IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

PLANNED PARENTHOOD OF ARKANSAS & EASTERN OKLAHOMA INC., and JANE DOES, 1-3, on their behalf and all others similarly situated **PLAINTIFFS**

v. **Case No. 4:15-cv-00566-KGB**

CINDY GILLESPIE, Director, Arkansas Department of Human Services, in her Official Capacity **DEFENDANT**

ORDER

Before the Court is a motion to stay proceedings filed by plaintiffs Planned Parenthood Arkansas & Eastern Oklahoma d/b/a Planned Parenthood Great Plains ("PPAEO"), Jane Doe #1, Jane Doe #2, and Jane Doe #3, on their behalf and all others similarly situated (Dkt. No. 185). Defendant Cindy Gillespie, Director of Arkansas Department of Human Services ("ADHS"), responded in opposition (Dkt. No. 188), and plaintiffs replied (Dkt. No. 189). Also before the Court is Ms. Gillespie's motion for judgment on the pleadings as to plaintiffs' Medicaid Act claim (Dkt. No. 168). Plaintiffs responded in opposition (Dkt. No. 171), and Ms. Gillespie replied (Dkt. No. 174). For the reasons discussed below, the Court denies plaintiffs' motion to stay proceedings and declines, at this time, to rule on defendants' motion for judgment on the pleadings as to plaintiffs' Medicaid Act claim (Dkt. Nos. 168, 185).

I. Background

A detailed history of the procedural background in this matter may be found in this Court's prior Order denying plaintiffs' latest motion for a preliminary injunction (Dkt. No. 181, at 1-5). Without repeating that history in full, the Court provides a brief overview to provide context for

this Order. On September 11, 2015, plaintiffs filed a complaint alleging that defendant John Selig[1] violated the Medicaid Act, 42 U.S.C. § 1396a(a)(23), by denying PPAEO's Medicaid patients the opportunity to obtain family planning and other preventative health care services from a qualified provider of their choosing (Dkt. No. 1). Plaintiffs also alleged that Mr. Selig violated the First and Fourteenth Amendments by penalizing plaintiffs for associating with Planned Parenthood and abortion and that Mr. Selig had singled out plaintiffs for unfavorable treatment in violation of the Equal Protection Clause of the Fourteenth Amendment (*Id*., ¶¶ 49, 51). The Court granted plaintiffs a temporary restraining order on September 18, 2015 (Dkt. No. 21). Then, on October 2, 2015, the Court granted a preliminary injunction in favor of just the Jane Doe plaintiffs (Dkt. No. 44, 45).

On January 25, 2016, the Court certified a class of patients (the "Patient Class"), which consists of those patients who seek to obtain, or desire to obtain, health care services in Arkansas at PPAEO through the Medicaid program (Dkt. No. 86). The plaintiffs then moved for a new preliminary injunction; the plaintiffs sought to have this new preliminary injunction extend to the newly-certified class (Dkt. No. 98). On September 29, 2016, the Court entered a preliminary injunction on behalf of the Patient Class enjoining the ADHS from suspending Medicaid payments to PPAEO for services rendered to Medicaid beneficiaries who are members of the Patient Class (Dkt. No. 127). This preliminary injunction was based upon plaintiffs' Medicaid Act claim. On November 30, 2016, with the Court's permission, plaintiffs filed their third amended complaint, alleging that ADHS' actions violate 42 U.S.C. § 1396a(a)(23), penalize plaintiffs for their constitutionally protected right to associate with Planned Parenthood and/or abortion, and unfairly

[1] Ms. Gillespie was automatically substituted as defendant when she became director of the ADHS. *See* Fed. R. Civ. P. 25 ("The officer's successor is automatically substituted as a party.").

target plaintiffs for unfavorable treatment without adequate justification in violation of the Equal Protection Clause of the Fourteenth Amendment (Dkt. No. 135-1, ¶¶ 54-59).

