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

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

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 OF LAW IN RESPONSE TO THE COURT'S NOVEMBER 26, 2012 ORDER

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Pursuant to this Court's Nov. 21, 2012 Order, D.E. 1210, and in response to Defendants' memorandum, D.E. 1213, Plaintiffs through counsel respectfully submit this memorandum regarding whether any of the issues raised in this action are mooted or affected by a provision of the Patient Protection and Affordable Care Act ("ACA"), which will require state Medicaid programs to play for certain primary care services performed within the next two years at a rate no less than equal to that of Medicare. *See* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, § 1202(a)(1); 42 U.S.C. § 1396a(a)(13)(C) (2012).

PRELIMINARY STATEMENT

The provisions of the ACA which raise Medicaid reimbursement for certain primary care services are limited by their terms to a two-year period, expiring on December 31, 2014, and do not moot Plaintiffs' request for declaratory and injunctive relief regarding the inadequacy of rates for medical services for children, nor any other part of the case. No case cited by Defendants—or of which Plaintiffs are aware—supports a finding of mootness created by such an expressly limited governmental action. The United State Supreme Court has held that governmental changes which are likely impermanent solutions do not moot a federal case. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). Compliance with the ACA's temporary mandate has not "unambiguously terminated" Florida's long-standing violations of the Medicaid statutes regarding payment for physician services, and hardly makes it "*absolutely clear*" that the Florida's wrongful conduct could not recur. *Harrell v. The Florida Bar,* 608 F.3d 1241, 1267-1268 (11th Cir. 2010). Thus, that aspect of the case is not moot either with respect to

declaratory or to injunctive relief, although the Court properly may consider the ACA in connection with the imposition of injunctive relief.[1]

Aside from being temporally limited, the ACA is also limited in scope to the provision of certain primary care services. Because not all physicians providing services to children (or all services provided to children) are covered by the rate increase, Defendants contend that the Congress' decision through enactment of the ACA to pay certain physicians at an enhanced rate for two years implies that other physicians providing Medicaid services need not be paid at the Medicare rate. There is no basis in the statute, or its legislative history, of such an intent—and, as courts have observed, it is "treacherous" and counter to Supreme Court case law to interpret Congressional silence. Congress—apparently recognizing the obvious relationship between Medicaid reimbursement rates and access to care, sought, for a limited transitional period, to improve, or at least not worsen, access to care resulting from the ACA's mandated increases in Medicaid eligibility. If anything is to be reliably inferred from Congress' passage of the ACA, it is that physician reimbursement matters, and matters greatly, and that the growing consensus that Medicaid reimbursement levels should at least equal Medicare reimbursement is shared in the halls of Congress.

FACTUAL BACKGROUND

The Defendants go to great efforts in their submission to convince the Court that Florida does intend to comply with federal law, and implement the mandatory reimbursement increases, to the extent required by the ACA. Defendants also provide support for their contention that certain procedural snags in implementing the reimbursement increase have been resolved and that for the services required to be compensated at Medicare levels, Florida will do so

[1] Even the Defendants recognize that the ACA does not affect the other aspects of Plaintiffs' case, including provision of dental services, administrative barriers, and outreach. Def. Mem. at 1.

retroactively to January 1, 2013. All of this is unexceptional. Plaintiffs do not contend that the state is going to directly flout the mandate of the ACA to raise reimbursement for certain primary services to Medicare levels when the federal government is paying for the increase. The issue is whether there is any basis in the ACA or Florida's reaction from which to conclude that Florida has done an about-face in legislative attitude and will make the reimbursement rate increase permanent once 100 percent federal funding ends in two years.

On that issue, the record is clear. Florida has implemented the increase only to the extent required by federal law, only for so long as federal law requires the increase, and only to the extent the federal government is paying 100 percent of the cost. By its terms, the ACA requires state Medicaid programs to pay Medicare rates only for certain primary care services rendered between January 1, 2013 and December 31, 2014. The record shows that the Agency for Health Care Administration ("AHCA") is in the process of raising Medicaid reimbursement rates for covered services only because it is required to do so by federal law. *See* AHCA Health Care Alerts & Provider Alerts Messages December, 2012 D.E. 1214-25 at 1 ("Federal law requires state Medicaid agencies to increase payments to the Medicare rate for primary care physician providers" for certain CPT codes; AHCA Health Care Alerts & Provider Alerts Messages January, 2013, D.E. 1214-26 at 2 ("In accordance with Section 1202 of the Patient Protection and Affordable Care ACT (ACA), Florida Medicaid will increase reimbursement rates to eligible physician providers for primary care services provided to Medicaid eligible recipients.").

