IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

JOHN B., *et al.*,	)	
***Plaintiffs*,**	)	
v.	)	
M.D. GOETZ, JR., Commissioner, Tennessee Department of Finance and Administration, *et al*.,	)	**No. 3-98-0168**
	)	**Judge Haynes**
***Defendants*.**	)	

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO VACATE THE CONSENT DECREE AND DISMISS THE CASE

Robert E. Cooper, Jr.
Attorney General
Michael C
Linda A. Ross
Deputy Attorney General
Office of the Attorney General
P.O. Box 20207
Nashville, TN 37202
(615) 741-1771

Charles J. Cooper
W. Kirk
Nicole J. Moss
COOPER & KIRK, PLLC
555 Eleventh Street, N.W., Ste. 750
Washington, D.C. 20004
(202) 220-9600

Aubrey B. Harwell, Jr.
Ronald G. Harris
Phillip D. Irwin
NEAL & HARWELL, PLC
One Nashville Place, Suite 2000
150 4th Avenue North
Nashville, TN 37219
(615) 244-1713

Counsel for Defendants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Other

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

JOHN B., *et al.*,	)	
***Plaintiffs*,**	)	
v.	)	
	)	**No. 3-98-0168**
M.D. GOETZ, JR., Commissioner, Tennessee Department of Finance and Administration, *et al*.,	)	**Judge Haynes**
***Defendants*.**	)	

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION
TO VACATE THE CONSENT DECREE AND DISMISS THE CASE

When Defendants consented to entry of the Decree in this case in 1998, they explicitly conditioned their consent "upon the assumption that the EPSDT requirements of 42 U.S.C. §§ 1396a(a)(43) and 1396d(r), and 42 U.S.C. §§ 671(a)(16) and 675(1) and (5) of the Adoption Assistance Act are enforceable in an action under 42 U.S.C. § 1983." Consent Decree (Doc. 12) ¶ 15. Further, Defendants explicitly reserved the right to seek modification of the Decree "if controlling precedent establishes lack of § 1983 enforceability as to any of these provisions." Consent Decree ¶ 15. Controlling precedent has now established that the parties' legal assumption was incorrect, and that the outstanding substantive provisions of the Decree lack Section 1983 enforceability because they are aimed not at enforcing *individual federal rights*, but at promoting *systemic compliance with federal laws* concerning Early Periodic Screening Diagnosis and Treatment ("EPSDT").

For these reasons as well as others outlined herein, the Consent Decree must be vacated because a condition precedent to the Defendants' consent has now been nullified and there has been a significant change in law.

I. DEFENDANTS ARE ENTITLED TO VACATUR OF THE CONSENT DECREE.

A. Defendants Expressly Conditioned Their Consent To The Decree On The Premise That The Medicaid Provisions On Which The Decree Is Predicated Are Enforceable Under 42 U.S.C. § 1983.

Consent decrees are contracts and "they should be construed basically as contracts," with all their express conditions and other limiting terms. *United States v. ITT Cont'l Banking Co.*, 420 U.S. 223, 236-37 (1975); *Sault Ste. Marie Tribe of Chippewa v. Engler*, 146 F.3d 367, 372 (6th Cir. 1998). "While the imprimatur of judicial approval gives consent decrees the force of law, 'it is the parties' agreement that serves as the source of the court's authority to enter any judgment at all.' " *King. v. Walters*, 190 F.3d 784, 788 (7th Cir. 1999) (quoting *Local 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 522 (1986)); *see also Firefighters v. Cleveland*, 478 U.S. at 525 ("the parties' consent animates the legal force of a consent decree"); *Reynolds v. Roberts*, 251 F.3d 1350, 1357 (11th Cir. 2001) (without the consent of the parties, a court lacks the power to enter a judgment purportedly based on consent); *Harris v. Pernsley*, 820 F.2d 592, 603 (3d Cir. 1987) ("The source of the district court's authority to enter a consent decree is the parties' agreement."). This is a *jurisdictional* requirement, and it is unsurprising, insofar as "it hardly makes sense to refer to a document as a 'consent' decree when it is based on something other than the parties' voluntary agreement." *King*, 190 F.3d at 788.