On August 16, 2017, the Eighth Circuit Court of Appeals issued an opinion vacating the Court's second preliminary injunction order on the grounds that 42 U.S.C. § 1396a(a)(23)(A) does not create an enforceable federal right for individual patients. *Does v. Gillespie*, 867 F.3d 1034, 1046 (8th Cir. 2017). The Eighth Circuit's mandate was entered on November 20, 2017, at which point this Court regained jurisdiction of the case. On January 19, 2018, PPAEO and the Jane Does filed a motion for preliminary injunction on their constitutional claims (Dkt. No. 144). While the Court was considering the motion for preliminary injunction, Ms. Gillespie filed her motion for judgment on the pleadings as to plaintiffs' Medicaid Act claim (Dkt. No. 168). The Court denied the motion for a preliminary injunction based upon plaintiffs' constitutional claims on July 30, 2018 (Dkt. No. 181).

While this litigation was ongoing, other Circuit Courts of Appeals held that 42 U.S.C. § 1396a(a)(23)(A) creates an enforceable federal right for individual patients. *See Planned Parenthood of Kan., Inc. v. Andersen*, 882 F.3d 1205 (10th Cir. 2018) (holding that § 1396a(a)(23) creates a private right of action in individual patients); *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445 (5th Cir. 2017) (same); *see also Planned Parenthood Ariz., Inc. v. Betlach*, 727 F.3d 960, 968 (9th Cir. 2013) (same); *Planned Parenthood of Ind., Inc. v. Comm'r of the Ind. State Dep't of Health*, 699 F.3d 962, 967 (7th Cir. 2012) (same); *Harris v. Olszewski*, 442 F.3d 456 (6th Cir. 2006) (same). To resolve the circuit split created by the Eighth Circuit's decision in *Does*, two petitions for writs of *certiorari* were filed with the Supreme Court, and plaintiffs filed their present motion to stay proceedings pending the final disposition of the petitions for writs of *certiorari* (Dkt. No. 185). Before the Court could rule on the motion to stay proceedings or the

motion for judgment on the pleadings, the Supreme Court denied the petitions for writs of *certiorari* on December 10, 2018. *See Andersen v. Planned Parenthood of Kan. and Mid-Missouri*, No. 17-1340, 2018 WL 1456394 (2018); *Gee v. Planned Parenthood of Gulf Coast, Inc.*, 139 S. Ct. 408 (2018).

II. Motion To Stay Proceedings

In their motion to stay proceedings, plaintiffs argue that issues of judicial economy weigh in favor of staying the present proceedings while the Supreme Court considers the pending petitions for writs of *certiorari* (Dkt. No. 185). Plaintiffs specifically argue that, "if the Supreme Court grants certiorari in the *Gee* or *Andersen* cases" and finds that there is an individual right of action under § 1396a(a)(23), then it may be unnecessary for this Court to reach plaintiffs' constitutional claims (*Id*., at 4). In response, Ms. Gillespie points out that the earliest deadline agreed to by the parties in the Rule 26(f) report is the August 12, 2019, deadline for joining parties and amending the pleadings and argues that any decision by the Supreme Court will be rendered before that date (Dkt. No. 188, at 4). Ms. Gillespie also points out that the Rule 26(f) report sets the deadline for completing discovery on November 20, 2019 (*Id*., at 4-5). Thus, according to Ms. Gillespie, the primary result of a stay pending the Supreme Court's consideration of the *certiorari* petitions would be to delay discovery in this matter (*Id*., at 5).

