal Rule of Civil Procedure 23(a), as well as at least one of the requirements set forth in Rule 23(b)." *See Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1265 (11th Cir. 2009) (citations omitted). The "district court must conduct a rigorous analysis of the Rule 23 prerequisites before certifying a class,"and though it "should not determine the merits of the plaintiffs' claim at the class certification stage, [it] can and should consider the merits of the case to the degree necessary to determine whether the requirements of Rule 23 will be satisfied." *Id.*

at 1266 (citations omitted). Additionally, the court may "accept the substantive allegations in the complaint as true." *See Drayton v. W. Auto Supply Co.*, 2002 WL 32508918, at *6 (11th Cir. 2002).[1]

II. FACTS & PROCEDURAL HISTORY

The background of this case is described in Judge McAliley's R&R and I will not repeat it here. Judge McAlilely's finding that class certification is appropriate is consistent with numerous federal cases considering a state's alleged non-compliance with the Medicaid Act. *See, e.g., Memisovski ex. rel. Memisovski v. Maram*, 2004 WL 1878332, at *1 (N.D. Ill. 2004); *Hawkins ex. rel. Hawkins v. Comm'r of N.H. Dep't of Health and Human Servs.*, 2004 WL 166722, at *4 (D.N.H. 2004); *McCree v. Odum*, No. 4:00-173 (H)(4) (E.D.N.C. 2002); *Carr v. Wilson-Coker*, 203 F.R.D. 66, 72-75 (D.Conn. 2001); *Salazar v. District of Columbia*, 954 F. Supp. 278, 287-88 (D.D.C. 1996); *Sanders v. Lewis*, 1995 WL 228308, at *1 (S.D. W. Va. 1995); *Thompson v. Raiford*, 1993 WL 497232, at *1 (N.D. Tex. 1993).[2] Despite this precedent, the defendants hurl a litany of objections at the R&R. Though the objections are impressive in number, they lack merit. I address the defendants' arguments in the following order: (a) whether the class representatives have standing; (b) whether Rule 23(a) is satisfied; and (c) whether Rule 23(b) is satisfied.

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[1]The defendants argue that the R&R applies an incorrect legal standard to determine whether the proposed class satisfies Rule 23's requirements and that I should conclusively resolve factual disputes where there is conflicting evidence. As is evident from the legal standard applicable to class actions, conclusive resolution of factual disputes is not required. I may accept the plaintiffs' allegations as true and may "consider the merits of the case to the degree necessary to determine whether the requirements of Rule 23 will be satisfied." *See Vega*, 564 F.3d at 1265-66.

Because it does not affect the Rule 23 analysis, addressed below, the defendants' contentions that the plaintiffs have not proffered evidence of care received by Florida children with private insurance and that the plaintiffs rely on inaccurate statistical evidence will be resolved at summary judgment or trial. The defendants' argument that there is no evidence that AHCA has failed to pay for requested medical services, and that therefore there is no claim under 42 U.S.C. §§ 1396a(a)(8) and (a)(10), is rejected, as explained in the order denying the defendants' motion for summary judgment.

[2] These decisions are inconsistent with *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280 (10th Cir. 1999), in which the Tenth Circuit denied class certification to the plaintiffs -- children suing New Mexico for failure to provide services required by Medicaid -- because the proposed class lacked commonality. Given the substantial legal support for finding class certification, the record in this case, and my own analysis of the commonality issue discussed below, I do not find *Valdez* persuasive.