The Declarations and exhibits submitted by the Defendants make clear that AHCA will not implement the rate increases until it receives money from the federal government to pay for those increases. Declaration of Stacey Lampkin, D.E. 1214-3 at 2 ("states are entitled to 100% Federal Financial Participation (FFP) for the costs of increasing their Medicaid primary care service rates to the level required by Section 1202, over what was paid in 2009"); AHCA Health

Care Alerts & Provider Alerts Messages, January, 2013, D.E. 1214-26 at 3 ("Florida Medicaid cannot make the enhanced payments until federal funding is authorized. . . . Florida Medicaid is prepared to implement the enhanced rate *if and when the funds are made available*.") (emphasis added).

The implementation of the rate increase in Florida reflects its temporary nature. For instance, the amendment AHCA made to its managed care contracts, an amendment that was effective January 1, 2013, indicates that the MCPs will only have to pay at Medicare rates through December 31, 2014. The key language states: "The Health Plan shall process claims for and, if capitated or are approved by the Agency to subcapitate for certain covered services, pay certain physicians who provide Florida Medicaid-covered eligible primary care services in accordance with the Affordable Care Act and 42 C.F.R. §§ 438 and 447, *for the period January 1, 2013, through December 31, 2014.*" Declaration of Melanie Brown-Woofter, D.E. 1214-2 at 3 (emphasis added). Similarly, the amendment to Florida's Medicaid State Plan ("State Plan Amendment" or "SPA"), which AHCA submitted on January 2, 2013, also makes clear that the rate increase will be in effect only for as long as required by federal law. *See* 1214-9 at 4 (attachment 4.19-B) ("Specifically, the fee schedule and any annual/periodic adjustments to the fee schedule *including the Primary Care Rate Increase referenced in section 1902(a)(13)(C) of the Social Security Act* are published at www.MyMedicaid-Florida.com"). The italicized language is the plan amendment, and, of course, the referenced rate increase, by the express terms of the Act, only applies to services rendered between January 1, 2013 and December 31, 2014. The accompanying cover letter by Justin Senior, AHCA's Deputy Secretary for Medicaid, to CMS, underscores that the rate increase will be in effect for two years only, stating: "This state plan amendment is being submitted as a result of implementing the Affordable Care Act requirement that Medicaid pay physicians practicing in family medicine, general internal

medicine, pediatric medicine, and related subspecialists at Medicare levels for the procedure codes specified in the Act in *Calendar Years 2013 and 2014*." D.E. 1214-9 at 2. The announcement AHCA published in the Florida Administrative Register drives home the same point, stating: "The Agency for Health Care Administration is submitting an amendment to the Medicaid State Plan, to implement the primary care rate increase according to the requirements published by the Centers for Medicare and Medicaid Services in the Federal Register on November 6, 2012. Section 1202 of the Patient Protection and Affordable Care ACT (ACA) requires state Medicaid agencies to pay primary care physicians a fee that is at the level of the Medicare rate for certain services during the calendar years 2013 and 2014." D.E. 1214-9 at 10. The exhibits throughout Defendants submission are replete with references to the indisputable fact that this increase is for only a two-year period, for certain primary care services.

