For Opinion See 136 F.3d 709

United States Court of Appeals,
Eleventh Circuit.
Lawton CHILES, in his official capacity as Governor of the State of Florida, et. al., Appellants,
v.
John/Jane DOE Nos. 1-13, Appellees.
No. 96-5144.
April 8, 1997.

On Appeal from the United States District Court for the Southern District of Florida

Answer Brief of Appellees

Respectfully submitted, Steven M. Weinger, Esquire, Florida Bar No. 280585, Helena Tetzeli, Esquire, Florida Bar No. 759820, Kurzban, Kurzban, Weinger & Tetzeli, P.A., 2650 S.W. 27th Avenue, 2nd Floor, Miami, Florida 33133, (305) 444-0060, Counsel for Appellees.

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***1** *STATEMENT OF JURISDICTION*

This is an appeal from a final decision of the District Court for the Southern District of Florida. Jurisdiction is

vested in this Court pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Issue I: Whether the District Court was correct in following all other federal courts in granting relief from a violation of 42 U.S.C. § 1396a(a)(8) where thousands of mentally retarded individuals were denied an essential Medicaid service or placed on a waiting list for many years for this service after the state had determined eligibility.

Issue II: Whether, in the alternative, the Final Judgment was proper because the denial of Intermediate Care Facilities for the Mentally Retarded ("ICF/MR") services by state officials was random and arbitrary in violation of the Due Process and Equal Protection guarantees of the United States Constitution.

RESPONSE TO STATEMENT OF CASE AND THE FACTS

I. *COURSE OF PROCEEDINGS AND DISPOSITION BELOW*

This suit was filed as a class action on March 13, 1992. (R. Vol. 1, D.E. 1). The Magistrate Judge entered his Report and Recommendation that the Plaintiffs' Motion for Class Certification be granted on August 27, 1996. (R. Vol. 14, D.E. 442). No objection was filed by Defendants. See Local Rules, United States District Court, Southern District of Florida, Magistrate Judge Rule 4(b); Fed. R. Civ. P. 72.

Although Defendants argue "Plaintiffs' Motion for Class Certification was not granted," (Appellants' Brief at 3), the District Court clearly viewed the matter as resolved at the time Final Judgment was entered as the District Judge specifically referred to the Report and Recommendation at the hearing resulting in the Final Judgment. (R. Vol. 15, D.E. 458). Further, ***2** in the Final Judgment, the District Court ordered that "Plaintiffs in this action, as a class, may intervene in the *Cramer* action." (R. Vol. 14, D.E. 449 at 1, n. 3).

At the hearing, the Court informed the Plaintiffs and Defendants that the class certification issue had been resolved in favor of class certification by issuance of the Recommended Order. (R. Vol. 15, D.E. 458). The District Court stated on the record that in view of the Magistrate's recommendation, he was inclined to enter a final judgment. *Id.* Despite this clear notice from the Court, the Defendants voiced no objection to the Magistrate's Order, or to class certification at that hearing, nor did they ask the Court to refrain from entering a final judgment so they could object to the Magistrate's Report and Recommendation. *Id.* Because no timely objections were filed by Defendants, the Report and Recommendation became the Order of the District Court. *See, McGill v. Goff,* 17 F.3d 729 (5th Cir. 1994) (Appellant's failure to object, despite opportunity to do so, resulted in waiver of right to appeal district court's error in adopting magistrate's report prior to end of 10 day objection period).

Moreover, Defendants viewed the Final Judgment as being in the form of a class, asserting in their Emergency Motion to Stay Final Judgment an "astronomical" cost to serve the class and the inadequacy of 90 days in light of the relief ordered. Appellees' Emergency Motion for Stay at 3. Clearly, Defendants were referring to the entire class of developmentally disabled individuals denied ICF/DD services.

II. *REPLY TO DEFENDANTS'/APPELLANTS' STATEMENT OF FACTS*

INTRODUCTION

The original named Plaintiffs were fourteen (14) Medicaid eligible, developmentally disabled individuals, who, based on assessments by Defendant state officials, were placed on the waiting list for placement in Intermediate Care Facilities for the Mentally Retarded ***3** (Developmentally Disabled).[FN1] (App. 81-112). Most had been waiting for five years or more. *Id.*

> FN1. The terms Intermediate Care Facility for the Mentally Retarded and Intermediate Care. Facility for the Developmentally Disabled, and their respective acronyms "ICF/MR" and "ICF/DD," are used interchangeably by the Defendants and in this Brief. Several years ago, the State of Florida changed the name of these facilities from "ICF/MR" to "ICF/DD" to avoid the pejorative connotations of the term "mentally retarded," however, the parties agree that the name change in no manner affects the parties' legal positions. The program remains subject to the ICF/MR definitions and standards. *See,* for example, 42 C.F.R. §§435.1009, 440.150, 483.400, *et seq.*

The Doe Plaintiffs are the most physically and mentally vulnerable individuals in the State of Florida, and the individuals least able to speak for themselves. These individuals suffer from mental retardation and other afflictions not as the result of any voluntary choice but as the result of birth defects and other circumstances entirely beyond their control. By virtue of their disabilities, they are unlikely to contribute to political campaigns, form voter blocks, or otherwise assert their rights, except through the assistance of advocates in the judicial process. In this case, the Court is called upon to enforce the federally guaranteed rights of these individuals to essential, life preserving therapeutic services.

As admitted by the Defendants, approximately one-half of the equally needy and identically situated individuals receive the government benefit of ICF/MR Medicaid services while, without any distinction on the basis of need or eligibility the other half, the Doe class, is relegated to languish or die as a result of the deprivation of services as to which the State has already determined eligibility.[FN2] (App. 138, see App. 76-79.)

> FN2. Not only did the State Defendants concede all the essential elements of the claim, but the State Defendants obtained a legal opinion from their own attorney in 1990, two years before this lawsuit was commenced, that the creation of waiting lists violates Federal law. (App. 35-36). Presumably, the Defendants were concerned due to the waiting lists for ICF/MR services that started in 1988, when, it turns out, the Defendants adopted a moratorium on new ICF/MR placements except where an existing ICF/MR recipient died or moved out. *See* App. 71, 265-66. This decision was never incorporated into the State Medicaid Plan or published, but the effects were felt as a waiting list blossomed. The legal opinion delivered to Florida Health and Rehabilitative Services ("HRS") Secretary (Defendant Williams) by his General Counsel was:
>
> 42 C.F.R. 440.210 and .220 provide that ICF/DD is an optional part of Medicaid; therefore, the state could choose not to offer this program and would have to remove ICF/DD from the state Medicaid plan. However, since the state has chosen to offer this program, 42 C.F.R. 440.230(b) requires "each service much sufficient in amount, duration and scope to reasonably achieve its purpose". Stated differently, this program has in essence become an entitlement because of this regulation and 42 U.S.C. 1396(a)(8) as stated below and applicable case law.
>
> It is our understanding that the Developmental Services program office has already culled down a list of people for whom the ICF/DD program is appropriate, who are eligible for the service, and who cannot be ranked one over the other and say that this person needs the service more than another. 42 U.S.C. 1396(a)(8) "provides that all individuals wishing to make application for medical assistance under the

> (state) plan shall have the opportunity to do so and that such assistance shall be furnished with reasonable promptness to all eligible individuals".
>
> It is our view that the Department will have to service this waiting list of individuals with reasonable promptness to have them receive ICF/DD services. Failure to provide these services through lack of legislative appropriations or otherwise, would leave us open to a lawsuit, notwithstanding F.S. 393.067(14)....
>
> If we wish to continue to provide the ICF/DD program, it will have to be funded with "reasonable promptness" and service "most" eligible individuals. (D.E. 412, App. At 123-24.).

***4** Two of the named Plaintiffs died from a lack of appropriate care while the lawsuit was pending. (App. 77-78). To obtain a clear picture of the dire straits of these individuals denied ***5** ICF/DD placement, Plaintiffs respectfully request this Court to read these reports regarding at least several of the 14 named Plaintiffs prepared by a federally qualified "QMRP" (Qualified Mental Retardation Professional).[FN3] (App. 76.112.)

> FN3. For example, Jane Doe No. 6 is still awaiting an ICF/DD placement, she has been waiting nearly ten years (App. 77, 92-93). She is severely retarded, has Downs Syndrome, cannot talk, and is totally dependent on others for all daily life skills. (App. 78, 97-98). She was born with an incomplete duodenum and requires a special diet and other medication. *Id.* Comprehensive training in an ICF/DD certainly would have seen Jane performing many tasks of daily life and self-care independently. *Id.*
>
> Although Jane is 39 years old, she lives with her parents who are ages 77 and 74. Her mother has suffered a heart attack and experiences heart problems, and her father has severe asthma. Neither can continue to care for Jane, and she has been denied services since 1987. *Id.*

For reasons which are apparent from the Defendants' reports documenting the ever increasing number of eligible, severely disabled individuals, this class action was filed. (App. 1-32).

THE ICF/MR PROGRAM

As part of its Medicaid program, the State of Florida provides for placements in Intermediate Care Facilities for the Mentally Retarded/Developmentally Disabled ("ICF/MR or ICF/DD"). Fla. Stat. §409.904. Over fifty percent of the cost of the services is paid for by the United States of America through federal financial participation. (See App. 142.) The State of Florida is required to comply with the conditions of participation in the Medicaid program as set forth in 42 U.S.C. § 1396a(a). (App. 223.)

***6** The ICF/MR program is designed to insure that each client "receive a continuous, active treatment program, which includes aggressive, consistent implementation of a program of specialized and generic training, treatment, health services and related services directed toward the acquisition of behaviors necessary for the individual to function with as much self determination and independence as possible and the prevention or deceleration of regression or loss of current optimal, functional status." 42 C.F.R. § 483.440(a). The State of Florida Department of Health and Rehabilitative Services has explained that "active treatment is defined as a level of care which provides for multiple services delivered by a variety of professional disciplines across a twenty-four hour period addressing the most basic life skills. Individuals who need this kind of service are by definition people who lack self-care skills and have significant limitations in functional life skills or behavior problems". (App.

190.)

The program is restricted to individuals with sufficiently severe mental retardation and related conditions. The ICF/MR program is not designed for generally independent clients who are able to function with little supervision or in the absence of a continuous active treatment program. See 42 C.F.R. §483.440(a)(2). Each mentally retarded individual has an individual program plan developed by an interdisciplinary team representing the professions relevant to that individual's needs. 42 C.F.R. §483.440(c).

Each ICF/MR resident is assured that he will have the services of a physician available twenty-four hours a day and a medical care plan of treatment, including, twenty-four hour licensed nursing care as appropriate. See, generally 42 C.F.R. §483.460. In addition, each ICF/MR client must be provided with preventive and general medical care. *Id.* See, generally 42 C.F.R. §483.400, *et seq*.

DOE PLAINTIFFS WHO OBTAINED ICF/MR SERVICES ARE THRIVING

***7** The ICF/MR program provides essential benefits to severely and profoundly mentally retarded individuals who will benefit from active treatment as shown by the results obtained by the several named Plaintiffs who are fortunate enough to receive ICF/DD placements during the pendency of this lawsuit.