III. DISCUSSION

A. STANDING OF CLASS REPRESENTATIVES

Before certifying a class, a court must ensure that "at least one named class representative has Article III standing to raise each class subclaim." *See Prado Steiman v. Bush*, 221 F.3d 1266, 1279 (11th Cir. 2000) (citations omitted). For a plaintiff to have Article III standing, there must be (1) an injury in fact, i.e., an invasion of the plaintiff's legally protected interest that is concrete and particularized, actual, or imminent; (2) a causal connection between the plaintiff's injury and the defendant's conduct; and (3) the likelihood that a favorable decision will redress the injury. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Fla. Conf. of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1159 (11th Cir. 2008). At the class certification stage, the plaintiff need not conclusively prove that he has suffered a redressable injury in fact that is causally related to the defendant's conduct to show standing. Rather, the plaintiff need only "*allege* facts demonstrating that he is a proper party with standing to invoke judicial resolution of a dispute." *See Hernandez v. Medows*, 209 F.R.D. 665, 668 (S.D. Fla. 2002) (emphasis added) (citations omitted). To determine whether a plaintiff has adequately alleged standing, a court undertakes a fact-specific inquiry and examines "factual proffers" such as "affidavits and other evidentiary documents." *See Prado-Steiman*, 221 F.3d at 1280.[3]

Because I previously determined that individual plaintiffs had standing to bring Counts 1 and 4 against DCF and Counts 1 and 2 against DOH, *see* summary judgment order, [D.E. 541, p. 4-9],

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[3] The defendants contend that Magistrate Judge McAliley failed to adequately resolve claimed factual contradictions in the affidavits supporting standing. The defendants, however, misunderstand the plaintiffs' burden in showing standing. At the class certification stage, the plaintiffs need only make an allegation, supported by "factual proffers" such as affidavits, that a plaintiff has standing. *See Prado-Steiman*, 221 F.3d at 1280. I need not determine that the plaintiffs' factual allegations are conclusively correct at the class certification stage because lack of standing is a jurisdictional defect that is "open to review at all stages of the litigation." *See Wilson v. State Bar of Ga.*, 132 F.3d 1422, 1427 (11th Cir. 1998) (citation omitted). I find that the evidence that Magistrate Judge McAliley relied on sufficient to support each element of standing at this stage. *See generally Borchese v. Town of Ponce Inlet*, 405 F.3d 964, 975-76 (11th Cir. 2005) (each element of standing must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation).

and this decision remains the law of the case,[4] the only issues remaining are whether there is an individual plaintiff who has standing to bring Counts 1 (reasonable promptness), 2 (equal access), and 4 (outreach and information) against AHCA.

Magistrate Judge McAliley found that S.M. had standing to pursue Counts 1 and 4 against AHCA because he faces imminent injuries: he was denied a timely medical screening in the past, his mother did not receive required information about S.M.'s rights from defendants, and these injuries are likely to recur in the future.[5] Similarly, she found that J.S. had standing to pursue Count 2 against AHCA because she also faces an imminent injury: it is likely that she would be denied access to necessary, specialized medical care based on repeated, past denials. Both S.M. and J.S. can show causation and redressability because the imminent denial of prompt, necessary care and lack of information is allegedly caused by AHCA's failure to fulfill its statutory responsibilities, including ensuring adequate funding and providing information. The injuries would be redressed by an injunction compelling compliance with the law. Indeed, several courts have held that there is a "direct connection between Medicaid recipients' access to medical care and services and low reimbursement rates" sufficient to prove causation and redressability. *See Equal Access for El Paso, Inc. v. Hawkins*, 509 F.3d 697, 701 n.5 (5th Cir. 2007) (*citing Okla. Chapter of the Am. Acad. of Pediatrics v. Fogarty*, 366 F. Supp. 2d 1050, 1106-07 (N.D.Okla.2005)); *Memisovski ex rel. Memisovski v. Maram*, 2004 WL 1878332, at *42 (N.D. Ill. 2004); *Clayworth v. Bonta*, 295 F. Supp. 2d 1110, 1116 (E.D. Cal.2003), *rev'd on other grounds*, 140 Fed. Appx. 677 (9th Cir. 2005); *Clark v. Kizer*, 758 F. Supp. 572, 577 (E.D. Cal.1990), *aff'd in relevant part*, *Clark v. Coye*, 967 F.2d 585 (9th Cir.1992); *Thomas v. Johnston*, 557 F. Supp. 879, 903-04 (W.D. Tex.1983)). As a result, I