Nothing submitted by the Defendants suggests any change by the Florida legislature or, for that matter, by AHCA administrators regarding the level of Medicaid reimbursement. As reflected in the trial record, the Florida legislature for years has rejected legislative budget requests from AHCA that called for far more modest increases in reimbursement for primary care physicians than those set forth in the ACA—and had not increased the reimbursement for primary care providers, except for a 4% increase in 2002, in 13 years. Plaintiffs' Proposed Findings of Fact and Conclusions of Law at ¶ 226. Moreover, the Florida legislature has required for most codes that the determining factor in reimbursement is budget neutrality, and the legislature has allowed Florida's Medicaid reimbursement for children to fall further behind other states and the level of comparable Medicare reimbursement, and even further behind private insurance reimbursement levels. *Id.* at ¶¶ 113, 213-225, 229. Nothing in the Defendants' submission suggests that the attitude of AHCA has changed. In any event, regardless of whether AHCA's views are more accurately reflected by its years of submitting legislative budget

requests calling for rate increases, or by its position more recently taken in this court that rate increases are not necessary, it is the Florida legislature and not the agency that controls the purse-strings. There is absolutely no basis on which to believe Florida will continue the rate increases for even one day once states will have to begin bearing part of the financial burden. Similarly, it is complete conjecture by Defendants that Congress will pass new legislation—which would be required—to extend the ACA's rate increases beyond December 31, 2014.

Finally, it is not disputed that the rate increase covers physicians with a specialty designation of family medicine, general internal medicine or pediatric medicine, or a subspecialty recognized by the American Board of Medical Specialties ("ABMS"), the American Board of Physician Specialties ("ABPS") or the American Osteophathic Association ("AOA"). 42 C.F.R. § 447.400(a) (2013). While many specialists are included, others are not, including orthopedists, pediatric cardiac surgeons, pediatric neurologists, radiologists, anesthesiologists, allergists, dermatologists, psychiatrists, ENTs, and certain obstetricians, among others.[2] *See* D.E. 1214-10 at 10-11; Def. Mem. at 21.

Even for the primary care doctors who are covered by the ACA, not all services they render to children on Medicaid are covered. Rather, the ACA extends only to "Evaluation and Management codes 99201 through 99499 and vaccine administration codes 90460, 90461, 90471, 90472, 90473, or their successor codes." D.E. 1216-6 at 10. Other codes are not covered. *Id.* That means that a physician who treats a child for a sore throat, can receive an enhanced payment for the office visit (99213) but not for doing a rapid strep screen (87880), a strep culture (87081), or an influenza screen (87804). *See* Ex. A to Plaintiffs' Notice of Filing In

[2] Physicians who are certified in Family Medicine Obstetrics, meaning that they are certified first in Family Medicine with an additional certification in obstetrics qualify for the increase; physicians certified in obstetrics by ABMS or AOA do not qualify for the higher payment.

Support of Plaintiffs' Memorandum of Law in Response to Court's Nov. 26, 2012 Order. Similarly, if a child comes into a pediatrician's office with a cut finger or other laceration, the doctor can receive an enhanced payment for an office visit (99213) but not for suturing the cut (12002). *Id.* A physician who treats a child with an asthmatic attack, can receive an enhanced payment for an office visit (99213) but not for a breathing or nebulizer treatment. (94640). *Id.* Similarly, the enhanced payments do not cover a urinalysis (81000); urine culture (87088); pinworm slide (87172); intramuscular injection (96372); or potassium hydroxide prep for a skin rash (87220), among other services. *Id.* Thus, while the ACA's provisions are a laudable and important step that will improve access to care for a two-year period for certain primary providers, they are neither a comprehensive or permanent solution.

ARGUMENT

I. A TEMPORARY CHANGE IN A DEFENDANTS' WRONGFUL CONDUCT, COMPELLED BY FEDERAL LAW, DOES NOT RENDER A CASE MOOT

Just this past January, the Supreme Court stated:

> We have recognized, however, that a defendant cannot automatically moot a case simply by ending its unlawful conduct once sued. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289, 102 S. Ct. 1070, 71 L.Ed.2d 152 (1982). Otherwise, a defendant could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends. Given this concern, our cases have explained that "a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190, 120 S. Ct. 693, 145 L.Ed.2d 610 (2000).