When this lawsuit was filed in 1992, Jane Doe number 5 was twenty-seven years old and living at home with her widowed and ailing mother. (App. 94-96.) She is profoundly retarded and legally blind. When this lawsuit was filed she was unable to control her environment, she could not turn on or off music or television, had no contact with her peers, spent her days in her bedroom where her mother would bring her food and feed her. *Id.* She was obese. *Id.* Her developmental training had stopped when she turned twenty-one and ceased to be eligible for the public school exceptional student education program. *Id.* She was receiving no physical, occupational, or speech therapy, and did not have access to the adaptive equipment necessary to allow her to move about. *Id.* She had been denied ICF/DD services for six years and had not only failed to progress, but, had lost skills relating to mobility, socialization, basic self-care and communication. *Id.*

Jane Doe 5 began receiving ICF/MR services while this case was pending. She began receiving behavioral, speech and occupational and physical therapy, skill acquisition training, and a meal time program. App. (77-78.) As a result, she learned to control certain aspects of her life, she has begun developing a language diary and is beginning to communicate through sounds or words. *Id.* Her adverse behaviors are now controlled through behavioral programs. *Id.* She is on a therapeutic diet to reduce her obesity. *Id.* Through careful monitoring and therapeutic levels of anti-convulsants her seizures are under control. *Id.* Through training and encouraging her mobility, she is now able to safely engage in exploring her environment. *Id.*

Similarly, Jane Doe 1 and John Doe 11, began receiving ICF/MR services during the ***8** pendency of this law suit and finally received the occupational, physical and speech therapy, therapeutic diets, skill acquisition training and day program services, which are mandatory components of the ICF/MR program. (App. 76, 78.) As a result of their admissions to ICF/MR programs, these named Doe Plaintiffs have shown substantial progress. Compare the 1992 Whitaker Evaluation with the Declaration of Whitaker dated May 31, 1996. (App.76-112).

WITHOUT ICF/MR SERVICES DOE PLAINTIFFS ARE DYING AND REGRESSING

The importance of ICF/MR services to eligible individuals is also well documented in regard to the majority of the named Plaintiffs who, even four years after suit was filed, still did not receive ICF/MR services. For ex-

ample, John Doe 3 never received ICF/MR services and died in a non-ICF/MR setting of an epileptic seizure where there were no nurses on staff or staff trained in a manner which would meet the requirements for training of staff in an ICF/MR facility.

John Doe 8 died in December, 1995 as predicted in the evaluation of John Doe 8's prognosis absent ICF/DD services in the report prepared in 1992 ("as services continue to be denied to John, John's future is envisioned as one of lessening mobility of all limbs, more contractures coupled with pain, decreasing respiratory ability as his severe scoliosis worsens without proper positioning...*in short, John's future ranges from death to daily pain to total isolation* as his skills related to awareness continue to diminish without stimulation"). (App. 101-02, see App. 78.)

John Doe 8 had received ICF/MR services from 1978, when he was four years old, until 1990. (App. 101-02). During that twelve year period, he received intensive training, therapies and twenty-four hour medical intervention supervision, he was attending public school program and was obtaining intensive therapies. *Id.* John Doe 8 functioned in the profound range of mental retardation, had a seizure disorder, had severe scoliosis, curvature of the spine, had cerebral palsy ***9** which affected all body parts, he was virtually unable to move any part of his body, had a permanent tracheostomy and had a gastrostomy. *Id.* Through IFC/MR active treatment services, Doe 8 was able to interact with others, enjoy his environment and receive appropriate positioning for his comfort. *Id.*

In 1990, John Doe 8 required hospitalization. *Id.* The State of Florida's ICF/MR program provides that an individual loses his ICF/MR placement when absent for fourteen days from the ICF/MR facility, even for hospitalization. In light of the tremendous demand for ICF/MR services by the thousands of individuals on the waiting list, John Doe 8's bed was filled by another needy individual. As a result, when John Doe 8 was ready to continue receiving ICF/MR services after the hospital stay, no such services were available for him and he was discharged to a nursing home where he awaited placement until his untimely death. (See App. 78, 101-02.)

While in the nursing home, John Doe 8 received none of the essential services or active treatment which he had been receiving from 1978 through 1990 which allowed him to thrive and develop and he regressed significantly. (App. 101-02.). Thus, after several years of being deprived of the essential ICF/MR services for which he was eligible, his tragic death came as no surprise and, as noted above, the expert evaluation of John Doe in 1992 predicted this outcome absent the return of ICF/MR services to John Doe 8. (See App. 78, 101-02.)

Those Doe Plaintiffs who have survived during the pendency of this action who have not received ICF/MR services have not progressed as they would have in an ICF/MR facility, as provided for by Federal law. (App. 76-79.) In sum, the uncontroverted evidence shows what the Federal government knew all along in deciding to fund the majority of the cost of ICF/MR services, these services are essential to the preservation of life and provide a tangible benefit to profoundly and severely mentally retarded individuals. Without these services, eligible individuals continue to ***10** languish and, not infrequently, die.

THE STATE OF FLORIDA HAS DOCUMENTED THE UNMET NEEDS, THE ILLEGALITY OF THE WAITING LISTS AND THE INTENTIONAL MORATORIUM PROHIBITING MOST ELIGIBLE MENTALLY RETARDED INDIVIDUALS FROM RECEIVING ICF/MR SERVICES OR OTHER ESSENTIAL MEDICAID SERVICES

Florida's total fiscal effort for MR/DD services (services for the mentally retarded/developmentally disabled) was ranked forty-ninth in the nation in a comparative study of the states. (App. 4, 6.) "Florida's total fiscal effort increased by only three cents in eleven years, from $1.51 in 1977 to $1.54 in 1988, and its ranking fell from

forty-fifth to forty-ninth [among the states] during this period." *Id.* In January, 1992, Governor Lawton Chiles and State of Florida Department of Health and Rehabilitative Services Secretary Robert B. Williams issued the State's "Strategic Plan for People with Developmental Disabilities - Developmental Services 1992 - 2002" as required by Florida law. App. 7-10. In the report, the Defendants' wrote:

The most urgent large scale need of individuals in the developmental services population is for residential services and community life supports.

Lack of resources to develop residential services of the past eight years has resulted in a large and growing waiting list....

In April, 1991, 2,060 persons were on the long-term residential care (LTRC) waiting list.

In addition to these persons, there were another 2,906 age 30 and older still living in their parents' home but not identified on the LTRC waiting list. Most of these persons are from the post-World War II baby boom generation. They live with a single elderly parent and will "suddenly" need a home ***11** sometime within the next few years. App. 10.

Over the past eight years, the service population has grown at an average rate of 6.75% per year. App. 9.[FN4]

> FN4. For example, in January, 1990, the Governor and the Secretary of the Department of Health and Rehabilitative Services wrote in regard to individuals with developmental disabilities (mental retardation):
> "Analysis of waiting lists and population growth indicates that, to meet the needs of the service population in 1992, an additional 2,753 beds, 4,788 training and work programs, 1,696 early intervention services and 2,704 training and therapy services will be required.
>
> Thus, to meet projected needs, current capacity must increase from 40% to 80% over the next two years, depending on the service area involved. Over the past two years, the number of persons needing services grew 15%. App. 24.

Even for those individuals fortunate enough to receive ICF/DD services, the Defendants failed to pay adequate rates to meet the requirement of Federal law that the Medicaid rates be "reasonable and adequate" for services in compliance with applicable state and federal laws. *Florida Association of Rehabilitation Facilities, et al. v. State of Florida, Department of Health and Rehabilitative Services (FARF v. HRS),* United States District Court for the Southern District of Florida, Case No. 89-0984-CIV-NESBITT, Order Granting Preliminary Injunction, dated September 11, 1991. (App. 113-17, 147-58.) This situation was remedied only by a Preliminary Injunction by the United States District Court, the Honorable Lenore C. Nesbitt presiding, which was entered on September 11, 1991 and remains in effect through today. *Id.*

In granting injunctive relief, Judge Nesbitt found the State's interpretation of the requirements of the Medicaid Act unlawful, and also found the state officials' arguments "false to the point of absurdity" and to "evince a disturbing and fundamental misunderstanding of the goals ***12** of the Medicaid Act." (App. 156.) Judge Nesbitt also found that "[d]efendants' contention both ignores reality and would allow any state to evade entirely its requirements under the Act" and Defendants' arguments constituted"circular reasoning." (App. 157.)

In January, 1992, Florida Governor Lawton Chiles and Lieutenant Governor Buddy McKay issued their report entitled "Investing in Florida 1992 - 1996" in which they acknowledged this "pending lawsuit alleging that insufficient availability of intermediate Care Facilities/Developmental Disabilities (ICF/DD's) and other Medicaid services results in restricted access for Medicaid eligible clients" and, on a related note, described the settlement

of another lawsuit, which finally resulted in the alignment of the previously lower Medicaid reimbursement rate for Intermediate Care Facilities/Mental Retardation (ICF/MR's) with the nursing home rate." (App. 13.) Thus, the neglect of Medicaid Eligible individuals with severe mental retardation by state officials rears its head at every turn -- even through the refusal to pay rates equivalent to nursing home rates until sued in federal court.

Also prior to the filing of this lawsuit, on February 13, 1992, Defendant HRS Secretary Robert B. Williams wrote that, "Waiting lists for community based services and residential placements continue to increase for Floridians with... developmental delay." (App. 15.) Secretary Williams explained that, "[t]he DS [Developmental Services] waiting list has grown by twenty-nine percent since June 1990...The current waiting list is 8,200. (App. 18.) The growing waiting list described by the Defendants themselves in 1992 came as no surprise as the Defendants had, in previous years, clearly acknowledged the growth of waiting lists for ICF/MR services and the deprivation of services to eligible individuals. Defendants have tracked the large and ever increasing number of individuals eligible for and in need of essential services who are not receiving those services in their "Developmental Services Program Office Monthly Data ***13** Report. (App. 25.) and admitted that the number of individuals in need of ICF/MR facilities is understated. (App. 32.) Indeed, Defendants issued their own report giving typical examples of people on the ICF/DD waiting list. (App. 29 - 32). The Defendants description of these individuals are virtually identical to the description of the Plaintiffs in the Whitaker Declaration and evaluation, (App. 76 - 112), including the description of the harm resulting from lack of services, and conversely, the positive results of ICF/DD placement. (App. 29-32)

As the State of Florida's own Department of Health and Rehabilitative Services established, based on the national use rate for ICF/MR facilities, the State of Florida required an additional 4,277 ICF/MR beds. (App. 32.) One year later, Florida Governor Lawton Chiles acknowledged in writing the then current unduplicated waiting lists for one or more developmental services in excess of 8,000 as well as the "increased demand for residential services and supports, and increased waiting list for services." (App. 37.)

DEFENDANTS' ACTIVITIES IN 1995 AND 1996

In 1995, one year before the entry of the Final Judgment in this case, the State Defendants acknowledged that "funds were never made available to serve all the people who need services in Florida who received Medicaid services for which they were eligible." (App. 55.) Although the State has been authorized to serve individuals under the waiver, the waiver has never been fully funded and that the Department was only meeting the needs of 55% or 60% of the developmentally disabled population who are registered clients with the HRS. (App. 52, 55.)

As Defendant state official Allen admitted, in the three years since the suit was filed, the number of Medicaid eligible individuals not receiving the services to which they are entitled has actually increased:
"Question: Now isn't it true that the increased number of people receiving ***14** services from 1992 through today is smaller than the number of new people who have come into the system needing the services who are Medicaid eligible?"
Answer: Correct.
Question: Is that correct?
Answer: Yes, it is.
Question: So the actual number of people needing services is, the raw number, number of people Medicaid eligible for services are not getting the services but are eligible, is a bigger number today than it was in 1992, isn't that true?
Answer: Correct.