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[4] "A court has the power to revisit prior decisions of its own . . . although as a rule courts should be loath to do so in the absence of extraordinary circumstances such as where the initial decision was clearly erroneous or would work a manifest injustice." *Christianson v. Colt Indus. Op. Corp.*, 486 U.S. 800, 817 (1988). The defendants have not identified any extraordinary circumstances or an intervening change in controlling law to compel me to reevaluate my March, 2009 decision that individuals plaintiffs have standing to bring Counts 1, 2, and 4 against DCF and DOH. Should the evidence at trial demonstrate otherwise, I will of course revisit my prior rulings.

[5]The defendants also argue that 42 U.S.C. § 1396a(a)(43) requires states to provide Medicaid recipients outreach regarding only EPSDT services and immunizations. The plaintiffs' allegation that S.M.'s mother did not receive information about S.M.'s rights under Medicaid reasonably encompasses this narrower claim because the EPSDT program is a component of Medicaid. It is therefore unnecessary to determine the scope of the statutory provision in the standing analysis.

conclude that S.M. has standing to pursue Counts 1 and 4 against AHCA, and that J.S. has standing to pursue Count 2 against AHCA.

The defendants also argue, contrary to clear precedent of the Eleventh Circuit, that the plaintiffs have not demonstrated cognizable injuries in fact; according to the defendants, they have not shown by a preponderance of the evidence that they will suffer immediate harm because they have successfully received care in some instances. An injury in fact is imminent and "likely to occur immediately" if there is a "realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement," and that the "anticipated injury [will] occur with some fixed period of time in the future." *See Browning*, 522 F.3d at 1161. Thus, the plaintiffs' allegations of future harm based on inconsistent care in the past are sufficiently imminent to show standing because there is a "realistic danger of sustaining a direct injury" in the near future. *See id.*

Furthermore, the fact that some of the plaintiffs have in some instances received necessary care does not make their claims of imminent injury moot:

> It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. If it did, the courts would be compelled to leave the defendant free to return to his old ways. In accordance with this principle, the standard we have announced for determining whether a case has been mooted by the defendant's voluntary conduct is *stringent*: A case *might* become moot if subsequent events made it *absolutely clear* that the allegedly wrongful behavior *could not reasonably be expected to recur.*

see Sheely v. MRI Radiology Network, P.A., 505 F.3d 1173, 1183-84 (11th Cir. 2007) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs, Inc.*, 528 U.S. 167, 189 (2000)). Because the defendants voluntarily ceased the allegedly wrongful behavior that caused the plaintiffs' past harm, and this harm could be reasonably expected to recur in the future, the plaintiffs' claims are not moot. *See id.*

B. RULE 23(a)'S REQUIREMENTS

Under Rule 23(a), the plaintiffs must demonstrate (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of both the class plaintiffs and class counsel. *See Vega*, 564 F.3d at 1265.[6] I find that the proposed class satisfies these elements.

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[6]The defendants' contentions that the R&R fails to assess conflicting evidence in its Rule 23 analysis (e.g., whether S.M. or T.G. suffered harm that satisfies the immediacy requirement) miss the mark because immediacy is evaluated under the standing principles and is distinct from the Rule 23 prerequisites. Because these class representatives have standing under the relevant legal standard,