Thus, a consent decree depends, by definition, on the consent of the parties. The scope of the obligations to which the parties have consented is set by the terms and conditions memorialized in the consent decree. Any attempt by a district court to hold a party to terms

other than those to which it has agreed is an abuse of discretion *per se*. *See Firefighters*, 478 U.S. at 529; *United States v. Ward Baking Co.*, 376 U.S. 327, 334 (1964); *King*, 190 F.3d at 788.

The Decree in this case is expressly "premised upon the assumption that the EPSDT requirements of 42 U.S.C. §§ 1396a(a)(43) and 1396d(r) and 42 U.S.C. §§ 671(a)(16) and 675(1) and (5) of the Adoption Assistance Act are enforceable in an action under 42 U.S.C. § 1983." Consent Decree ¶ 15. That condition limits the defendants' consent to the Decree and therefore limits the legal force of the Decree itself. It is unambiguous. If there were any lingering doubt, the Decree also contains an explicit reservation of rights: "Defendants do not waive any right to seek modification of this consent decree if the controlling preceden[t] establishes lack of § 1983 enforceability as to any of these provisions." Consent Decree ¶ 15.

This condition is crucial here because, as described in detail below, the United States Court of Appeals for the Sixth Circuit has recently revised the law governing the enforceability of Medicaid provisions under Section 1983. *See Westside Mothers v. Olszewski*, 454 F.3d 532, 538-39, 542-43 (6th Cir. 2006) ("*Westside Mothers II*"). The condition precedent to defendants' consent to the Decree therefore no longer exists and the Decree must be modified accordingly.

B. Defendants Are Independently Entitled To Vacatur Of The Decree Because Of An Intervening Change In Governing Law.

Even if defendants had not expressly conditioned their consent to the Decree, they would nevertheless be entitled to modification of the Decree under the doctrine announced in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992). " '[S]ound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed.' " *Id.* at 380 (quoting *Railway Employees Dep't v. Wright*, 364 U.S. 642, 647 (1961)); *see also id.* at 384, 390. As the Sixth Circuit ruled *en banc* in *Sweeton v. Brown*, 27 F.3d 1162, 1166 (6th Cir. 1994) (*en banc*), "[o]ngoing

injunctions should be dissolved when they no longer meet the requirements of equity." This occurs when "[t]he law changes and clarifies itself over time." *Id.*; *see also Déjà Vu of Nashville, Inc. v. Metropolitan Gov't of Nashville*, No. 05-5895, 2006 U.S. App. LEXIS 25426, at *9 (6th Cir. Oct. 12, 2006) (same); *David B. v. McDonald*, 116 F.3d 1146, 1147 (7th Cir. 1997) (Easterbrook, J.) ("A change of law may … require a modification of a consent decree.") (citing *Rufo*). As explained above, there has now been such a change in law with the Sixth Circuit's recent ruling in *Westside Mothers II*, which requires that enforceability of Medicaid requirements be determined with respect to each separate Medicaid provision implicated in an action brought under Section 1983.

The change in doctrine concerning the creation by federal statutes of individual rights actionable under Section 1983, *see, e.g., Gonzaga University v. Doe,* 536 U.S. 273 (2002); *Blessing v. Freestone*, 520 U.S. 329 (1997), has culminated in the Sixth Circuit's recent decision in *Westside Mothers II*. In that ruling, the Court of Appeals confirmed that Section 1983 "provides redress only for a plaintiff who asserts a 'violation of a federal *right*, not merely a violation of federal *law*.' " 454 F.3d at 541 (quoting *Blessing*, 520 U.S. at 340). Moreover, *Westside Mothers II* specifically applied this general rule in the context of a claimed violation of the EPSDT provisions of the Medicaid statute, holding that courts must decide whether a Section 1983 remedy for such a violation is available "as to each specific statutory provision identified" by the plaintiffs. *Id.* at 538. That is, a court must "consider[] whether the specified provisions of the Medicaid Act confer enforceable rights under § 1983 before holding that the plaintiffs have a cause of action under § 1983." *Id.* at 539.