Question: What is being done to remedy that situation?
Answer: We continue to request funds for people who are waiting for services." (App. 48.)

As Defendants admitted, Florida ranked 49th vis-a-vis the other states in terms of funding. (App. 44.) As conceded by the State's Defendants, the State would spend more of its general revenues simply to provide services to merely keep people currently in ICF/MR's alive than the State's share for comprehensive high quality ICF/MR services as part of the state's Medicaid plan (which is primarily funded by the federal government). (App. 60.)

In 1996, with full recognition of the extensive waiting list of Medicaid eligible individuals entitled to ICF/MR services, the Governor of the State of Florida signed into law legislation which eliminated two-thirds of the existing ICF/MR beds and which cut funding for services to the individuals residing in those beds by $60,000,000 (sixty million dollars) per year. (See App.70-74, 120.)

ORDERS OF THE TRIAL COURT

On July 22, 1996, the District Court entered its Order on Motions for Summary Judgment, denying the Defendant's Motion for Summary Judgment and granting Plaintiffs' Cross-Motion for Summary Judgment. (App. 215.) The Court relied upon 42 U.S.C. § 1396a(a)(8) and the ***15** corresponding regulation, 42 C.F.R. § 435.930.[FN5] The Court determined, *inter alia,* that § 1396a(a)(8) of the Medicaid Act, specifically the reasonable promptness clause, is enforceable under 42 U.S.C. § 1983 and that "medical assistance under the plan" has been defined as medical services. (App. 215-17.) The District Court found that the state is obligated to furnish medical services only to the extent that such placements are offered in the federally approved state plan but that, once the state elects to provide a service, that service becomes part of the state Medicaid plan and is subject to the requirements of federal law. (App. 215-17.)

> FN5. The agency must -
> (a) furnish Medicaid promptly to recipients without delay caused by the agency's administrative procedures;
>
> (b) continue to furnish Medicaid regularly to all eligible individuals until they are found to be ineligible....
>
> 42 C.F.R. §435.930

The Court noted in the Order on Motions for Summary Judgment that, at oral argument, Defendant conceded that Florida's federal Health Care Finance Administration ("HCFA") approved Medicaid plan provides for placement in ICF/MR facilities (Fla.Stat. §409.904), and the Defendant had not disputed the facts alleging the State's failure to conform with the provisions set forth in the Statute, which the Court construed as an admission of unreasonable delays in placing developmentally disabled individuals into ICF/MR facilities.[FN6] (App. 215-***16** 17.)

> FN6. At oral argument on the Motions for Summary Judgment, counsel for the Defendants (Mr. Smith) admitted as follows:
> "No state is obligated to participate in the Medicaid program. However, *if a state opts to participate, it must do so in a manner that complies with Federal Statutory and Regulatory requirements.* That is pursuant to § 1396(n). Florida has opted to participate in the Federal Medicaid Program...." Transcript of

proceedings, June 10, 1996, App. 221.

Pursuant to § 409.9066(14) Fla. Stats. [sic], Florida has chosen to provide ICF/DD services. Once the state opts to provide optional Medicaid service, it must comply with all relevant Federal requirements for that service. App. 223.

There is a wait list for some people to receive services and Plaintiffs are alleging that the wait list is inappropriate and they have a right to something short of an immediate placement; something they are characterizing as reasonable.

The Court: What is your response to that?

Mr. Smith: There is no Federal requirement that requires us to immediate place them.

The Court: Is that what you have agreed to by the approved plan, to a reasonable and prompt placement in a facility?

Mr. Smith: Yes.... App. 228.

The Court: *Is there also a wait list under the waiver program?*

Mr. Smith: *Yes, there is* ... the Federal Government matches it with fifty-six percent ... Yes, there is a wait list. There is not the money available to fund the program for [*sic*] that extent. App. 232-33.

The Court: Where do you -- at what point does a wait list become a method or device for just not providing the services at all?

Mr. Smith: We don't contend the wait lists are not problematic and there is considerable concern and effort in attempting to whittle them down. On some levels we are dealing with modern fiscal reality, there is only so much money ... Again, if we fully utilize those and all the matching funds were received and drawn down, it would aggregate to around $586 Million. There is not that kind of money to do Florida's share with the current budget situation we are under. *Id.,* at pp. 19 - 20, App. 236-37.

Mr. Burns (co-counsel for Defendants): We have the cite where the Secretary of HRS Williams stated that there was a -- prohibitive licensing in the new ICF MR beds.

Mr. Talenfeld, [counsel for Defendant/former Secretary of HRS Williams]: Your Honor, *Mr. Weinger is correct with respect to his citation as to the moratorium imposed by the State of Florida.* App. 265-66. (Obvious typographical errors in transcript corrected for clarity) (emphasis added).

On August 28, 1996, the District Court entered its Final Judgment. (App. 278-79.) The ***17** Judgment requires that "Defendants' shall within sixty days of the date of this Order establish within the state's Medicaid Plan, a reasonable waiting list time period, not to exceed ninety days, for individuals who are eligible for placement in ICF/DD institutional care facilities." (App. 278.) The Order is simple, does not in any manner restrict the state Defendants' method of complying with federal law obligations to the Medicaid eligible individuals and establishes a maximum waiting period which is extremely generous in light of Federal regulations which allow a maximum of 90 days for a state to determine eligibility for disabled persons, and which specifically provides

that this maximum time period may not be used as a waiting period. 42 C.F.R. § 435.911.

III. *STATEMENT OF THE STANDARD OR SCOPE OF REVIEW*

The Plaintiffs do not oppose Defendants' position as to the standard or scope of review.

SUMMARY OF THE ARGUMENT

Plaintiffs are Medicaid eligible, severely and profoundly mentally retarded individuals, most with severe physical disabilities as well. By definition, the Plaintiff class includes only those individuals assessed by the State of Florida and determined to be eligible for and in need of a placement in an Intermediate Care Facility for the Mentally Retarded ("ICF/MR") where they will receive comprehensive active treatment. Of the named Plaintiffs in the class action, two died absent an ICF/MR placement while the suit was pending, others languished without the care which they were entitled. (App. 76-112.) Three of the named Doe Plaintiffs were placed in ICF/MR facilities and are thriving. (App. 76-79.)

Although the ICF/MR program is a minuscule part of the Medicaid program in Florida in terms of total expenditures, the cost of services on a per person basis is fairly high. As a result of their significant disabilities and indigency, the eligible individuals are powerless to assert their ***18** rights. The State Defendants have not identified any Florida Medicaid services other than those for developmentally disabled individuals, for which there are several year waiting lists.

The Defendants have conceded that Florida is at the very bottom (49th among the states) in terms of funding for services for people with developmental disabilities (App. 6, 44), and that the state is only meeting the needs of 55% or 60% of the developmentally disabled population who are registered clients with the state's Medicaid program. (App. 52, 55).

Aside from conceding the existence of extensive waiting lists for ICF/MR Medicaid services, the Defendant state officials conceded that Florida opted to participate in the federal Medicaid program and to provide ICF/MR services (Fla. Stat. § 409.904) and that "if a state opts to participate, it must do so in a manner that complies with federal statutory and regulatory requirements," and "must comply with all relevant federal requirements for that service." (Transcript of proceedings, App. 221, 223.) *See Wilder v. Virginia Hospital Ass'n,* 496 U.S. 498, 110 S.Ct. 2510 (1990); *Alexander v. Choate,* 469 U.S. 287, 289 n.1, 105 S.Ct. 712, 714 n.1 (1985).

42 U.S.C. §1396a(a)(8) requires that a state plan for medical assistance *must:*
provide that all individuals wishing to make application for medical assistance under the plan shall have opportunity to do so, and that such assistance shall be furnished with reasonable promptness to all eligible individuals.

See also, 42 C.F.R. § 435.930.

On the basis of 42 U.S.C. § 1396a(a), the courts have uniformly and unanimously provided remedies to Medicaid eligible individuals who are on waiting lists for Medicaid services. *E.g., Sobky v. Smoley,* 855 F.Supp. 123 (E.D. Cal. 1994); *Linton by Arnold v. Carney by Kimble,* 779 F.Supp. 925 (N.D. Tenn. 1990). No courts, at any time, have tolerated the denial ***19** of timely provision of any Medicaid service to an eligible individual. On appeal, Defendants ignore the substantial case law opposing their position, all of which was presented in the District Court.

Defendants' entire argument is premised on factual inaccuracies, such as the claim that individuals on the wait-

ing list are all receiving services and therefore not being injured (Appellants' Brief, at 9), and that a large class of individuals is not suffering a lack of services (*Id.*). This is belied by Defendants' own assertion that they cannot meet the requirements of providing ICF/MR services to all eligible individuals as to do so would require "massive spending." *Id. (See, also,* App. 76-112, Declaration of Whitaker, describing lack of adequate services to Plaintiffs on ICD/DD waiting list.)

Defendants write of the advantage of waiver services over ICF/MR placements. However, Defendants ignore the fact that it is the Medicaid recipients' choice as to whether to waive the right to an ICF/MR placement and active treatment. *See* 42 C.F.R. § 441.302(d)(2), requiring that the Medicaid recipient, not the state, be "given the choice of either institutional [ICF/MR] or home and community based [waiver services]." Moreover, Defendants admit that the situation is no different for those recipients seeking waiver services. There is a waiting list and the state similarly claims a lack of funds to pay its share of the Medicaid cost of the waiver program. (App. 232-33.)

Although it is well settled that "[i]nadequate state appropriations do not excuse non-compliance [with federal Medicaid standards]," *Alabama Nursing Home Ass'n v. Harris,* 617 F.2d 388, 396 (5th Cir. 1980), Defendants repeatedly argue to the contrary. Defendants also contend, without citations, that they cannot be ordered to comply with the requirements of federal law because the issue is political (e.g., Appellants' Brief, p. 10).

***20** The Doe Plaintiff class has standing, as do the named Plaintiffs, and "[t]he great weight of case authority is to the effect that Medicaid recipients have standing to challenge alleged violations of the Medicaid Act by state officials." *Thomas v. Johnston,* 557 F.Supp. 879 (W.D. Tex. 1983) (citations omitted). Although actual injury, including death, loss of skills and constant pain, was shown unequivocally (App. 76-112), even the threat of harm is sufficient to confer standing. *E.g., Church of City of Huntsville,* 30 F.3d 1339 (11th Cir. 1994). Moreover, the state officials' novel argument that they can deprive individuals of a benefit for which the individual is eligible pursuant to state and federal law with impunity unless palpable injury is shown, finds no support in the case law. Presumably, the state could claim a right to deny paychecks to state employees who inherit wealth on the same basis.