1. NUMEROSITY

The numerosity requirement is met when the proposed class is "so numerous that joinder is impracticable." Fed. R. Civ. P. 23(a)(1). "Parties seeking certification do not need to know the 'precise number of class members,' but they 'must make reasonable estimates with support as to the size of the proposed class.'" *See Jones v. Jeld-Wen, Inc.*, 250 F.R.D. 685, 693 (S.D. Fla. 2008) (citations omitted). The necessity of making a reasonable estimate does not preclude certification of a class where all class members are not known. In fact, that a proposed class includes unknown individuals supports finding numerosity because "joinder of unknown individuals is certainly impracticable." *See Jack v. Am. Linen Supply Co.*, 498 F.2d 122, 124 (5th Cir. 1977) (finding numerosity existed for a proposed class that included unknown, future black employees). In this case, the plaintiffs contend that there are more than 1.5 million class members. They cite the CMS-416 Report from 2006-2007, which specifies that the total eligible individuals for the child health care check-up participation report are 1,593,814. *See* Plaintiffs' Motion for Class Certification. [D.E. 281, Ex. 10]. I conclude that this report provides a reasonable estimate of the members of the proposed class and that the inclusion of unknown individuals, including children who "now, or in the future will" reside in Florida and who "are or will be eligible" for Medicaid services, supports rather than undermines a finding of numerosity.

2. COMMONALITY

Commonality is satisfied when there is one question of law or fact that is common to the class as a whole. *See Vega*, 564 F.3d at 1268. "Class actions seeking injunctive or declaratory relief . . . by their very nature present common questions of law or fact." *Haitian Refugee Ctr., Inc. v. Nelson*, 694 F.Supp. 864, 877 (S.D. Fla. 1988). Additionally, all questions of law need not be common to all plaintiffs. *See id.* The plaintiffs, as Magistrate Judge McAlilely identified, have raised several common legal questions including whether the defendants are meeting their obligations under the Medicaid Act to provide reasonably prompt services, equal access to those services, and outreach and information, and whether Florida's Medicaid reimbursement rates are adequate to ensure that class members have access to providers. The plaintiffs, moreover, are seeking declaratory and injunctive relief, and not damages. Because the plaintiffs share common legal questions and are seeking an injunction requiring Florida's compliance with the Medicaid Act, the commonality requirement is satisfied.

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as discussed above, a separate Rule 23 analysis of immediacy is not warranted.

3. TYPICALITY

The defendants argue that the plaintiffs' class representatives cannot represent individuals who are eligible but not enrolled for Medicaid, because none of the class representatives are eligible but not enrolled for Medicaid. The typicality requirement, however, can "be satisfied even if some factual differences exist between the claims of the named representatives and the claims of the class at large." *See Prado Steiman*, 221 F.3d at 1279 n.14 (citations omitted). A "strong similarity of legal theories will satisfy the typicality requirement despite substantial factual differences." *See id.* As the plaintiffs explain, children enrolled in Medicaid and children unenrolled but eligible for Medicaid share the legal theory that Florida is failing to comply with federal law in the administration of the Medicaid program. In particular, both groups pose that Florida has failed to satisfy its outreach obligation under § 1396a(a)(43).[7] Therefore, typicality exists.

Additionally, I agree with Magistrate Judge McAliley's analysis that the organizational plaintiffs cannot satisfy the typicality requirement because they do not share the same injury as the class members. The organizational plaintiffs' injury of depletion of resources due to energy spent advocating for children improperly denied care under the Medicaid Act is distinct from the children's injury of improper denial of care. *See Vega*, 563 F.3d at 1275 ("A class representative must possess the same interest and suffer the same injury as the class members in order to be typical under Rule 23(a)(3).").

4. ADEQUACY

The defendants do not clearly challenge the R&R's adequacy analysis. I adopt Magistrate Judge McAliley's finding that the plaintiffs' counsel are well qualified and the named plaintiffs do