Already, LLC v. Nike, Inc., 133 S. Ct. 721, 727 (2013). In *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289, (1982) the Supreme Court denied a mootness claim even though the challenged law was no longer in effect. The Court observed that the City's repeal of the challenged ordinance would not prevent it from reenacting the same provision and "there is no certainty" that this reenactment would not occur. 455 U.S. at 289. Indeed, the City of Mesquite

had indicated it would seek to do so if the decision holding its prior ordinance void for vagueness were vacated. Similarly, in *Ne. Florida Chapter of Assoc. Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 660 n.1 (1993), the Supreme Court, relying on *City of Mesquite*, declined to find moot a challenge to a minority set-aside program even though the challenged law had been repealed because it had been replaced with a law that, although somewhat narrower, still had the potential to disadvantage the plaintiff. *Id.* at 662. Here, of course, Florida's budget neutrality approach to setting rates and the inadequate rates have not been "repealed" at all—they have essentially been superseded for a two-year period with respect to certain professionals and for certain services. If the outright repeal of the challenged governmental action in the *City of Mesquite* and *City of Jacksonville* cases did not create mootness, then a fortiori, the ACA does not do so here.

Eleventh Circuit law, as discussed below, similarly recognizes a "formidable burden" of making "absolutely clear" that a case is moot as a result of change. And that is change which arises in the context of "voluntary compliance." Were this a case of AHCA having successfully persuaded the Florida legislature to increase Medicaid reimbursement for children to at least Medicare levels, without a pre-set termination date, it would then be incumbent on the Court to determine whether that voluntary action reflected a genuine recognition of error and commitment to change, or, instead was a strategic action directed at ending a lawsuit. Here, there is no "voluntary compliance," no basis on which to conclude that the attitudes of either Defendants or the Florida legislature have changed, and no basis to believe that the many years during which Florida grossly undercompensated Medicaid providers resulting in denial of equal and prompt access to care for Florida children have come to an end. Rather, because federal law compels it and federal funds will pay the entire cost, Florida will for a two-year period adhere to the express

requirement of federal law to increase rates.[3] In this scenario, there is absolutely no reason—and no basis whatever in the case law—to determine that Plaintiffs' legal challenge to the inadequacy of Medicaid reimbursement, for providers of primary and specialty care for children, is moot.

A. The Presumption Regarding Governmental Action Only Arises When Wrongful Conduct Has Been Voluntarily And "Unambiguously Terminated"

Defendants' cite no applicable case where an externally-imposed temporary change has been found to render a case moot. Instead, Defendants point to the doctrine that when a government agency has voluntarily ceased the unlawful conduct, "there is a rebuttable presumption that the objectionable behavior will not recur." *Trioiano v. Supervisor of Elections in Palm Beach County, Fla.*, 382 F.3d 1276, 1283 (11th Cir. 2004) (citing *Coral Springs St. Sys., Inc. v. City of Sunrise*, 371 F.3d 1320, 1328-29 (11th Cir. 2004). This doctrine and presumption are inapplicable here. First, Florida has not voluntarily ceased unlawful conduct—rather, it has been compelled for a limited time to suspend its prior wrongful conduct. In *Troiano,* a challenge to the absence of audio devices in election booths to assist visually-impaired voters was moot because the election supervisor "not only ceased the allegedly illegal practice, she did so prior to the notice of the litigation." *Id.* at 1285. Moreover, "since making the decision to use audio components in every election, [the supervisor] has consistently followed this policy." *Id.* Thus, the Eleventh Circuit concluded, "we can discern no hint that [the supervisor] has any intention of removing the accessible voting machines in the future." *Id.* Similarly distinguishable is *Jews for Jesus, Inc. v. Hillsborough Cnty. Aviation Auth.,* 162 F.3d 627, 629 (11th Cir. 1998), cited by Defendants. There, the court agreed that "there was no reasonable expectation that the Tampa

[3] Defendants claim without any record support (Def. Mem. at 14) that it will require an amendment to its state plan to pay providers of primary care services less than the Medicare rate starting Jan. 1, 2015. However, in its plan amendment, AHCA has already indicated its intent to pay the enhanced rate for two years only.

International Airport would return to its prior policy" of restricting the distribution of literature, noting that "[t]he new 'open door' policy appears to have been the result of substantial deliberation on the part of airport officials, and … there is no reason to think the airport will change its policy…" *Id.* at 629. Of course, nothing similar could be said here where the change is not voluntary, occurs years after the Defendants have bitterly fought every stage of this litigation, and by its terms the increase is temporary.