Despite *Ex Parte Young* and numerous Supreme Court cases requiring state officials to comply with federal law requiring payments and services for its citizens, the Defendant state officials claim immunity based on the Eleventh Amendment. Defendants can find no support in *Pennhurst,* 465 U.S. 88, 104 S.Ct. 900 (1984), as the Court made clear that that injunction was not upheld based exclusively on a finding that state officials were not enforcing *state* laws and that federal courts may enjoin officials from engaging in violations of federal law. "Injunctive relief may, of course, be applied to state officials where actions derogate federal Medicaid laws and regulations," *Smith v. Miller,* 665 F.2d 172, 175 (7th Cir. 1981), and such relief has been consistently granted against state officials who create waiting lists in violation of 42 U.S.C. § 1396a(a)(8). Although these cases are too numerous to mention in the Summary of the Argument, suffice it to say that all of the cases were presented to the District Court and Appellants/Defendants do not mention or distinguish a single one of these cases in their Initial Brief.

***21** The courts have consistently upheld the right to § 1983 relief for violations of the Medicaid Act, and the Social Security Act generally. *E.g., Wilder v. Virginia Hospital Ass'n,* 496 U.S. 498, 110 S.Ct. 251 (1990); *Rosado v. Wyman,* 397 U.S. 397, 90 S.Ct. 1207 (1970). Ignoring these cases, as well as the numerous cases specifically granting § 1983 relief for violations of 42 U.S.C. § 1396a(a)(8) (most recently, *Blanchard v. Forrest,* Lexis 12697 (E.D. La. 1994)), Defendants argue that relief is not available based upon cases involving entirely unrelated statutory provisions, such as the statute reviewed in *Suter.*

Based on an unbroken line of cases construing 42 U.S.C. § 1396a(a)(8), Defendants' conduct is in violation of this statute. Defendants' position that they can refuse to authorize anyone to provide ICF/MR services to individuals on the waiting list and avoid liability because they are only obligated to pay providers with "reasonable promptness," shares the same fundamental misunderstanding for which they were criticized by another District Court Judge in a case involving inadequate funding for services for individuals with developmental disabilities. (App. 156-57.)

Aside from the statutory basis for relief, the random and arbitrary denial of ICF/MR services to several thousand individuals who are identically situated to the fortunate individuals who receive services, violates the due process and equal protection guarantees of the United States Constitution. *E.g., Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 102 S.Ct. 1148 (1981).

The Final Judgment is drawn with extreme care. The District Court gave the Defendants sixty (60) days to plan and set a ninety (90) day maximum waiting period -- finding frequent waits of over five years to not meet the "reasonable promptness" standard imposed by federal law.

***22** *LEGAL ARGUMENT*

I. *THE PLAINTIFFS MEET THE APPLICABLE STANDING REQUIREMENTS*

A. THE DOE PLAINTIFFS ARE BEING DEPRIVED OF A MEDICAL SERVICE FOR WHICH THEY ARE ELIGIBLE AND PLAINTIFFS HAVE STANDING TO SEEK RELIEF

Beyond question, the Doe Plaintiffs who did not die from lack of services during the pendency of this case are entitled to ICF/MR services. Defendants have admitted that the waiting list for services is actually longer now than at the time suit was filed. (App. 48.) Further, the record discloses through uncontroverted evidence that numerous named Doe Plaintiffs continue to be deprived of ICF/MR services and continue to be harmed by this deprivation, e.g., John Doe #4, Jane Doe #6. (App. 76-112.)

B. STANDING EXISTS TO ENFORCE THE MEDICAID ACT

1. MEDICAID RECIPIENTS HAVE STANDING.

The District Court in this case properly rejected Defendants' argument that Plaintiffs lack standing to enforce their rights under 42 U.S.C. § 1396a(a)(8). The federal courts have routinely enforced the Medicaid Act and "[t]he great weight of case authority is to the effect that Medicaid recipients have standing to challenge alleged violations of the Medicaid Act by State officials." *Thomas v. Johnston,* 557 F.Supp. 879, 904 (W.D. Tex. 1983), citations to *Hodgson v. Board of County Commissioners,* 614 F.2d 601, 606 n. 7 (8th Cir. 1980); *National Union of Hospital & Health Care Employees v. Carey,* 557 F.2d 278, 280-81 (2nd Cir. 1977); *Roe v. Ferguson,* 515 F.2d 279, 281 (6th Cir. 1975); *Pennsylvania Pharmaceutical Association,* 542 F.Supp. At 1349; *Morabito v. Blum,* 528 F.Supp. 252, 260-61 (S.D. N.Y. 1981); ***23***Roe v. Casey,* 464 F.Supp. 487, 498-99 (E.D. Pa. 1978), *aff'd* 623 F.2d 829 (3d Cir. 1980); *Massachusetts General Hospital v. Sargent,* 397 F.Supp. 1056 (D. Mass. 1975); *Smith v. Vowell,* 379 F.Supp. 139, 146-48 (W.D. Tex. 1974), *aff'd,* 504 F.2d 759 (5th Cir. 1974). *See, also, Wilder v. Virginia Hospital Association,* 496 U.S. 498, 110 S.Ct. 2510 (1990); *Smith v. Miller,* 665 F.2d 172 (7th Cir. 1981); *Arkansas Medical Society v. Reynolds,* 6 F.3d 519 (8th Cir. 1993); *Catanzano by Catanzano v. Dowling,* 847 F.Supp. 1070 (W.D. N.Y. 1994), *aff'd* 60 F.3d 113 (2d Cir. 1995); *Mayer v. Wing,* 922 F.Supp. 902 (S.D.N.Y. 1996).

Injunctive relief is deemed essential whenever a Medicaid recipient is deprived of a medical service. See, *McMillan v. McCrimon,* 807 F.Supp. 475, 479 (E.D. Ill. 1992); *Sobky v. Smoley,* 855 F.Supp. 1123, 1137 (E.D. Cal. 1994); *Police & Fire Ass'n for Handicapped v. Philadelphia,* 705 F.Supp. 1109, 1111 (E.D. Pa. 1989).

The factual record before the District Court clearly established standing to sue for enforcement of 42 U.S.C. §1396a(a)(8) which mandates that Medicaid eligible developmentally disabled individuals be provided "medical assistance" with "reasonable promptness."

As the Defendants themselves expressly conceded (App. 221, 223), the State of Florida has obligated itself to provide ICF/DD services, and as a Medicaid participant receiving federal Medicaid funds, must obey the provisions of the Medicaid Act and its regulations. *See, e.g.,* Fla. Stat. 409.904; *Wilder v. Virginia Hospital Association,* 496 U.S. 498, 110 S.Ct. 251 (1990); *Alabama Nursing Home Association v. Harris,* 617 F.2d 388 (5th Cir. 1980); *Smith v. Miller,* 665 F.2d 172 (7th Cir. 1981); *Arkansas Medical Society v. Reynolds,* 6 F.3d 519 (8th Cir. 1993).

2. THE COURTS HAVE REPEATEDLY GRANTED RELIEF PURSUANT TO 42 U.S.C. § 1396A(A)(8) AND RELATED PROVISIONS OF THE MEDICAID ACT

***24** The courts have unanimously found in favor of individuals seeking enforcement of 42 U.S.C. § 1396a(a)(8) and directly related provisions of the Medicaid Act. In none of these cases did the courts express any doubt as to the plaintiffs' standing. *See, e.g., Linton by Arnold v. Carney by Kimble,* 779 F.Supp. 925 (M.D. Tenn. 1990) (Court ruled in favor of plaintiffs suing for enforcement of 42 U.S.C. §1396a(a)(8)); *Sobky v. Smoley,* 855 F.Supp. 123 (E.D. Cal. 1994) (Court ruled in favor of plaintiffs and enforced §1396a(a)(8) and other provisions of §1396a(a)); *Clark v. Kizer,* 758 F.Supp. 572 (E.D. Cal. 1990) (Court ruled in favor of plaintiffs and enforced §1396a(a)(8) and other provisions of §1396a(a)(8)) *aff'd in part, rev'd in part* on other grounds *sub nom Clark v. Coye,* 967 F.2d 585, (9th Cir. 1992) WL 140278, (unpublished disposition.); *Catanzano by Catanzano v. Dowling,* 847 F.Supp. 1070 (W.D. N.Y. 1994) *aff'd* 60 F.3d 113 (2d Cir. 1995) (enforcement of notice and hearing pursuant to §1396a(a)(8)); *Haymon v. Williams,* 795 F.Supp. 1611 (M.D. Fla. 1992) (court ruled in favor of plaintiffs and enforced §1396a, and other provisions of §1396a.); *McMillan v. McCrimon,* 808 F.Supp. 475 (C.D. Ill. 1992)(Court ruled in favor of plaintiffs who sued for enforcement of §1396a); *Blanchard v. Forrest,* Lexis 126 (E.D. La. 1994) (Same.)

Finally, Defendants do not dispute that Plaintiffs, and each and every member of the class they represent, have been allowed to languish on a virtually interminable "waiting list" for necessary ICF/DD placements which do not occur unless an individual already in an ICF/DD dies. (App. 71.) Defendants concede that eligible individuals were denied services for "several years." (Appellants' Brief, at p. 2.), although the average wait is closer to seven years. (See, App. 76 - 112.)

C. PLAINTIFFS MEET ALL THE CRITERIA FOR STANDING AND DEFENDANTS' CASES ON STANDING ARE INAPPOSITE

***25** It is well established that proof of actual occurrence of an injury is not necessary to demonstrate standing as injunctive relief is properly granted upon a demonstrating of a *threat* of harm. *Commonwealth of Pennsylvania v. State of West Virginia,* 262 U.S. 553, 43 S.Ct. 658 (1923); *Farmer v. Brennan,* 511 U.S. 825, 114 S.Ct. 1970, 1983 (1994); ("One does not have to await the consummation of a threatened injury to obtain preventive relief"). *See also, Helling v. McKinney,* 509 U.S. 25 113 S.Ct. 2475, 2481 (1993) ("... a remedy for unsafe conditions need not await a tragic event."); *Church v. City of Huntsville,* 30 F.3d 1332, 1335 (11th Cir. 1994) (Standing

may be premised on "threatened" harm).

Additionally, a plaintiff is deemed to have standing to request injunctive or declaratory relief, as long as the injury alleged is capable of being redressed by injunctive relief "at that moment." *County of Riverside v. McLaughlin,* 500 U.S. 44, 50 111 S.Ct. 1661, 1667 (1991). Thus, a plaintiff may demonstrate standing by alleging that a defendant was engaging in the unlawful practice against the plaintiff at the time of the complaint. *County of Riverside v. McLaughlin, supra* at 1667.

In this present case, the uncontroverted record evidence established that Plaintiffs were threatened with harm *and* that Plaintiffs were in fact being injured by Defendants' on-going violation of federal law. At the time Plaintiffs' Complaint was filed, each Plaintiff was suffering from Defendants' failure to provide statutorily mandated medically necessary services.[FN7] ***26** Plaintiffs submitted specific evidence of the damage caused by Defendants' admitted delay of "several years."[FN8] Plaintiffs documented, during the pendency of the case in evidence presented to the court, the injury to Plaintiffs, including the death of two *Doe* Plaintiffs, and the continuing deterioration of the other *Doe* Plaintiffs, caused by Defendants' failure to comply with federal law. (App. 76-112).

