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, et. al.

Plaintiffs

vs.

ALAN LEVINE, et. al.

Defendants

ORDER ON MOTION TO DISMISS

The Florida Pediatric Society, Florida Chapter of the American Academy of Pediatrics, the Florida Academy of Pediatric Dentistry, Inc. ("organizational plaintiffs"), and Ashley Dove, Blanche Spell, Eva Carmona, Amy Torchin, Rita Gorenflo, and Les Gorenflo ("individual plaintiffs"), have filed a four-count civil rights class action against Andrew Agwunobi[1], in his official capacity as Secretary of the Florida Agency for Health Care Administration (AHCA), Robert A. Butterworth, in her official capacity as Secretary of the Florida Department of Children and Family Services, and Joseph J. Chiaro, M.D., in his official capacity as the Secretary of the Florida Department of Health, alleging violations of federal law arising out of the defendants' alleged failure to provide Florida children enrolled in Medicaid with essential medical and dental services as required by the Social Security Act. The defendants have moved to dismiss the complaint. For the reasons stated below, the defendants' motion to dismiss [D.E. 9] is GRANTED as to Count III and DENIED in all other respects.

I. FACTS & PROCEDURAL HISTORY

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[1] Alan Levine, Lucy Hedi and M. Rony Fracois, M.D., no longer hold offices at issue in this case. As a result, they are no longer the official capacity defendants.

The defendants do not contend that the individual plaintiffs lack standing to bring this suit. Rather, they argue that the organizational plaintiffs do not have standing to assert the claims at issue. It is well-established, however, that when one plaintiff has standing to bring all claims in an action, a court need not inquire into the standing of the others. *See Carey v. Population Services, Intern.*, 431 U.S. 678, 682 (1977) ("We conclude that appellee Population Planning Associates, Inc. has the requisite standing and therefore have no occasion to decide the standing of the other appellees."); *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 254 n. 9 (1977) (same); *American Iron and Steel Institute v. Occupational Safety and Health Administration*, 182 F.3d 1261, 1274 n.10 (11th Cir. 1991) ("No one questions that the Steelworkers have standing. Thus, except to the extent that the doctors raise points not adopted by the steelworkers, the standing question is moot"); *Planned Parenthood of the Atlanta Area, Inc., v. Miller*, 934 F.2d 1462, 1465 n.2 (11th Cir. 1991) (when one plaintiff has standing to bring all claims in an action, the court need not inquire into the standing of the others). In this case, the defendants have not challenged the standing of the individual plaintiffs. Therefore, their argument that the organizational plaintiffs have no standing need not be resolved at this stage of the case.[4]

B. The Statutes Under Which The Plaintiffs Bring Suit Confer Individually Enforceable Rights

The defendants also argue that the complaint must be dismissed because the statutes under which the plaintiffs sue do not create individually enforceable rights. The Supreme Court has previously explained that in order to determine whether a federal statute creates an enforceable right 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

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[4] The defendants also argue that the Florida Academy of Pediatric Dentistry is barred from bringing this suit because it is a dissolved corporation. Since the filing of the motion to dismiss, however, the Academy has been reinstated *nunc pro tunc* to the date of its dissolution and, under controlling law, this contention must be rejected. *See S.E.C. v. Diversified Group*, 378 F.3d 1219, 1228 (11th Cir. 2004); *Allied Roofing Industries v. Venegas*, 862 So. 2d 6 (Fla. 3d D.C.A. 2003).

> 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, 341 (1997) (emphasis added). For statutory language to be "rights-creating," it must clearly impart an "individual entitlement" and have an "unmistakable focus on the benefitted class." *Gonzaga University v. Doe*, 536 U.S. 273, 287 (2002). The defendants' contentions fail because the statutes at issue in this case -- with the exception of 42 U.S.C. §1396u-2(b)(5) -- meet the three-prong test established in *Blessing*, as refined by *Gonzaga*.

1. COUNT I: 42 U.S.C. §1396a(a)(8) & a(10)

Count I of the plaintiffs' complaint is based in part on the Reasonable Promptness Clause of the Social Security Act, 42 U.S.C.1396(a)(a)(8). The Eleventh Circuit has specifically held that §1396(a)(8) meets all three elements of the *Blessing* test. *Doe v. Chiles*, 136 F.3d 709, 719 (11th Cir. 1998). *Doe* is binding, and I do not believe its holding has been called into doubt by *Gonzaga*. I am persuaded by *Sabree v. Richman*, 367 F.3d 180, 190-92 (3d Cir. 2004), a post-*Gonzaga* decision which agreed with the holding in *Doe*. *See also Bryson v. Shumacy*, 308 F.3d 79, 88-90 (1st Cir. 2002) (§1396a(a)(8) creates enforceable rights).

Count I also alleges a violation of §1396a(a)(10), which provides that a "State plan for medical assistance must provide for making medical assistance available." I agree with the Third, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits, which have all squarely addressed this issue and concluded that under *Blessing* and/or *Gonzaga*, §1396a(a)(10) confers enforceable rights on the plaintiffs.[5] *See Watson v. Weeks*, 2006 WL 288147, at *8 (9th Cir. 2006); *Sabree*, 367 F.3d at 190; *S.D. ex. rel. Dickson*, 391 F.3d 581, 607 (5th Cir. 2004); *Westside Mothers v. Haveman*, 289 F.3d 852, 862-63 (6th Cir. 2002); *Pediatric Specialty Care, Inc., v. Arkansas Dept. Of Human Services*, 293 F.3d 472, 477 (8th Cir. 2002); *Miller v. Whitburn*, 10 F.3d 1315, 1319-20 (7th Cir. 1993).