While the Court has broad discretion to stay discovery under Federal Rule of Civil Procedure 26(c), *see Steinbuch v. Cutler*, 518 F.3d 580, 588 (8th Cir. 2008), the Court concludes that a stay is not appropriate at this time. The Court first notes that plaintiffs' arguments for a stay are predicated upon the Supreme Court granting the petitions for writs of *certiorari* in the *Gee* and *Andersen* cases; those arguments have been mooted by the Supreme Court's denial of *certiorari* in those cases. *See Andersen*, 2018 WL 1456394; *Gee*, 139 S. Ct. 408. Thus, if the Court were to

grant a stay at this time, the primary effect of the stay would be to delay discovery on plaintiffs' remaining constitutional claims. Courts have used various standards in determining whether to stay discovery, including: (1) whether there is a strong showing that a claim is unmeritorious; (2) the breadth of discovery and burden of responding to it; and (3) the risk of unfair prejudice to the party opposing the stay. *Chesney v. Valley Stream Union Free Sch. Dist.*, 236 F.R.D. 113, 116 (E.D.N.Y. 2006). Courts may also consider the complexity of the action and the stage of litigation. *Chesney*, 236 F.R.D. at 116; s*ee TE Connectivity Networks, Inc. v. All Sys. Broadband, Inc.*, Case No. CIV. 13-1356 ADM/FLN, 2013 WL 4487505, at *2 (D. Minn. Aug. 20, 2013) ("Among other things, district courts have taken a 'peek' at the merits of the pending dispositive motion, considered the breadth of pending discovery, and balanced the harm produced by delaying discovery against the possibility that the entire matter will be resolved by the motion."); *Benge v. Eli Lilly & Co.*, 553 F. Supp. 2d 1049, 1050 (N.D. Ind. 2008) (identifying three factors a court may use in determining whether a stay is appropriate: "(1) potential prejudice to the non-moving party; (2) hardship and inequity to the moving party if the matter is not stayed; and (3) economy of judicial resources.").

Considering the factors other courts have identified in determining the propriety of a stay of discovery, the Court finds that, at this time, a stay in this action is not warranted.

III. Motion For Judgment On The Pleadings

In her motion for judgment on the pleadings as to plaintiffs' Medicaid Act claim, Ms. Gillespie argues that, given the Eighth Circuit's decision in *Does v. Gillespie*, plaintiffs no longer have standing to bring their claim under the Medicaid Act, and therefore it should be dismissed (Dkt. No. 169, at 2). Plaintiffs make three arguments in response: (1) the Eighth Circuit's decision in *Does v. Gillespie* may be unsettled by a decision from the Supreme Court; (2) any order from

the Court dismissing the Medicaid Act claim would be interlocutory; and (3) dismissing the Medicaid Act would have no practical effect on discovery because the scope of discovery on plaintiffs' constitutional claims are the same as on their Medicaid Act claim (Dkt. No. 171). Plaintiffs also ask the Court to defer any decision on Ms. Gillespie's motion until the close of the case (*Id.*, at 5). In reply, Ms. Gillespie argues that it is not appropriate to deny the motion because of "the off-chance" of a Supreme Court decision, the fact that a dismissal of the Medicaid Act claim would be interlocutory means that it should be granted, and that there is no authority for allowing a claim to proceed because the dismissal of that claim would have no effect on the litigation (Dkt. No. 174, at 1-3).

The Court concludes that a ruling on the motion for judgment on the pleadings as to plaintiffs' Medicaid Act claim is neither necessary nor helpful at this stage of the litigation. *See U.S. v. 687.30 Acres of Land, More or Less, in Dakota and Thurston Counties, State of Neb.*, 451 F.2d 667, 670 (8th Cir. 1971) ("Rulings on pleadings are clearly interlocutory and are not appealable. Of course all interlocutory rulings are subject to review upon appeal from final judgment."). Any ruling from this Court on the pending motion for judgment on the pleadings as to plaintiffs' Medicaid Act claim would be an interlocutory order that the Court could reconsider prior to entering a final judgment. Accordingly, the Court will hold the motion for judgment on the pleadings as to plaintiffs' Medicaid Act claim under advisement until a later date (Dkt. No. 168).

IV. Conclusion

For the reasons discussed above, the Court denies plaintiffs' motion to stay proceedings (Dkt. No. 185). The motion for judgment on the pleadings as to plaintiffs' Medicaid Act claim remains under advisement (Dkt. No. 168).

It is so ordered, this the 24th day of March, 2019.

Kristine G. Baker
United States District Judge