> FN7. Only three of the named *Doe* Plaintiffs weve received ICF/DD services at the time judgment was entered. Other *Doe* Plaintiffs continue to be denied ICF/DD Services. App. 76-79. Of the *Doe* Plaintiffs that did receive ICF/DD services (only after this lawsuit was commenced) all now face the continued imminent threat of deprivation of ICF/DD services due to Defendants/Appellants' elimination of these placements. (App. 76-79.) The Defendants' assertion that some of the Plaintiffs no longer wish placement in ICF/DD homes, and that the *Doe* Plaintiffs are receiving an array of waiver services, is untrue and conflicts with the evidence. All of the *Doe* Plaintiffs remaining in the litigation who did not receive ICF/DD placement during the pendency of this case, *still* seek and need ICF/DD placement. App. 76-79. Furthermore, the majority of the *Doe* Plaintiffs, who continue to wait for placement and ICF/DD services, are *not* and never have received adequate waiver or other services. (App. 76-79.)
>
> FN8. Thus, this case complies with the standing law set forth in Defendants' Brief. In each of the cases cited by Defendants, Article III standing exists when a plaintiff has suffered an actual injury or faces the threat of such injury. *E.g., Lewis v. Casey,* 518 U.S. 343, 116 S.Ct. 2174 (1996); *Cone Corp. v. Fla. Dept. Of Transportation,* 921 F.2d 1190 (11th Cir. 1991). The Does demonstrated the indisputable and inevitable consequences of the denial of services, ranging from loss of basic motor skills to increased anti-social or behavior, to death; the plaintiffs in the cases cited by Defendants lacked standing simply because they lacked such injuries.

Typical of the results of Defendants' refusal to comply with federal law, as Plaintiffs established before the District Court, is *Jane Doe No. 6.,* who receives no services from the State, and instead must rely exclusively on her two sick, aging parents. Her mother had cancer surgery ***27** last year, and her father is blind in his right eye. The record below establishes the continuing harm caused to *Jane Doe No. 6* and others on the waiting list, see, e.g., *John Doe No. 4,* App. 76-9, 92-3, 97-8. These facts, and additional detailed evidence demonstrating the impact on the other *Doe* Plaintiffs of the Defendants' continuing violation of §1396a(a)(8), was uncontroverted by Defendants. Plaintiffs therefore, clearly have standing to bring this action for enforcement of §1396a(a)(8).

II. *THE ELEVENTH AMENDMENT DOES NOT BAR THIS ACTION*

A. THE ELEVENTH AMENDMENT DOES NOT LIMIT THE FEDERAL COURT'S DUTY TO ENJOIN

STATE OFFICIALS TO CONFORM THEIR CONDUCT TO FEDERAL LAW, REGARDLESS OF WHETHER SUCH RELIEF REQUIRES THE EXPENDITURE OF STATE FUNDS

For over a century, the Supreme Court of the United States has unambiguously held that the federal courts have the duty and the authority to enjoin officers and employees of a state who act in violation of the United States Constitution or federal statutes. *Davis v. Grey,* 21 L.Ed. 447, 453 (1872) (Federal courts are empowered to "enjoin a state officer from executing a state law in conflict with the Constitution or a statute of the United States, when such execution will violate the rights of the complainant."); *Ex Parte Young,* 209 U.S. 123, 28 S.Ct. 441 (1908) (A federal court may enjoin the attorney general of a state, whose "general duty" is to enforce state law, from proceeding to enforce a state statute which violates the federal constitution and such a proceeding is prohibited by the Eleventh Amendment); *Milliken v. Bradley,* 433 U.S. 267, 289, 97 S.Ct. 2749,2762 (1977) (affirming injunctive relief requiring state officials to "conform their conduct to requirements of federal law."); ***28***Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 116 S.Ct. 1114, 1132 (1996) (Reaffirming that *Ex Parte Young* allows a suit for injunction against a state official to go forward, notwithstanding the Eleventh Amendment, to end a continuing federal law violation).

This well established rule of law applies even if enforcement of the Constitution or federal statute requires the prospective expenditure of public, state funds. *Milliken v. Bradley,* 433 U.S. 267, 289, 97 S.Ct. 2749, 2762 (1977) (Supreme Court upheld and affirmed a federal court's order enjoining state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury); *Edelman v. Jordan,* 415 U.S. 651, 94 S.Ct. 1347, 1358 (1974) (Suit for injunctive relief proper to the extent it sought "payment of state funds ...as a necessary consequence of compliance in the future with a substantive federal-question determination ..."); *Turner v. Ledbetter,* 906 F.2d 606 (11th Cir. 1990) (No Eleventh Amendment violation when injunction has ancillary effect on state treasury). *See, Graham v. Richardson,* 403 U.S. 365, 91 S.Ct. 1848 (1971). (State officials prohibited from denying welfare benefits to otherwise qualified recipients who are aliens.); *Goldberg v. Kelly,* 397 U.S. 254, 90 S.Ct. 1011 (1970) (New York City welfare officials enjoined from following New York State procedures which authorize termination of welfare benefits without prior hearing.)

As the Supreme Court stated in *Edelman v. Jordan, supra,* at 1358 "such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle in *Ex Parte Young* ..." at 1358. *See also, Smith v. Miller,* 665 F.2d 172, 175 (7th Cir. 1981) ("Many courts have exercised equitable powers to force a state to make or continue making public relief payments until the state's administration of its public aid program comports with federal, statutory, or constitutional standards"); ***29***Alabama Nursing Home Ass'n v. Harris,* 617 F.2d 388, 396 (5th Cir. 1980) ("Inadequate state appropriations for Medicaid do not excuse the State's non-compliance" with "federal statutory standards").

B. THE FEDERAL COURTS ROUTINELY ORDER STATE DEFENDANTS TO COMPLY WITH THE MEDICAID ACT IN A MANNER WHICH RESULTS IN THE EXPENDITURE OF STATE FUNDS AND INADEQUATE STATE APPROPRIATIONS FOR MEDICAID DO NOT EXCUSE THE STATE'S NON-COMPLIANCE WITH FEDERAL LAW REQUIREMENTS

The federal courts have entered orders in a multitude of cases compelling compliance with the Medicaid Act and its corresponding regulations without finding that the Eleventh Amendment would bar such relief. *See, e.g., Alabama Nursing Home Ass'n v. Harris,* 617 F.2d 388 (5th Cir. 1980)[FN9] (Inadequate state appropriations do not excuse state's non-compliance with Medicaid requirements, State of Alabama could not circumvent its previous guarantee of reasonable cost related reimbursement under the Medicaid Act by failing to ensure adequate

funding for its Medicaid program); *Linton by Arnold v. Carney by Kimble,* 779 F.Supp. 925, 936 (M.D. Tenn. 1990) (State's "limited bed certification policy for nursing homes participating in Medicaid program, by causing Medicaid participants to experience extended delays "in waiting lists ... to gain access to long-term nursing home care," violated federal statute requiring states to insure that medical assistance will be furnished with reasonable promptness"); *Sobky v. Smoley,* 855 F.Supp. 123 (E.D. Cal. 1984) (Same provision of Medicaid Act, § 1396a(a)(8) required ***30** services be provided with reasonable promptness and such standard was sufficiently definite to enforce); *Arkansas Medical Society, Inc. v. Reynolds,* 6 F.3d 519 (8th Cir. 1983) (Equal access provision of Medicaid Act created a binding obligation on the States pursuant to *Wilder*); *Clark v. Kizer,* 758 F.Supp. 572 (E.D. Cal. 1990) *aff'd in part, rev'd in part on other grounds, sub. nom., Clark v. Coye,* in an unpublished decision at 967 F.2d 585, 1992 WL 140278 (9th Cir. 1992) (Persons eligible for dental care under California's Medicaid program frequently experienced delays in obtaining appointments for regular and emergency dental care with program providers and State therefore violated timely care provisions of Medicaid Act, affirmed finding of liability; *Catanzano by Catanzano v. Dowling,* 847 F.Supp. 1070 (W.D. N.Y. 1984) *aff'd* 60 F.3d 113 (2d Cir.1995); (Injunction entered against State officials for violation of 42 C.F.R. §431.200-250, requiring a hearing before suspending, terminating, or reducing services of Medicaid recipients); *Haymon v. Williams,* 795 F.Supp. 1611 (M.D. Fla. 1992) (Injunction entered against State of Florida officials to preserve recipients' rights under 42 U.S.C. §1396a(a)(3) (deprivation of right of mentally retarded individuals); *Weaver v. Reagan,* 886 F.2d 194 (8th Cir. 1989) (denial of Medicaid coverage for drugs, §§1396a(a)(1), (15)); *Fulkerson v. Maine Dept. of Human Services,* 802 F.Supp. 529 (D. Me. 1992).

> FN9. In *Bonner v. City of Prichard, Ala.,* 661 F.2d 1206, 1209 (11th Cir. 1981) the Eleventh Circuit adopted as binding precedent decisions of the Fifth Circuit entered before October 1, 1981.

In each of these cases, courts entered injunctive relief against State officials who failed to comply with the Medicaid Act. In none of these cases did the courts find that Plaintiffs' claims were barred by the Eleventh Amendment.

C. PENNHURST DOES NOT CREATE ELEVENTH AMENDMENT IMMUNITY IN AN ACTION AGAINST STATE OFFICIALS BASED UPON FEDERAL LAW

The Defendants' reliance on ***31***Pennhurst State School and Hospital v. Halderman,* 465 U.S. 88, 104 S.Ct. 900 (1984) is misplaced. As the Supreme Court stated in *Pennhurst,* its decision stood only for the rule that the federal courts do not have "a mandate to enforce *state* law." *Pennhurst, supra,* at 912 n.17, 109 n.17 (emphasis in the original). The Supreme Court in *Pennhurst* reaffirmed the continuing vitality of *Ex Parte Young,* and reiterated that in cases involving an injunction based on *federal* law, federal courts have the "constitutional duty" to vindicate "the supreme authority of the United States." *Pennhurst, supra,* at 912 n.17, 109 n.17, quoting from *Ex Parte Young (emphasis added).* In *Pennhurst* the Court expressly, and with approval, reiterated its previous holding that when a plaintiff sues a State official alleging a violation of federal law a Federal court may enjoin the official from engaging in future violations of the law. *Pennhurst, supra,* at 909, 103, citing *Edelman v. Jordan,* 415 U.S. 651, 94 S.Ct. 347 (1974). The Court in *Pennhurst* took great pains to distinguish the *Pennhurst* situation from the situation present in this case, where the defendant state officials have acted in violation of federal law and the federal Constitution and where the District Court, as it is bound to do, enjoined future violations of federal law.

Indeed, the Defendants' Eleventh Amendment argument not only lacks a valid legal basis, it conflicts with a legal principle that is so firmly entrenched and well established *(see, e.g., Davis v. Grey* and *Ex Parte Young,*

supra) that the courts usually do not address this argument as a genuine issue in this context.[FN10] *See, e.g.,* ***32***Smith v. Miller,* 665 F.2d 172, 175 (7th Cir. 1981) ("Injunctive relief may, *of course,* be applied to state officials whose actions derogate federal Medicaid laws and regulations") citations to *Ex Parte Young, supra* (emphasis added). *See also, Thomas v. Johnston,* 557 F.Supp. 879 (W.D. Tx. 1983) (action by mentally retarded Medicaid recipients challenging reduction in ICF/MR reimbursement rate, held *Pennhurst* did not bar application of § 1983 to claims of Medicaid recipients challenging state action as violative of the Social Security Act).