In its prior decision in the same case, *Westside Mothers v. Haveman*, 289 F.3d 852, 863 (6th Cir. 2002) ("*Westside Mothers I"*), the Sixth Circuit had concluded that "[p]laintiffs have a

cause of action under § 1983 for alleged noncompliance with the screening and treatment provisions of the Medicaid Act." Prior to *Westside Mothers II*, this Court cited *Westside Mothers I* as binding precedent supporting the conclusion that plaintiffs' similar claims in this case concerning the EPSDT screening and treatment requirements are enforceable under Section 1983. *See* Transcript of April 17, 2006 Hearing at 9. In *Westside Mothers II*, however, the Sixth Circuit determined that the above-quoted statement in *Westside Mothers I* "creates considerable ambiguity," and that it could not be sure that the prior panel had in fact "considered whether [each of] the specified provisions of the Medicaid Act confer[s] enforceable rights under § 1983." As a result, the issue was open to the district court on remand from the first *Westside Mothers* ruling. *Westside Mothers II*, 454 F.3d at 539. *A fortiori*, the issue is likewise open to this Court. Therefore, this Court must assess, in accord with the standards announced in *Westside Mothers II*, the enforceability of each individual Medicaid requirement relied upon by the plaintiffs to justify the relief in the Consent Decree. When such an analysis is conducted, it becomes clear that all of the substantive provisions of the Decree must be vacated.

II. SECTION 1396a(a)(30) DOES NOT CONFER INDIVIDUAL RIGHTS ENFORCEABLE BY THE PLAINTIFFS UNDER 42 U.S.C. § 1983.

The Consent Decree expressly invokes 42 U.S.C. § 1396a(a)(30) as the legal justification for the imposition on defendants of the sweeping and invasive network adequacy requirements found throughout the Decree. *See* Consent Decree ¶ 61(iii) & n.10.[1] The Sixth Circuit specifically held in *Westside Mothers II* that Section 1396a(a)(30) "does not … provide Medicaid recipients or providers with a right enforceable under § 1983." 454 F.3d at 542; *see also id*. at 543. For a statutorily conferred "right" to be enforceable under Section 1983,

[1] Although the State has agreed with CMS to adhere to certain "Terms and Conditions for Access" as part of CMS's approval of the TennCare Waiver, enforcement of those Terms and Conditions resides with CMS not individual litigants.

" 'Congress must have intended that the provision in question benefit the plaintiff.' " *Westside Mothers II, supra*, at 541 (quoting *Blessing*, 520 U.S. at 340-41). That cannot be said with respect to Section 1396a(a)(30), because it "focuses on 'the aggregate services provided by the State,' rather than 'the needs of any particular person.' " *Id.* at 542 (quoting *Gonzaga*, 536 U.S. at 282) (brackets omitted). "The provision speaks, not of individual benefits, but rather of the State's obligation to develop" a healthcare plan with specified features. *Id.* Any inference that Congress intended to confer individually enforceable rights on beneficiaries is negated by the fact that the provision addresses, and focuses on, "the state as the person regulated." *Id.* (citation and quotation marks omitted).