Subsequently, the Eleventh Circuit has made clear that "as required to invoke the presumption [the court] identified in *Troiano,"* the government defendant must have "unambiguously terminated" its prior wrongful conduct and "borne its heavy burden of showing that it is '*absolutely clear'* that the allegedly wrongful behavior could not reasonably be expected to recur." *Harrell v. The Florida Bar,* 608 F.3d 1241, 1267-1268 (11th Cir. 2010) (emphasis in original). In *Harrell,* the Eleventh Circuit found that The Florida Bar's declaration that an advertising slogan was permissible did not moot a constitutional challenge to the Bar's earlier rejection of the slogan. The Court found that it was unable to say that the Defendant 'unambiguously terminated" the application of a Florida Bar rule to the slogan nor made it "absolutely clear" that the allegedly wrongful behavior would not recur, thus the presumption did not apply, and the claim was not moot. *Id.* at 1267. Here, the record is not "clouded by ambiguity" as in *Harrell, id.,* at 1268. There is no "unambiguous termination" of Florida's Medicaid rate structure and its adherence to the principle of budget neutrality, only a two-year temporary change due to federal law and federal funds. Instead of being "absolutely clear" that the problem of inadequate Medicaid reimbursement will not recur, it is clear—absent entirely new legislative action by Congress or Florida's legislature—that the same reimbursement structure which gave rise to this seven-year litigation, will be fully operative come January 1, 2015. *See City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 289 n. 11, (1982 (rejecting the

argument that a challenge to a repealed city statute was moot because there was no certainty that the law would not be reenacted and the City had, in fact, announced an intention to reenact it if the Court threw out the case.); *Nat'l. Advertising Co. v. City of Ft. Lauderdale*, 934 F.2d 283 (11th Cir. 1991) (finding decision by city to amend sign ordinance six weeks after it was sued to remove constitutionally objective provision did not moot the case because "[n]either the City nor the district court has established the likelihood of further violations is sufficiently remote to dismiss [plaintiff's] claims"); *see also Coral Springs St. Sys., Inc. v. City of Sunrise*, 371 F.3d 1320 (11th Cir. 2004) (discussing *Nat'l. Advertising Co.* and saying, "We therefore rejected the defendant's suggestion that the suit was moot because there was a non-insubstantial chance that the law would be reenacted. This finding was undoubtedly informed by the timing of the change in the law—well after suit had already been brought, which reasonably led the Court to doubt the City's sincerity.")[4]

Defendants also argue that even if Congress does not extend the enhanced reimbursement rate, what will happen on January 1, 2015 is "too remote" to keep this action from becoming moot. Def. Mem. at 14. In support of that assertion, they cite *Al Najjar v. Ashcroft*, 273 F.3d 1330, 1336 (11th Cir. 2001), in which the Eleventh Circuit said: "The remote possibility that an event might recur is not enough to overcome mootness, and even a likely recurrence is insufficient if there would be ample opportunity for review at that time." *Al Najjar* involved a

[4] A similar three-part approach was set forth in *Nat'l Ass'n of Bds. of Pharm. v. Bd. of Regents,* 633 F.3d 1297, 1310 (11th Cir. 2011). First, the court considers whether the termination of the offending conduct was "unambiguous." Second, the court looks to whether the change in government policy or conduct appears to be the result of substantial deliberation, or is simply an attempt to manipulate jurisdiction. Third, the court asks whether the government has "consistently applied" a new policy or adhered to a new course of conduct. Here there is no termination of Florida's rate-making structure and inadequate rates, only a two-year hiatus. There was no deliberation at all by Florida, which is suggestive of a reformed attitude, and Defendants have adhered no more to a new course of conduct than to the extent federal law required.

deportation situation where it became clear that the appellant was subject to deportation on other grounds that were not challenged, *see* 273 F.3d at 1338, that the parties' claim was moot, and that the "mere possibility" of a recurrence in the future did not constitute conduct capable-of-repetition-yet-evading-review, a strand of mootness doctrine that the Court need not reach here.[5]