FN10. The Defendants' reliance on the *Seminole Tribe of Florida v. Florida* decision also provides no support for their Eleventh Amendment argument. Indeed, *Seminole* is consistent with cases cited by Plaintiffs, as it reaffirmed the continuing applicability of the *Ex Parte Young* doctrine. *Seminole Indian Tribe of Florida v. Florida,* 517 U.S. 44, 116 S.Ct. 1114, 1132, 1133 n.17 (1996). Furthermore, the court in *Seminole* employing the same analysis as in *Wilder,* found that a private claim in federal court against state officials was precluded by the Indian Gaming Regulatory Act's detailed remedial procedures. *Seminole, supra* at 1132. In *Wilder,* of course, the Supreme Court found a private right of action could be brought because the Medicaid Act lacked a comprehensive scheme for private, judicial or administrative enforcement. *Wilder, supra,* 496 U.S. at 521, 110 S.Ct. At 2523.

III. *THE DEFENDANTS ARE DEPRIVING PLAINTIFFS OF A RIGHT PROTECTED BY FEDERAL LAW AND PLAINTIFFS HAVE A REMEDY IN FEDERAL COURT*

A. OVERVIEW OF APPLICABILITY OF § 1983 TO ACTIONS TO ENFORCE THE SOCIAL SECURITY ACT

The Plaintiffs are entitled to enforcement by the District Court of their rights pursuant to the Medicaid Law provisions of Title XIX of the Social Security Act. There is a presumption in favor of the right to bring suit under §1983. *Chan v. City of New York,* 1 F.3d 96, 103 (2d Cir. 1993), quoting from *Wilder v. Virginia Hospital Association,* 496 U.S. 498, 110 S.Ct. 2510 (1990) (The general rule is that § 1983 providers have a remedy for violations of federal statutory ***33** rights unless "Congress has affirmatively withdrawn the remedy").

Further, the Supreme Court has expressly held that suits in federal court under §1983 are proper to secure compliance with provisions of the Social Security Act on the part of the participating state. *Rosado v. Wyman,* 397 U.S. 397, 90 S.Ct. 1207 (1970). Subsequently, in *Maine v. Thiboutot,* 448 U.S. 1, 100 S.Ct. 2502 (1980), the Supreme Court explicitly held that §1983 provides a remedy for purely statutory violations of federal law by state officials. More recently, in *Wilder v. Virginia Hospital Association, supra,* the Supreme Court specifically held that state Medicaid plan requirements are judicially enforceable; that beneficiaries of the Medicaid Act have a private right of action to seek injunctive relief to enforce both procedural and substantive plan requirements; and that the Medicaid Act lacks the regulatory scheme necessary to preclude a private right of action pursuant to 42 U.S.C. §1983. *Wilder, supra,* at 2523, 2524.

Similarly, all courts have unanimously ruled in favor of Plaintiffs seeking services under §1396a(a)(8).

For example, in *McMillan v. McCrimon,* 808 F.Supp. 475 (C.D. Ill. 1992), the court found that §1396a(a)(8) requires that Medicaid services be provided to all eligible individuals with reasonable promptness.

Again, in *Sobky v. Smoley,* 855 F.Supp. 1123 (E.D. Cal. 1994), the court found that §1396a(a)(8) of the Medicaid Act was sufficiently definite to enforce, and that the provision of Medicaid services was a federal right enforceable under §1993.

In *Linton by Arnold v. Carney by Kimble,* 779 F.Supp. 925 (M.D. Tenn. 1990), the court ruled in favor of Medicaid eligible individuals adversely affected by Tennessee's limited bed certification policy for nursing homes. The Plaintiffs in *Linton* had sued under various provision ***34** of 42 U.S.C. §1396a, including subpart (a)(8).

In *Smith v. Miller,* 665 F.2d 172, 175 (7th Cir. 1981), an action under §1396a(a)(8), the court held that "Congress intended that 'the full panoply' of judicial remedies be available to courts considering in 42 U.S.C. §1983 actions a state's compliance with the Social Security Act."

In *Blanchard v. Forrest,* Lexis 12697 (E.D. La. 1994), the district court, after a lengthy and thorough analysis of *Wilder* and *Suter,* concluded that Medicaid recipients suing under various provisions of §1396a(a)(8) had a private, §1983 right of action.

Numerous cases also expressly or implicitly hold that there is a private right of action pursuant to the Medicaid Act in federal court for enforcement of other, similar, provisions of §1396(a). *See, e.g., Arkansas Medical Society, Inc. v. Reynolds,* 6 F.3d 519 (8th Cir. 1993) (Equal access provision of Medicaid Act created a binding obligation on the States pursuant to *Wilder*); *Fulkerson v. Com'r, Maine Dept. of Human Services,* 802 F.Supp 529 (D. Me. 1992) (Equal access provision, §1396a(a)(30)(n) was binding and enforceable pursuant to §1983); *Haymon v. Williams,* 795 F.Supp. 1511 (M.D. Fla. 1992) (Injunction entered against Florida officials to preserve rights under 42 U.S.C. §1396a(a)(3) in a claim by Medicaid eligible mentally retarded individuals).

B. THE PLAINTIFFS ARE ENTITLED TO ENFORCEMENT OF THEIR RIGHTS UNDER THE MEDICAID ACT PURSUANT TO §1983, ACCORDING TO THE SUPREME COURT'S DECISIONS IN *WILDER AND SUTER*

The District Court properly found that the Plaintiffs were entitled to enforcement of the right to medical assistance or services pursuant to 42 U.S.C. §1396a(a)(8). The Plaintiffs in this case have a right that can be enforced pursuant to the Medicaid Act under the standard set forth ***35** by the Supreme Court in *Wilder, supra,* as well as the guidelines Defendants suggest the Supreme Court enunciated in *Suter v. Artist M,* 503 U.S. 347, 112 S.Ct. 1360 (1992).

In *Wilder* the Supreme Court set forth a three-part test for determining whether a Federal law creates a right enforceable through §1983. The *Wilder* court applied this test to find that the plaintiffs in that case had a right to enforcement of the Medicaid Act (42 U.S.C. § 1396a(a)(13) under § 1983. The *Wilder* Court enunciated the following factors; whether: (1) a plaintiff is the intended beneficiary of the federal law sought to be enforced or allegedly violated; (2) the federal law in question imposes a binding obligation on the States; and (3) the interest asserted by the plaintiff is "too vague and ambiguous" for enforcement by the courts. *Wilder, supra,* at 2517.

1. MEDICAID RECIPIENTS DETERMINED BY THE STATE TO BE ELIGIBLE FOR ICF/MR SERVICES ARE INTENDED BENEFICIARIES OF 42 U.S.C. § 1396A(A)(8).

Medicaid eligible individuals in need of services are the intended beneficiaries of Section 1396a(a)(8) which states simply and unambiguously that a state plan for medical assistance *must:*
provide that all individuals wishing to make application for medical assistance under the plan shall have the opportunity to do so, *and that such assistance shall be furnished with reasonable promptness to all eligible individuals.* (Emphasis added).

Furthermore, regulations promulgated pursuant to the Medicaid Act expressly provide that the agency must

"furnish Medicaid" promptly to recipients "without any delay caused by the agency's administrative procedures;" and "continue to furnish Medicaid regularly to all eligible individuals until they are found to be ineligible ..." 42 C.F.R.§ 435.930 (emphasis added.) Therefore, §1396a(a)(8) plainly makes Medicaid eligible individuals, such as Plaintiffs, its intended beneficiaries. *Sokby v. Smoley,* 855 F.Supp. 1123, 1146 (E.D. Cal. 1994) (***36**Section 1396a(a)(8) is "phrased in terms of benefitting individuals seeking Medicaid services"); *Blanchard v. Forrest,* Lexis 12697 (E.D. La. 1994) (Section 1396a(a)(8) and other provisions of Medicaid Act are intended to benefit individuals eligible to receive Medicaid).

2. THE MEDICAID ACT HAS UNIFORMLY BEEN HELD TO CREATE A BINDING OBLIGATION ON THE STATES.

The second prong of the *Wilder* test is also met in this case. Indeed, *Wilder* specifically found the state Medicaid Plan requirements (42 U.S.C. § 1396a(a)) to be a binding and enforceable obligation.

The Medicaid Act states that medical assistance "must" be provided with "reasonable promptness." 42 U.S.C. §1396a(a)(8). Thus, the "reasonable promptness provision" of the Medicaid Act is framed in mandatory, not precatory terms, and is binding on the States. *Blanchard, supra; Sobky v. Smoley,* 855 F.Supp. 1146 (E.D. Cal. 1994) (Referring to §1396a(a)(8) the court wrote "... the obligation imposed is mandatory because the state plan must ... provide that Medical Assistance shall be furnished in accordance with the section").

The Defendants' state officials cite no apposite cases to the contrary. Defendants' reliance on *Maynard v. Williams,* 72 F3d 848 (11th Cir. 1996) is misplaced. *Maynard* involved the enforceability not of the Medicaid Act, but of a different federal law governing the AFDC JOBS program. This Court, in *Maynard,* expressly acknowledged the fact that the Medicaid Act had a "mandatory cast," that the statute in *Maynard* lacked. *Maynard, supra* at 855 n.9.

3. PLAINTIFFS' INTEREST IS NOT VAGUE OR AMBIGUOUS.

a. ALL "REASONABLENESS" STANDARDS IN 42 U.S.C. § 1396A(A) HAVE BEEN FOUND TO BE ***37** ENFORCEABLE BY THE SUPREME COURT AND ALL LOWER COURTS, INCLUDING COURTS ADDRESSING THE REASONABLE PROMPTNESS REQUIREMENTS OF SECTION (A)(8).

The third *Wilder* prong is also met in this case as the requirement of "reasonable promptness" is sufficiently definite for federal enforcement. Indeed, the relevant provision in *Wilder,* as in this case, was another mandatory provision of the Medicaid Act, also based on "reasonableness." Courts interpreting or enforcing §1396a(a)(8) have uniformly found this provision is capable of enforcement. *See, e.g., Sobky v. Smoley,* 855 F.Supp. 1123 (E.D. Cal. 1984); *Linton by Arnold v. Carney by Kimble,* 779 F.Supp. 925 (M.D. Tenn. 1990); *McMillan v. McCrimon,* 807 F.Supp. 475 (C.D. Ill 1992); *Clark v. Kizer,* 758 F.Supp. 572, 580 (E.D. Cal. 1990); *Blanchard v. Forrest,* Lexis 12697 (E.D. La. 1994). It is axiomatic that delays of "several years," as conceded by Defendants, for provision of ICF/DD placement, are far outside the realm of reasonableness.

b. THE SUPREME COURT AND LOWER COURTS HAVE CONSISTENTLY ENFORCED FEDERAL LAW PROVISIONS REQUIRING THE PROVISION OF GOVERNMENT BENEFITS WITH "REASONABLE PROMPTNESS."

Neither the Supreme Court, nor lower courts interpreting other federal statutes intended to assist the poor, have had difficulty in interpreting the term "reasonable" or "reasonable promptness." In *Jefferson v. Hackney,* 406

U.S. 535, 547, 92 S.Ct. 1724, 1731 (1972), the Supreme Court found that a provision of the Social Security Act requiring the provision of ***38** AFDC benefits with "reasonable promptness" was enforceable ("Section of Social Security Act which provides that AFDC benefits must be furnished with reasonable promptness to all individuals was intended to prevent States from denying benefits, even temporarily, to a person who had been found qualified for AFDC"); *Cornelius v. Minter,* 395 F.Supp. 616 (D. Mass. 1974) (Presents facts analogous to those in this case, *i.e.,* unreasonable delays in provision of medical services).