In the wake of *Gonzaga*, other circuits have come to the same conclusion about Section 1396a(a)(30). *See Mandy R. v. Owens*, 464 F.3d 1139, 1148 (10th Cir. 2006) (McConnell, J.) ("[S]ubsection 30(A) does not create a federal right enforceable under § 1983."); *Sanchez v. Johnson*, 416 F.3d 1051, 1059 (9th Cir. 2005) ("[N]othing in the text of § 30(A) . . . unmistakably focuses on recipients . . . as individuals"); *Long Term Pharmacy Alliance v. Ferguson*, 362 F.3d 50, 57 (1st Cir. 2004)(Subsection 30(A) "has no 'rights creating language' and identifies no discrete class of beneficiaries").[2] Nothing in the TennCare Waiver's Terms and Conditions for Access changes these fundamental facts. Indeed, the Terms and Conditions for

[2] The odd man out is *Pediatric Specialty Care, Inc. v. Arkansas Dep't of Human Servs.*, 443 F.3d 1005, 1014-16 (8th Cir. 2006), in which the Eighth Circuit deliberately adhered to pre-*Gonzaga* circuit precedent in holding that subsection 30(A) confers enforceable rights. The Eighth Circuit relied principally on the fact that, although *Gonzaga* was decided after the Eighth Circuit's original decision in *Pediatric*, the mandate in *Pediatric* did not issue until ten days after the Supreme Court handed down *Gonzaga* – therefore, technically, "*Gonzaga* [wa]s not an intervening decision of a superior tribunal, as is required before we may overturn matters previously settled as the law of the case." 443 F.3d at 1014. Putting aside that unpersuasive reasoning, the holding in *Pediatric* has been expressly rejected by both the Sixth Circuit (*Westside Mothers II*, 454 F.3d at 542) and the Tenth Circuit (*Mandy R.*, 464 F.3d at 1148).

Access make clear that the focus is on the aggregate services provided by the State, not the needs of any individual.

The Sixth Circuit found further support for its holding in the fact that violations of Section 1396a(a)(30) are "ill-suited to judicial remedy." 454 F.3d at 543. That provision requires that the state's healthcare plan be structured so as "to enlist enough providers so that care and services are available under the plan." 42 U.S.C. § 1396a(a)(30)(A). The Sixth Circuit held that formulating and supervising injunctive relief for violation of this requirement – a task undertaken in great detail in the Consent Decree here – "would involve making policy decisions for which this court has little expertise and even less authority." *Westside Mothers II,* 454 F.3d at 543 (citation and quotation marks omitted); *see also Mandy R.,* 464 F.3d at 1147 (subsection 30(A)'s " 'broad and nonspecific' language is 'ill-suited to judicial remedy") (quoting *Westside Mothers II*, 454 F.3d at 542-43); *Sanchez*, 416 F.3d at 1059 ("the flexible, administrative standards embodied in the statute do not reflect a Congressional intent to provide a private remedy for their violation").

Thus, it is now the law of this circuit that Section 1396a(a)(30) confers no rights actionable under Section 1983. Accordingly, the Consent Decree and any orders enforcing it must be modified to vacate all relief for the alleged violation of this non-actionable provision of the Medicaid statute. As the Sixth Circuit recently explained, the rules governing termination of injunctions date to Sir Francis Bacon, who declared that " 'a court has continuing jurisdiction to terminate or modify an injunction and that an equitable remedy should be enforced only as long as the equities of the case require.' " *Déjà Vu*, 2006 U.S. App. LEXIS 25426 at *9 (citation omitted). Now that the "foundation upon which the claim for injunctive relief was built has crumbled," there is "[n]o basis in federal law … for the injunctive relief imposed in this case."

Sweeton, 27 F.3d at 1166 (en banc). At a minimum, the following paragraphs of the Decree addressing "network adequacy" must be vacated:

- Paragraph 43, which requires defendants to "ensure that their contractors' networks are adequate."
- Paragraph 58, which specifies staffing requirements and requires that "utilization review and prior authorization decisions be made only by qualified personnel with education, training, or experience in child and adolescent health."
- Paragraph 60(v) and (vi), which requires defendants to "demonstrate that their [MCO] networks include providers with cultural and linguistic competency," and "that each MCO have a sufficient array of services and specialists to meet the medical and behavioral health needs of class members."
- Paragraph 61(ii), which requires defendants to demonstrate "that provider networks currently comply with the 'Terms and Conditions for Access.' "
- Paragraph 61(iii), which specifically mandates that defendants comply with 42 U.S.C. § 1396a(a)(30).
- Paragraph 62, which addresses the broader issue of staffing and networks by requiring the creation and dissemination of "up-to-date lists of specialists to whom referral may be made for screens."
- Paragraph 71(ii), which attempts to address network adequacy issues by requiring that defendants ensure "a comprehensive and appropriate scope of geographically accessible child and adolescent behavioral health services."