B. This Court Is Fully Capable Of Providing Declaratory And, If Necessary, Injunctive Relief

Citing wholly inapplicable cases, Defendants argue that the Court "could not provide Plaintiffs with any effective relief pertaining to the adequacy of [reimbursement] rates." Def.'s Mem. at 15. Each of Defendants' cases is clearly distinguished. *In re Club Associates*, 956 F.2d 1065 (11th Cir. 1992) involved a case where because a reorganization plan had already been implemented (the decision below not having been stayed), it would be inequitable to seek to restore the status quo. In *Atlanta Gas Light Co. v. FERC,* 140 F.3d 1392, 1402 (11th Cir. 1998), a settlement between the parties meant that an intervenor's claim was moot because no relief could be effectuated. *Webb v. Missouri Pac. R.R. Co.*, 98 F.3d 1067 (8th Cir. 1996) is not even a mootness case—it is simply a situation where the evidence did not support the need for injunctive relief on the discrimination claims presented. Because this case is not moot, as discussed above, this Court may enter both declaratory and injunctive relief.

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[5] If it were necessary for the court to do so, however, that doctrine is also applicable. Defendants' suggestion that there will be an "adequate opportunity" for review of a decision if Congress decided to extend the ACA's requirements in January 2015 can only be seen as facetious given that we are now in the eighth year of this litigation. In *Tallahassee Mem'l Reg'l Med. Ctr. v. Bowen,* 815 F.2d 1435, 1451 (11th Cir. 1987) the court found that a challenge to Medicare reimbursement was not moot under the "capable of repetition" exception even though administrative regulations had changed because "if this case is dismissed as moot, we would be creating a class of cases capable of evading judicial review by the very fact that, after years of litigation challenging an administrative regulation, an agency would be able to moot a given lawsuit by promulgating a new regulation." *See U.S. Parole Comm'n. v. Geraghty*, 445 U.S. 388, 398, 9 (1980) (The "capable of repetition, yet evading review" doctrine is applicable "where the named plaintiff does have a personal stake at the outset of the lawsuit, and where the claim may arise again with respect to that plaintiff.")

In *Thomas v. Bryant*, 614 F.3d 1288 (11th Cir. 2010), for example, the Eleventh Circuit considered and rejected the defendants' claim that recent reforms in the state Department of Corrections designed to ensure better and more appropriate treatment of inmates with mental health problems had rendered the awarded injunctive relief unnecessary, stating:

> We have recognized that "[s]ubsequent events, such as improvements in the allegedly infirm conditions of confinement, while potentially relevant, are not determinative" of whether injunctive relief is no longer warranted. *LaMarca*, 995 F.2d at 1541. This is especially true "[w]hen a defendant corrects the alleged infirmity after suit has been filed," *id.*, "for practices may be reinstated as swiftly as they were suspended," *Gates*, 501 F.2d at 1321. The defendants filed this lawsuit in September of 2004, and many of the relied-upon reforms were enacted as recently as July 31, 2008. *See Thomas*, 2009 WL 64616, at *28 n. 51. Thus, to rely on intervening events occurring after suit has been filed the defendants must satisfy the heavy burden of establishing that these such events "have completely and irrevocably eradicated the effects of the alleged violations." *LaMarca*, 995 F.2d at 1542 (internal quotation and citation omitted).

Id. at 1320-21. Accordingly, Plaintiffs' claims are not moot for either declaratory or injunctive relief. Although the case is not moot for purposes of either declaratory or injunctive relief, the Court can consider the need, for an injunction on these primary care services covered by the ACA to be in place before January 2015, or sufficiently in advance of that date, to avoid a disruption in payment to providers. Because, as the Court indicated, separate proceedings will be held on injunctive relief, those issues can be considered at that time.

For immediate purposes, however, the Court can and should proceed to make appropriate findings of fact and conclusions of law to support Plainitffs' entitlement to declatory relief. As the Declaratory Judgment Act itself indicates, 28 U.S.C. § 2201 *et seq.*, declaratory relief is permissible, "whether or not further relief is or could be sought." *See Zwickler v. Koota*, 389 U.S. 241, 254 (1967) ("a federal district court has the duty to decide the appropriateness and the merits of the declaratory requests irrespective of its conclusion as to the propriety of the issuance of the injunction."); *Powell v. McCormack*, 395 U.S. 486 (1969) ("A court may grant declaratory

relief even though it chooses not to issue an injunction or mandamus."). Given that Plaintiffs' claims are not moot under any applicable authority—and finding mootness would be completely contrary to controlling Supreme Court and 11th Circuit authority—it is this Court's duty to proceed to make such findings and issue appropriate declaratory relief.