In *Cornelius,* Massachusetts residents were forced to wait two to six months to receive financial and other support services for which they were eligible. The State defendants claimed they lacked the staff to process the requests promptly. The district court in *Cornelius* certified the class of plaintiffs and held that the defendants, officials of the State's Department of Public Welfare, had "fail[ed] to provide financial, supportive or emergency services entirely, or with reasonable promptness, to public assistance recipients, in violat[ion] [*inter alia*] of ... 42 U.S.C. § 1396a(a)(8)...." The defendants in *Cornelius* made the same argument that Defendants attempt to make in this case, that a court cannot determine the meaning of the term "reasonable promptness" because it is too vague. The court in *Cornelius* flatly rejected this argument and stated "on the contrary, courts are uniquely suited to determine what is reasonable in such a situation." *Cornelius, supra,* at 616, citing *Like v. Carter,* 448 F.2d 798 (8th Cir. 1979); *cert. denied* 405 U.S. 1045, 192 S.Ct. 1309 (1972), and *Adens v. Sailer,* 302 F.Supp. 923 (E.D. Pa. 1970).

Numerous courts subsequent to *Cornelius* have interpreted or enforced a State's obligation to provide services with reasonable promptness and found that failure to do so is a violation of federal law that can be remedied in §1983 action. *See, Barnes v. Cohen,* 749 F.2d 1009, 1019 n.6 (3d Cir. 1984) (42 U.S.C. §602a(10) requires that aid be furnished with ***39** reasonable promptness to all eligible individuals. "States may not deny benefits to individuals who meet federal requirements, so too, the Social Security Act prohibits a State from refusing assistance to individuals who are eligible under State law"); *Smith v. Miller,* 665 F.2d 175 (7th Cir. 1981) (delays violated 42 U.S.C. § 1396a(a)(8) and 42 C.F.R. § 435.30); *Morgan v. Maher,* 449 F.Supp. 229 (D. Conn. 1978) (Sixty-day delays violated the "reasonable promptness" provisions of the Social Security Act); *Kessler v. Blum,* 591 F.Supp. 1013, 1032 (S.D.N.Y. 1984) (Finding reasonable promptness provisions of the Medicaid Act frequently enforced by the courts).

The legislative history of the Social Security Act also supports Plaintiffs' right to enforce the "reasonable promptness" provision of the Act. "[T]he requirement to furnish assistance with 'reasonable promptness' will still permit a state sufficient time to make adequate investigations but will not permit them to establish waiting lists for individuals eligible for assistance." Conference Report No. 2271, 81st Congress, 2d Session (1950). *See, also,* H.Rep. #1300, 81st Congress, 1st Session 48 (1949) (The decision by a state "not to take more applications or to keep eligible families on a waiting list until enough recipients could be removed from the assistance rolls to make a place for them ... results in undue hardship on needy persons and is inappropriate in a program financed from federal funds.")

c. DEFENDANTS' RELIANCE ON *SUTER* IS MISPLACED.

Under the analysis applied by the Supreme Court in *Suter v. Artist M,* 503 U.S. 347, 112 S.Ct. 1360 (1992), Plaintiffs also have an enforceable cause of action pursuant to §1983. *Suter,* unlike *Wilder,* did not consider the right to §1983 enforcement of the Medicaid Act but, instead considered the enforceability of a wholly separate and distinct federal statute, the Adoption Assistance and Child Welfare Act. The Court expressly distinguished the provisions and ***40** regulations of the Adoption Act from the provisions and regulations of the Medicaid Act

reviewed by the court in *Wilder.* Unlike the provisions of the Adoption Act reviewed in *Suter,* which conditioned receipt of federal funds *only* on submission of a factually adequate state plan (*Suter* at 1369), the regulations governing §1396a(a)(8) (as in the regulations governing the Boren Amendment, and *Wilder, supra,* at 519, n. 17) do *not* merely require submission to the federal government of a state plan in compliance with the Act and the regulations, the State must *substantively comply* with the Medicaid Act and with federal law. Thus, the regulations applicable to this case clearly make federal funding contingent not only on submission of the state plan, but *also* on compliance with all the requirements and provisions of federal law. Contrasting the Adoption Act provision at issue in *Suter* with the Medicaid Act provision at issue in *Wilder,* the *Suter* Court noted that:
In *Wilder* the underlining Medicaid legislation similarly required participating states to submit to the Secretary of Health & Human Services a plan for medical assistance describing the State's medical program. But in that case [*Wilder*] we held that the Boren Amendment [42 U.S.C. §1396a(13)(A)] actually required the States to adopt reasonable and adequate rates, and this obligation was enforceable by the providers. We relied in part on the fact that the statutes and the regulations set forth in detail the factors to be considered in determining the methods for calculating rates.

Suter at 335, 1368.

As in *Wilder,* the statutes and regulations at issue in this case are enforceable, as they also
impose specific, affirmative requirements on the State to adopt plans that provide assistance, determination of eligibility and hearings for these denied eligibility with 'reasonable promptness' 42 U.S.C. §1396a(a)(8). Further, §1396a(a)(34) provides that medical assistance must be made available for those eligible for a certain retroactive period. Congress conferred on these plaintiffs [Medicaid eligible individuals] a private right of action through the statutes' plain language.

Blanchard, supra, at 25.

***41** This conclusion is buttressed by the regulations adopted pursuant to §1396a(a). For instance, 42 C.F.R. §430.35 expressly states that payments by the federal government will be withheld if a state fails "*to actually comply with a Federal requirement,* regardless of whether the plan itself complies with the requirement." (Emphasis added.) This regulation applies to all provisions of §1396a. *Sobky v. Smoley,* 855 F.Supp. 1123 (E.D. Cal. 1994), n. 25.

A state participating in Medicaid is "required by statute, regulation, and case law to comply with the Act and all its requirements once it voluntarily chooses to participate in Medicaid." *Alexander v. Choate,* 469 U.S. 287, 289, n.. 1, 105 S.Ct. 712, 714, n.. 1 (1985). Plaintiffs in this case clearly meet the three-part *Wilder* test, have an enforceable claim under *Suter,* and have an enforceable right under §1983.

IV. *THE TRIAL COURT PROPERLY ENTERED FINAL JUDGMENT ENFORCING PLAINTIFFS' RIGHTS UNDER SECTION 1396a(a)(8)*

Section 1396a(a)(8) of the Medicaid Act states, in relevant part, that a State plan for medical assistance *must:*
provide that all individuals wishing to make application for medical assistance under the plan shall have opportunity to do so, and that such assistance shall be furnished with reasonable promptness to all eligible individuals. (emphasis added).

In addition, the applicable regulations, entitled "Furnishing Medicaid," require that "Medicaid" be "furnish[ed]...promptly to recipients without any delay caused by the agency's administrative procedures;" and

require that "Medicaid" "continue" to be "furnish[ed]" to all eligible individuals until they are found to be ineligible...." 42 C.F.R. §§435.930(a) and (b).[FN11]

> FN11. The District Court's determination that 90 days be the outer bounds of reasonable promptness for funding Medicaid to eligible individuals has ample support in the Medicaid regulations. 42 C.F.R. §435.991 entitled "Timely Determination of Eligibility," provides that time standards "for determining eligibility [of] ... the applicant.... [and] These standards may not exceed--(1) 60 days for applicants who apply for Medicaid on the basis of disability...."

***42** The Act refers frequently to claims for "medical assistance" owed or rendered to individuals, not providers. *See, e.g.,* §1396a(a)(3) providing that the State plan must give an "opportunity for a fair hearing ... to any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness." Similarly, §1396a(a)(9) requires a State health agency to be responsible for establishing health standards for private or public institutions "in which *recipients of medical assistance under the plan may receive care or services ....*" (Emphasis added.) Section 1396a(a)(10)(A) also requires a State plan to provide "for making medical assistance available ... to all individuals ...." §1396a(a)(C)(iv) also contains requirements regarding "medical assistance, *includ[ing] services* in institutions for mental diseases or in an intermediate care facility for the mentally retarded...." (Emphasis added.) Thus, the Act and the regulations use the term "medical assistance" interchangeably with the term "medical services." *See, also, Sobky v. Smoley,* 855 F.Supp. 1123 (E.D. Cal. 1984) (§1396a(a)(8) requires "medical assistance under the plan" to be furnished with reasonable promptness, and this can only mean "medical services.")

The Defendants' strained reading of the Medicaid Act to the effect that only providers are entitled to "medical assistance with reasonable promptness," and not the individuals who need Medicaid services, conflicts not only with the plain language of the statute, but with cases interpreting this language.[FN12] *Blanchard v. Forrest,* Lexis 12697 (E.D. La. 1994); *Sobky v.* ***43** *Smoley,* 855 F.Supp. 1146 (E.D. Cal. 1994), *McMillan v.* McCrimon, 808 F.Supp. 475 (C.D. Ill. 1992); *see, also, Linton by Linton v. Carney by Kimble,* 779 F.Supp. 925 (M.D. Tenn. 1990), *Clark v. Kizer,* 758 F.Supp.572 (E.D. Cal. 1990); *King v. Sullivan,* 776 F.Supp. 645 (D.R.I. 1991) (Medical assistance means placement in ICF/MR in suit brought by Medicaid recipients whose claims for home health care services were rejected because offered ICF/MR placement by state).

> FN12. The only case Defendants cite in support of their reading of the term "medical assistance," *Briarcliff Haven, Inc. v.. Dept. Of Human Resources, Ga,* 403 F.Supp. 1355 (N.D. Ga. 1975), dealt not with the rights of Medicaid recipients, but the rights of providers to reimbursement. Thus, this case, which was decided before passage of the Boren amendment in 1980, is superseded by *Wilder, supra.* Further, the court in *Briarcliff* did not have before it the issue of the meaning of the term "medical assistance," and made no finding or ruling that that term does not apply to Medicaid recipients.

The Medicaid Act and corresponding regulations contain explicit provisions governing timely payments to providers. 42 U.S.C. §1396a(a)(3); 42 C.F.R. §447, 45(d)(2), (3) and (4). Pursuant to these provisions the State is required to pay 90% of "clean" Medicaid claims within 30 days and 99% of such claims within 90 days of receipt. All other claims must be paid within 12 months of the date of receipt. *Dowling v. Davis,* 19 F.3d 445, 44 (9th Cir. 1994). Thus, not only does the Defendants' interpretation of the Act conflict with every other case construing §1396a(a)(8) (*e.g., Sobky, Linton, McCrimon, Clark, King, Blanchard, supra),* this misinterpretation renders the provisions of §1396a(a)(8), as well as the regulations that require reasonable promptness superfluous since other statutes and regulations set forth specific time limits for payment of providers. Statutory language

should not be construed in a manner ***44** rendering provisions redundant or superfluous. *Cooper v. Tazewell Square Apartments,* 577 F.Supp. 1483 (W.D. Va. 1984).

V. *PLAINTIFFS ARE ENTITLED TO RELIEF BASED ON THE EQUAL PROTECTION AND DUE PROCESS GUARANTEES OF THE UNITED STATES CONSTITUTION*

Defendants' disparate treatment of Florida's developmentally disabled citizens violates the Equal Protection and Due Process provisions of the United States Constitution. A state must distribute a public benefit, such as medically necessary ICF/MR placements for Medicaid eligible individuals, in compliance with the Constitution's provision of Equal Protection and Due Process. *See, Goldberg v. Kelly,* 397 U.S. 254, 90 S.Ct. 1011 (1970); *Shapiro v. Thompson,* 394 U.S. 618, 89 S.Ct. 1322 (1969).