III. THE PROVISIONS OF THE CONSENT DECREE PURPORTEDLY ENFORCING SECTION 1396a(a)(43) DO NOT ADDRESS INDIVIDUAL RIGHTS THAT ARE ENFORCEABLE UNDER 42 U.S.C. § 1983.

A. Under The Analysis Required By *Gonzaga* And *Westside Mothers II*, Only Individual Rights Granted by Section 1396a(a)(43) Are Enforceable.

The Supreme Court has pointedly observed that Spending Clause legislation has rarely been read to confer individual rights enforceable under Section 1983. *See Gonzaga*, 536 U.S. at 280 ("Our more recent decisions … have rejected attempts to infer enforceable rights from Spending Clause statutes."). Adhering closely to the teaching of *Gonzaga*, the Sixth Circuit recently emphasized the general rule that:

> *[F]ederal funding provisions provide no basis for private enforcement by § 1983*." *Gonzaga*, 536 U.S. at 273-74 (emphasis added). The [Supreme] Court explained that spending legislation is generally not intended to confer individual rights enforceable under § 1983. *Id*. In the few instances when the Court has found an individual right enforceable under § 1983 within spending legislation, the provisions conferred specific and definite monetary entitlements on the plaintiffs . . . .

Hughlett v. Romer-Sensky, No. 05-3299, 2006 U.S. App. LEXIS 16823, at *17 (6th Cir. July 6, 2006)(emphasis added). As the Court of Appeals explained in *Westside Mothers II*, "only unambiguously conferred rights, as distinguished from mere benefits or interests, are enforceable under § 1983." 454 F.3d at 542. The "[c]ritical … inquiry is whether the pertinent statute contains 'rights-creating' language that reveals congressional intent to create an individually enforceable right." *Id.* (quoting *Gonzaga*, 536 U.S. at 287).

The "text and structure" of the statute must "indicat[e] that Congress intend[ed] to create new individual rights." *Gonzaga*, 536 U.S. at 286. In pursuing this inquiry, a court must "[take] pains to analyze the statutory provisions in detail, *in light of the entire legislative enactment*, to determine whether the language in question created 'enforceable rights'" within the meaning of Section 1983. *Suter v. Artist M.*, 503 U.S. 347, 357 (1992) (emphasis added). The required

statutory analysis " 'is a holistic endeavor,' and, at a minimum, must account for a statute's full text, … structure, and subject matter." *United States Nat'l Bank v. Indiana Ins. Agents of Am.*, 508 U.S. 439, 455 (1993) (citation omitted).

Accordingly, the starting point here is not a reading of Section 1396a(a)(43) in isolation, but in the context of the Medicaid statute. Most of the provisions of this Spending Clause legislation may not be shoehorned into the rights-creating framework established by *Gonzaga.* The Medicaid statute, Title XIX of the Social Security Act, is entitled "Grants to States for Medical Assistance Programs," not "rights of individuals to Medicaid benefits." *See* 42 U.S.C. § 1396 *et seq.* Section 1396a provides that States (not individuals) get federal money on the condition that they submit a healthcare plan to the Secretary that meets federal requirements. And even then the States are obliged not to provide actual healthcare to Medicaid beneficiaries, but only to furnish "medical assistance" in the form of payments to third-party healthcare providers.[3] As Judge McConnell recently explained for the Tenth Circuit, "On its face, then, the Medicaid Act requires any state participating in Medicaid to pay promptly and evenhandedly for medical services when the state is presented with the bill. If that is all the statute requires, then the plaintiffs have no claim: they are on a waiting list for services, not a waiting list for payment for services." *Mandy R.*, 464 F.3d at 1143 (citing, *inter alia*, *Westside Mothers II*, 454 F.3d at 540). That is also the rule in this Circuit. *See Westside Mothers II*, 454 F.3d at 540 (statutory command of "medical assistance" requires only financial assistance). Because "Medicaid is a payment scheme, not a scheme for state-provided medical assistance," plaintiffs who purport to discern creation of individual healthcare rights in the Medicaid statute have a very tough row to