II. THE ACA'S TEMPORARY INCREASE IN REIMBURSEMENT RATES DOES NOT AFFECT NON-PRIMARY CARE PROVIDERS AND DOES NOT MOOT CLAIMS RELATING TO SUCH SERVICES

Even if the ACA-required rate increases were permanent, they would not entirely remedy the issue of inadequate Medicaid reimbursement for providers treating children and the resulting impact on Medicaid children's ability to receive prompt and equal access to care. *See Tallahassee Mem'l Reg'l Med. Ctr. v. Bowen,* 815 F.2d 1435, 1450 (11th Cir. 1987) (higher Medicare reimbursement to hospitals under new rule did not moot the case because for a case to be moot, the intervening event must provide complete relief to the plaintiffs in the litigation). The ACA increases cover primary care physicians who provide services and many specialists but not others such as in the fields of otolaryngology, psychiatry, orthopedic care, dermatology, pediatric neurology, pediatric cardiac surgery, anesthesiology, and obstetrics. The ACA, as discussed above, also does not cover many relevant services that children need in the course of diagnosis and treatment.

Defendants do not dispute this but instead advance the peculiar argument that the Court should infer from the limits of the ACA that Congress made a knowing determination that these other specialists should not be paid at the Medicare level or that prompt and equal access to such care for Medicaid children does not require providers receive such reimbursement. There, of course, is nothing in the statutory language that supports Defendants' conjecture. Nor is there anything in the legislative history to support such a negative inference.

While the Supreme Court does sometimes place interpretive weight on "congressional silence after years of judicial interpretation," *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 594 (2004), that, of course, is not the situation here. Defendants are not arguing that Congress through acquiescence to a long standing judicial interpretation of a statute has shown its agreement with that interpretation. Rather, Defendants are arguing that Congressional inaction or silence regarding Section 1202 of the ACA, reveals Congressional intent regarding other provisions of the Medicaid Act, provisions with different statutory language. The Supreme Court has repeatedly warned against such an approach. *See United States v. Wells*, 519 U.S. 482, 496 (1997) ("We thus have at most legislative silence on the crucial statutory language, and we have 'frequently cautioned that [i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law, *see also Tug Allie-B, Inc. v. U.S.*, 273 F.3d 936, 945 (11th Cir. 2001) ("Congressional silence, however, can be interpreted in a number of ways. As this Circuit has stated '[s]ilence may indicate that the question never occurred to Congress at all, or it may reflect mere oversight in failing to deal with a matter intended to be covered, or it may demonstrate deliberate obscurity to avoid controversy that might defeat the passage of legislation.'" (quoting *Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074, 1085 (5th Cir. 1980)); *While v. Mercury Marine, Div. of Brunswick, Inc.*, 129 F.3d 1428, 1434 (11th Cir. 1997) ("it is always treacherous to try to divine congressional intent from silence. As one court has aptly put it, '[n]ot every silence is pregnant.'") (quoting *State of Illinois Dept. of Public Aid v. Schweiker*, 707 F.2d 273, 277 (7th Cir.1983)). There is nothing in the ACA or its legislative history to indicate that Congress intended the provision to undermine or limit the enforcement of the EPSDT, prompt access or equal access provisions—all of which provide children with rights that this and other courts have found judicially enforceable.

CONCLUSION

For the foregoing reasons, this Court should find that Section 1202 of the ACA has not mooted any part of Plaintiffs' claims. The Medicaid Act requires that children eligible for Medicaid be afforded EPSDT services and reasonably prompt and equal access to medical care. The importance of the Medicaid Act was recently underscored by President Obama in his second inaugural when he stated: "The commitments we make to each other through Medicare and Medicaid and Social Security, these things do not sap our initiative, they strengthen us. They do not make us a nation of takers, they free us to take the risks that make this nation great." *See* http://www.whitehouse.gov/the-press-office/2013/01/21/inaugural-address-president-barack-obama.

Dated: February 11, 2013

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 11, 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
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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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