A. THE ARBITRARY AND RANDOM DENIAL OF MEDICAID ICF/MR SERVICES TO THOUSANDS OF ELIGIBLE INDIVIDUALS VIOLATES THE DUE PROCESS CLAUSE AND VIOLATES EQUAL PROTECTION GUARANTEES BASED ON *LOGAN V. ZIMMERMAN BRUSH CO.*

The Defendants' denial of ICF/MR services violates the Due Process Clause of the Constitution. In *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 102 S.Ct. 1148 (1981), the Supreme Court struck down an Illinois statute that used arbitrary and random criteria to dismiss certain claims filed with the Illinois Fair Employment Practices Commission. The Court held that although the state was not required to create a statutory cause of action for employment discrimination claims, and was free to eliminate the cause of action altogether, the state could not arbitrarily deny access to the right it had created. *Logan,* 455 U.S. at 432-33, 102 S.Ct. at 1156. ***45** In *Logan,* the Supreme Court also struck down the Illinois law on equal protection grounds.

Florida has assumed the responsibility of providing ICF/MR services to a particular class of individuals -- Medicaid eligible developmentally disabled Medicaid eligible citizens of the State. Therefore, the Defendants must provide a rational system for allocating the benefits and cannot deny the benefits arbitrarily. As set forth in Plaintiffs' Cross-Motion for Summary Judgment, the State often places individuals in ICF/DD facilities who are not even on its waiting list, based on their political influence or connections. For example, providers of ICF/MR services receive phone calls from legislators seeking placement for individuals. (D.E. 204, Deposition of Jim McGuire, at 179-80).

In *Logan, supra,* Justice Blackmun described the Constitutional violation as follows:
[The state] unambiguously divides claims--and thus, necessarily, claimants-- into two discrete groups that are accorded radically disparate treatment. Claims processed within 120 days are given full consideration on the merits, and complainants bringing such charges are awarded the opportunity of full administrative and judicial review. In contrast, otherwise identical claims that do not receive a hearing within the statutory period are unceremoniously, and finally, terminated. 455 U.S. at 438-439, 102 S.Ct. at 1159.

Here, the Defendants divide developmentally disabled individuals with the same need for treatment into two groups receiving diametrically opposed treatment. Those who are fortunate are given ICF/DD placement, and those who are not, are denied such placement and services.

Defendants' failure to provide services cannot be justified merely by claiming that individuals will be provided services when they reach the top of the waiting list. This unconstitutional policy has already been rejected by the Supreme Court. In *Logan,* the state defended its procedure as a way of "expediting" claims. This rationale was expressly rejected by the Court:

***46** [I]t is not enough, under the equal protection clause, to say that the legislature sought to terminate certain claims and succeeded in doing so, for that is a "mere tautological" recognition of the fact that [the legislature] did what it intended to do. This court still has an obligation to view the classificatory system, in a effort to determine whether the disparate treatment accorded the effected classes is arbitrary.

Logan, 455 U.S. at 441, 102 S.Ct. at 1161 (citation omitted).

In this case, as in *Logan,* the state has "convert[ed] similarly situated claims into dissimilarly situated ones, and then uses this distinction as the basis for its classification. This ... is the very essence of arbitrary state action." 455 U.S. at 442, 1021 S.Ct. at 1161.

B. THE DENIAL OF MEDICAID ICF/MR SERVICES TO HALF OF THE ELIGIBLE MEDICAID RECIPIENTS VIOLATES THE EQUAL PROTECTION CLAUSE.

Defendants' continuing denial of services to several thousand of Florida's Medicaid eligible, developmentally disabled citizens; while allowing several thousand identically situated Medicaid eligible, developmentally disabled citizens to receive ICF/MR services, violates the Plaintiffs' right to Equal Protection. *See, Hooper v. Bernalillo County Assessor,* 472 U.S. 611, 105 S.Ct. 2862 (1985).

This Constitutional guarantee extends both to statutes that draw discriminatory classifications, and statutes that appear neutral on their face but, when applied, lead to discriminatory classifications. *Columbus Board of Education v. Penick,* 443 U.S. 449, 99 S.Ct. 2941 (1979). A state policy can survive only if it has a rational basis; as this Court has noted, the rational basis test is "not a toothless one," and the Supreme Court has applied it to invalidate laws that irrationally discriminate against the mentally retarded, among others. *Rickett v. Jones,* 901 F.2d 1058, 1063 (11th Cir. 1990), quoting ***47***McGowan v. Maryland,* 366 U.S. 420, 425, 81 S.Ct. 1101, 1105 (1961).

As the Court expounded in *Boles v. Earl,* 601 F.Supp. 737 (W.D. Wisc. 1985), finding an equal protection violation in the delay and denial of energy assistance:
It may promote administrative convenience and reduce costs, but only to the same extent as a patently irrational measure such as the exclusion of every fourth applicant. The fact that in the instant case plaintiffs have not ... been completely excluded from eligibility, but have had their eligibility delayed does not alter the fact that they have been singled out for disparate treatment without any rational connection to a legitimate state interest. (Emphasis added.)

The court also held that the state officials' inconsistent state law obligations were irrelevant in determining whether the public interest would be enhanced by permitting them to continue to violate federal law, as "obligations under federal law are controlling." *Boles, supra,* at 748.

In the case at bar, there is no rational basis for the denial or indefinite and interminable delay in providing ICF/MR services to the Plaintiffs and the class members they represent, while providing such services to other developmentally disabled individuals who are identically situated to the Plaintiffs. The situation in Florida is worse than the obviously unconstitutional example described in *Boles, supra.* Here, half of the eligible applicants are arbitrarily and irrationally deprived of a government benefit -- essential therapeutic services in an ICF/MR.

Disabled individuals constitute a "sensitive class," and thus, a more substantial equal protection analysis of rationality is required of the reasoning for Defendants' conduct resulting in denial of ICF/MR placement and

Plaintiffs' motivation for such conduct. *Medora v. Colautti,* 602 F.2d 1149 (3d Cir. 1979). Furthermore, receipt of welfare benefits, such as Medicaid, is an "important right." *See, Goldberg v. Kelly,* 397 U.S. 254, 90 S.Ct. 1011(1970). Thus, the Third Circuit in *Medora, supra,* stated:

***48** [T]he importance of receiving welfare is not the sole reason we feel that close scrutiny of rationality is justified in this case .... While the class definition here is based in some sense on a non-suspect basis of wealth ..., it is also based on the appellees' status as blind, aged, or *disabled* .... When classifications involve sensitive but non-suspect classes, the courts may engage in a more substantial analysis of rationality. 602 F.2d at 1154 n. 12 (emphasis added).

The Defendants' sole justification for their discriminatory treatment of people who unquestionably qualify for and need ICF/MR services, to save Medicaid costs, is not a legitimate objective. *Shapiro v. Thompson,* 394 U.S. 618, 633, 89 S.Ct. 1322, 1330 (1969); *Alabama Nursing Home Ass'n v. Harris, supra; Medora, supra.* In *Shapiro v. Thompson,* 394 U.S. 618, 89 S.Ct. 1322 (1969), the Court held that a state's statutory prohibition of welfare benefits to residents of less than a year created a classification which constituted an "invidious distinction "in violation of the equal protection clause of the Constitution." Further, the Court held that such a denial of welfare assistance by the state could not be saved from constitutional infirmity on the basis that public assistance benefits are a privilege and not a right.

While the State Defendants in *Shapiro* made at least an objective distinction between the two classes of individuals (those who had resided in the state for a year and those who had not), the Defendants in this case act even more arbitrarily by denying ICF/DD services to a substantial number of Florida's developmentally disabled citizens without any rhyme or reason-- letting luck or fate choose who will receive services that to many can mean the difference between life and death.

VI. *THE INJUNCTIVE RELIEF ENTERED BY THE DISTRICT COURT WAS NARROW IN SCOPE AND PROPERLY TAILORED TO THE RIGHTS AND OBLIGATIONS OF THE PARTIES*

The injunctive relief entered by the District Court in this case is properly tailored to allow ***49** maximum flexibility to the Defendants, while ensuring that the Defendants' comply with federal law and observe Plaintiffs' federally guaranteed rights. The District Court did not order Defendants to provide Medicaid services to any non-eligible individuals. The District Court simply ordered the state defendants to provide essential Medicaid to individuals already determined to be eligible by the Defendants themselves.

Defendants object to the District Court's entry of injunctive relief on the basis that they were not given sufficient time to comply. Plaintiffs filed this lawsuit over five years ago, in March of 1992. Remarkably, Defendants were advised two years earlier by their own legal counsel that the creation of waiting lists and failure to provide ICF/MR services was in direct violation of the Medicaid Act. (App. 123-24). Defendants' legal counsel even informed the Defendants in the 1990 memorandum that the ICF/MR program was "an entitlement" and that 42 U.S.C. §1396a(a)(8) was enforceable through a private right of action. (App. 123-24). Nonetheless, Defendants have failed to take any action to comply with well established law. Indeed, Defendants did nothing to prepare for the entry of the Final Judgment, even though the District Court had previously denied Defendants' Motion for Summary Judgment and granted Plaintiffs' Cross Motion for Summary Judgment. (App. 215-17). The District Court had expressly found, in the Order on Motion for Summary Judgment, that the Defendants were in violation of federal law and were required to provide ICF/MR services.

Furthermore, other courts have entered orders requiring even more expeditious responses by Defendants in sim-

ilar Medicaid Act cases. For example, in *Haymons v. Williams,* 795 F.Supp. 1511 (N.D. Fla. 1982) the District Court ordered the state official defendants to reinstate, within 21 days of the date of the court's order, health care benefits under the Florida Medicaid program to all individuals whose benefits were terminated when their providers were terminated ***50** without advance notice and opportunity for a hearing.

Additionally, Defendants' argument that the District Court should not involve itself in cases such as this that involve political issues is meritless. As set forth herein, courts have not hesitated and, indeed, are obligated to enter injunctive relief for purposes of enforcing federal law. *See, for example, Ex Parte Young,* 209 U.S. 123, 285 S.Ct. 441(1908), *Smith v. Miller,* 665 F.2d 175 (7th Cir. 1981); *McMillan v. McCrimon,* 808 F.Supp. 475 F.Supp. 475 (C.D. Ill. 1992); *Sobky v. Smoley,* 855 F.Supp. 123 (E.D. Cal. 1954); *Linton by Arnold v. Carney by Kimble,* 779 F.Supp. 925 (M.D. Tenn. 1990); *Arkansas Medical Society v. Reynolds,* 6 F.3d 519 (8th Cir.1993). Finally, Defendants ignore the well established rule of law that federal courts have board discretionary authority to fashion equitable relief. *Sowers v. Kemira,* 701 F.Supp. 809 (S.D. Ga. 1988).

CONCLUSION

Based on the foregoing the District Court's Final Judgment should be affirmed.

Lawton CHILES, in his official capacity as Governor of the State of Florida, et. al., Appellants, v. John/Jane DOE Nos. 1-13, Appellees.
1997 WL 33493420 (C.A.11) (Appellate Brief)

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