

**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' MEMORANDUM IN RESPONSE
TO DEFENDANTS' JUNE 25, 2013 STATUS REPORT**

Plaintiffs file this response to Defendants' June 25, 2013 Status Report Regarding Implementation Of Primary Care Rate Increases And Approval Of The Statewide Medicaid Managed Care Waiver Program, D.E. 1238, and in support thereof, state:

1. Section 1202 of the Affordable Care Act ("ACA") requires that state Medicaid programs "pay physicians practicing family medicine, general internal medicine, pediatric medicine, and related subspecialists [qualifying Medicaid physicians] at Medicare levels for the procedure codes specified in the Act for Calendar Years 2013 and 2014." *See* D.E. 1238-1 at 1.

2. The Agency for Health Care Administration ("AHCA"), according to its plan amendment that was recently approved by the federal Centers for Medicare & Medicaid Services, intends to pay qualifying Medicaid physicians at the Medicare rate for "services delivered on and after January 1, 2013, *ending on December 31, 2014*, but not prior to December 31, 2014." *See* D.E. 1238-1 at 7 (emphasis added).

3. Defendants now appear to acknowledge the importance of paying physicians who treat children on Medicaid at Medicare rates. A report prepared by seven members of the state Senate, appointed by the President of the Senate, and by seven member of the state House of Representatives, appointed by the Speaker of the House, proposes paying qualifying Medicaid physicians at the Medicare rate in state fiscal years 2014-2015 and 2015-2016. *See* 1238-9 at 12. The state, of course, is required by the ACA to pay qualifying physicians at that rate through December 31, 2014 but not after that. Thus, the report proposes extending payment of the enhanced fees to qualifying Medicaid physicians by 18 months because the state fiscal year 2015-2016 ends on June 30, 2016. The report, the State of Florida Long-Range Financial Outlook for Fiscal Years 2013-2014 through 2015-2016, classifies such payments as among “Other High Priority Needs” and recommends including in the state budget \$173.8 million in recurring general funds in fiscal year 2014-15 and \$171.4 million in recurring general funds in fiscal year 2015-16. *Id.* The recommended increase would go only to physicians who qualify for the primary care practitioner fee increases under the ACA. *Id.*

4. Defendants’ status report also references that the state Legislature, as part of a plan to shift almost all Medicaid beneficiaries into Medicaid managed care organizations, enacted a law in 2012, *see* D.E. at 1238 at ¶ 8, which states: “Effective care management should enable plans to redirect available resources and increase compensation for physicians. Plans achieve this performance standard when physician payment rates equal or exceed Medicare rates for similar services.” Fl. Stat. § 409.967(2)(a) (2012). That performance standard covers all physicians providing care to Medicaid beneficiaries through a MCO, not just to physicians who qualify for the primary care practitioner increases under the ACA. *Id.*

5. Although the state legislature and defendants now recognize the desirability of paying physicians who treat children on Medicaid at Medicare rates, none of the measures discussed in Defendants' status report will require AHCA to do so after December 31, 2014 when the enhanced payments mandated under the ACA expire. The State of Florida Long-Range Financial Outlook for Fiscal Years 2013-2014 through 2015-2016 is not binding on the legislature or the governor. The document states so itself in bold and capitalized letters. **"THE OUTLOOK DOES NOT PURPORT TO PREDICT THE OVERALL FUNDING LEVELS OF FUTURE STATE BUDGETS OR THE FINAL AMOUNT OF FUNDS TO BE ALLOCATED TO THE RESPECTIVE BUDGET AREAS. THIS IS BECAUSE VERY FEW ASSUMPTIONS ARE MADE REGARDING FUTURE LEGISLATIVE POLICY DECISIONS OR DISCRETIONARY SPENDING, MAKING THIS DOCUMENT SIMPLY A REASONABLE BASELINE."** D.E. 1238-9 at 4 (emphasis in original).

6. Similarly, Fl. Stat. § 409.967(2)(a), does not requires Medicaid MCOs to pay physicians providers at Medicare rates. Tellingly, it indicates that the legislature, rather than allocating additional moneys to fund such payments, expects Medicaid MCOs to operate more efficiently and "redirect available resources" to increasing the reimbursement rates for physicians. The legislation simply sets an aspirational goal for the Medicaid MCOs, and states that AHCA "may impose fines or other sanctions on a plan that fails to meet this performance standard after 2 years of continuous operation." Fl. Stat. § 409.967(2)(a). Of course, AHCA is not required to exercise its discretion to levy fines or other sanctions if the Medicaid MCOs fail to raise physician reimbursements to Medicare levels, especially if the Legislature does not allocate any additional dollars to pay for such increases.

7. These developments, while laudable, do not change the legal status quo which remains that the ACA's increases expire at the end of December 2014 (and are limited to certain services by certain physicians). The extensive trial record before this Court reflects the many prior times that AHCA and even the Governor have urged increases in physician compensation under Medicaid for primary physicians and specialists, only to have those legislative budget requests rejected by the Florida Legislature. *See* Plaintiffs' Corrected Proposed Findings Of Fact And Conclusions Of Law at ¶¶ 226 to 231 (citing trial testimony and exhibits).

8. Furthermore, even with the federal mandate in the ACA and Federal financing, it has been Plaintiffs' experience that Florida was very slow in initiating payments for qualified MediPass providers at the Medicare level (payments started in mid-to-late April), that Florida still has not issued back payments to January 1, 2013 for MediPass child health checkups and office visits, and that no Florida Medicaid HMO is paying physicians at the required Medicare levels.

9. Children on Medicaid in Florida have for years been systematically deprived of their federal right to reasonably prompt medical care and equal access to medical care. It appears Defendants, however belatedly, now recognize the importance of paying Medicaid providers at Medicare rates. Recognition is not legal redress, and it remain important that this Court proceed to make the requisite findings of fact and conclusions of law to support declaratory relief that Defendants have failed to provide reasonably prompt access and equal access to medical care for children on Medicaid, and that physician reimbursement must be set at least at Medicare levels to meet those federal mandates.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 3, 2013, I electronically filed the foregoing document with the Clerk of the Court by using the CM/ECF system. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

s/ Carl E. Goldfarb

Carl E. Goldfarb

Dated: July 3, 2013

Respectfully Submitted,

By: /s/ Stuart H. Singer

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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 his 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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