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[7]The defendants contend that 42 U.S.C. § 1396a(a)(43) does not require them to conduct outreach to children who are not enrolled but are eligible for Medicaid. The plain language of the regulations implementing this section state that "[t]he agency must [p]rovide for a combination of written and oral methods designed to inform effectively all EPSDT eligible individuals (or their families) about the EPSDT program." *See* 42 C.F.R. § 441.56(a)(1); *Friends of Everglades v. S. Fla. Water Mgt. Dist.*, 570 F.3d 1210, 1227-28 (11th Cir. 2009) (stating that an agency's promulgation of regulations interpreting ambiguous statutory language is entitled to deference as long as the interpretation is reasonable). The one case the defendants cite to support their claim that "federal courts . . . have found that this section provides only to Medicaid recipients" and not all eligible individuals, [D.E. 622], conclusively supports the plaintiffs. It holds that "Medicaid's implementing regulations [in specific, § 441.56(a)] . . . obligate participating States to "effectively" inform all eligible individuals." *See Westside Mothers v. Olszewski*, 454 F.3d 532, 543-44 (6th Cir. 2006). The plain language of the regulations, combined with the case law supporting this interpretation, compel the conclusion that § 1396a(a)(43) and 42 C.F.R. § 441.56(a)(1) mandate that the state conduct outreach to all eligible individuals.

not have interests antagonistic to those of the rest of the class. *See Griffin v. Carlin*, 755 F.2d 1516, 1533 (11th Cir. 1985) (finding that to determine adequacy, the court should consider whether the plaintiffs' counsel are able to conduct the litigation competently and whether the plaintiffs have clearly antagonistic interests to each other). The fact that some of the plaintiffs, including K.K. and L.C., may have obtained private insurance in addition to the Medicaid coverage does not make their interests antagonistic to the those of the rest of the class.

C. RULE 23(b)(2)'S REQUIREMENTS

In addition to meeting the requirements of Rule 23(a), the plaintiffs must also satisfy one of the requirements of Rule 23(b). In this case, the plaintiffs ask that the class be certified under Rule 23(b)(2), which applies where "the party opposing the class has acted or refused to act on the grounds that apply generally to the class, so that the final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." As the plaintiffs assert, this provision was "designed specifically for civil rights cases seeking broad declaratory or injunctive relief for a numerous and often unascertainable or amorphous class of persons." *See Baby Neal ex. rel. Kanter v. Casey*, 43 F.3d 48, 58-59 (3d Cir. 1994) (citation omitted). For example, in *Fabricant v. Sears Roebuck*, 202 F.R.D. 310, 316 (S.D. Fla. 2001), the plaintiffs sought an injunction to force the defendants to comply with Florida laws regulating the sale of insurance. The district court found that "[r]equesting a declaration that defendants presently are violating the law and an injunction forcing defendants to comply with the law is precisely the type of class appropriate for class certification under Rule 23(b)(2)." *See id.* In this case, the plaintiffs are seeking injunctive relief to compel the AHCA and DoH to comply with the Medicaid Act. This is a proto-typical case for 23(b)(2) class certification.

IV. CONCLUSION

For the above stated reasons, the plaintiffs' motion for class certification is GRANTED IN PART. The following class is certified: all children under the age of 21 who now, or in the future will, reside in Florida and who are, or will be, eligible under Title XIX of the Social Security Act for Early

Periodic Screening, Diagnosis and Treatment Services. Boies, Schiller & Flexner, LLP and Louis Bullock of Bullock & Blakemore are appointed as class counsel.

DONE and ORDERED in chambers in Miami, Florida, this 30th day of September, 2009.

Adalberto Jordan
United States District Judge

Copy to: All counsel of record

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

CASE NO. 05-23037-CIV-JORDAN/McALILEY

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

Plaintiffs,

vs.

HOLLY BENSON, et al.,

Defendants.
_____/

ORDER ON UNOPPOSED
MOTION TO CORRECT CLERICAL ERROR

THIS MATTER comes before the Court upon Plaintiffs' Motion To Correct Clerical Error. The Court has carefully considered the Motion, and being otherwise fully advised in the premises, it is **ORDERED AND ADJUDGED** that this motion is hereby **GRANTED** and that the James Eiseman Jr. of the Public Interest Law Center of Philadelphia is appointed as additional counsel to the class certified in the Court's September 30, 2009 Order, D.E. 671.

DONE AND ORDERED in Chambers, at Miami-Dade County, Florida, this 7th day of October, 2009.

The Honorable Adalberto Jordan
United States District Judge

Copies furnished to:
All counsel of Record