2. COUNT II: 42 U.S.C. §1396a(a)(30)(A)

The defendants also claim that §1396a(a)(30)(A) -- the statute's "equal access" provision -- does not confer enforceable rights on the plaintiffs. This provision, however, "directly focuses on access to medical care" and, as a result, "the recipient plaintiffs have an individual entitlement to the

[5] No circuit has held that §1396a(a)(10) does not create an enforceable right.

equal access guarantee."[6] *Evergreen Presbyterian Ministries Inc. v. Hood*, 235 F.3d 908 (5th Cir. 2000); *See also Pediatric Specialty*, 364 F.3d at 930 (§1396a(a)(30)(a) is a "clearly established right" enforceable by recipients and providers). *Ark. Med. Soc'y, Inc. v. Reynolds*, 6 F.3d 519, 526 (8th Cir. 1993) ("The equal access provision is indisputably intended to benefit the recipients by allowing them equivalent access to health care services"). *Accord Visiting Nurse Ass'n v. Bullen*, 93 F.3d 997, 1004 n.7 (1st Cir. 1996) (acknowledging that Medicaid recipients "are intended beneficiaries under the 'equal access' requirement as it affects the availability of their medical care"). Therefore, §1396a(a)(30)(A) confers enforceable rights on the plaintiffs.[7]

3. COUNT III: 42 U.S.C. §1396u-2(b)(5)

Unlike the other statutes at issue, 42 U.S.C. §1396u-2(b)(5) does not establish a privately enforceable right under §1983. That provision states, in relevant part, that "[e]ach medicaid managed care organization shall provide the State and the Secretary with adequate assurances...that the organization, with respect to a service area, has the capacity to serve the expected enrollment in such service area, including assurances that the organization" offers an appropriate range of services and has an adequate geographic distribution of providers of services.

The statute describes the assurances that must be provided by a managed care organization and the state and the Secretary of the Department of Health and Human Services. I conclude that, under *Gonzaga*, §1396u-2(b)(5) does not have the "unmistakable focus on the benefitted class" required to establish a private right of action. The focus of this provision is aggregate and system-wide in nature, and it does not focus on the needs of a particular class of individuals. As a result, it does not create a privately enforceable right.

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[6] The defendants also argue that none of the cases cited by the plaintiffs demonstrate Congress' intention to benefit individuals via §1396a(a)(30)(A). However, "medical assistance" -- as it appears in and is defined by the Social Security Act – refers to "individuals" who are eligible for coverage. Thus, even if the plaintiffs had failed to cite a case on point, the plain meaning of the statute renders the defendants' contentions incorrect.

[7] I disagree with the Ninth Circuit's contrary decision in *Sanchez v. Johnson*, 416 F.3d 1051, 1060 (9th Cir. 2005). I also disagree with the Tenth Circuit's decision in *Mandy R. v. Owens*, 464 F.3d 1139, 1143 (10th Cir. 2006). In that case, the Tenth Circuit held that 42 U.S.C. §1396a(a)(30)(A) does not create rights enforceable pursuant to §1983.

4. COUNT IV: 42 U.S.C. §1396a(a)(43)(A)

Finally, the defendants contend that Count IV should be dismissed because §1396a(a)(43)(A) does not confer enforceable rights on the plaintiffs. I disagree. First, the Eleventh Circuit in a pre-Gonzaga case, *31 Foster Children v. Bush*, 329 F.3d 1255 (11th Cir. 2003), held that this provision created enforceable rights. Second, I do not think *31 Foster Children* has been called into question by *Gonzaga,* and I concur with those other district courts that have addressed this issue post-*Gonzaga* and concluded that §1396a(a)(43)(A) confers enforceable rights on the plaintiffs. *See Clark v. Richman,* 339 F. Supp. 2d 631, 638-640 (M.D. Pa. 2004); *Memisovski v. Maram*, No. 92 C 1982, 2004 WL 1878332, *8-11 (N.D. Ill. 2004); *Health Care for All v. Romney,* 2005 WL 1660677, *13 (D. Mass. July 14, 2005); *Westside Mothers v. Olszewski*, 368 F. Supp. 2d 740, 769-770 (E.D. Mich. 2005); *A.M.H. v. Hayes*, 2004 U.S. Dist. Lexis 27387, *19 (S.D. Ohio 2004).[8] The provision at issue requires the defendants to provide basic outreach and information to the plaintiff class. As a result, Congress must have intended that the provision in question benefit the plaintiffs, and the clear right that is protected by the provision is neither "vague" nor "amorphous."

IV. CONCLUSION

For the reasons stated herein, the motion to dismiss is GRANTED as to count III, and DENIED in all other respects. The defendants shall answer the complaint by February 12, 2007, and two weeks later the parties shall file a joint scheduling report.

DONE and ORDERED in chambers in Miami, Florida, this 11th day of January, 2007.

Adalberto Jordan
United States District Judge

Copy to: All counsel of record

[8] In fact, the defendants have not pointed to any decision holding that §1396a(a)(43)(A) does not confer enforceable rights on the plaintiffs.