[3] Even though Tennessee, through the TennCare Waiver, has voluntarily assumed some additional obligations to monitor quality of care and to coordinate care as part the managed care model approved by CMS, this does not change the fact that the State is a payor not a provider of services.

hoe, "given the Supreme Court's hostility, most recently and emphatically expressed in *Gonzaga University v. Doe*, to implying such rights in spending statutes." *Bruggeman v. Blagojevich*, 324 F.3d 906, 911 (7th Cir. 2003) (Posner, J.).

Far from containing "unambiguous rights-creating" language, most of the provisions of the Medicaid statute are couched in grant-conditioning language. And this federal grant program is administered not by a rights-oriented federal agency – such as the Equal Employment Opportunity Commission – but by the Center for Medicare and Medicaid Services, formerly (and telling) known as the Health Care *Financing* Administration. *See* State Medicaid Manual § 2084.2. In contrast, as the Court explained in *Gonzaga*, "rights-creating" language is to be found, for example, in Title VI of the Civil Rights Act of 1964, which "provides: '*No person* in the United States *shall* … be subjected to discrimination under any program or activity receiving Federal financial assistance.' " 536 U.S. at 284 n.3 (quoting 42 U.S.C. § 2000d) (emphasis and ellipses supplied by the Court).

In *Blessing v. Freestone*, the Supreme Court considered a federal grant program similar to that at issue here. To qualify for federal funds, the states were required to "operate a child support enforcement program that conform[ed] with the numerous requirements set forth" in the statute, and to "do so pursuant to a detailed plan that has been approved by the Secretary." 520 U.S. at 333. The Court unanimously held that this was insufficient to confer on recipients of the child support program "a right to require the [State] to bring the State's program into substantial compliance" with the federal statute. *Id.* at 343. The Court squarely held that federal "mandates" that the State program contain certain features did not "give rise to federal rights." *Id.* at 345.

Similarly, in *Suter v. Artist M.,* the Court held that a child welfare statute "d[id] not unambiguously confer an enforceable right upon the Act's beneficiaries" by requiring that a State, to qualify for federal financing, submit a plan to the Secretary containing certain features dictated by the statute. 503 U.S. 347, 363 (1992); *see also id.* at 351, 358, 359, 361. The Supreme Court reviewed and reaffirmed *Suter* in *Gonzaga*. *See* 536 U.S. at 281; *see also id.* at 291 (Breyer, J., concurring in the judgment).

Both *Blessing* and *Suter* confirm the principle that has guided the Supreme Court for over a quarter of a century: "In legislation enacted pursuant to the spending power, the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State." *Pennhurst State Sch. And Hosp. v. Halderman,* 451 U.S. 1, 28 (1981) (*quoted in Gonzaga*, 536 U.S. at 280). The Sixth Circuit has firmly embraced this analysis. *See Hughlett*, 2006 U.S. App. LEXIS 16823, *16 (quoting *Pennhurst*, 451 U.S. at 28). Here, as in *Blessing, Suter*, *Gonzaga* and *Hughlett*, the EPSDT provisions "speak only to the Secretary," directing the Secretary to require certain features in a State plan or waiver as a prerequisite to the Secretary's disbursal of federal money. *Gonzaga*, 536 U.S. at 287.

- The very first section of the statute is entitled "Appropriations," and it authorizes the spending "for each fiscal year" of sums necessary to enable "each State, as far as practicable under the conditions in such State, to furnish medical assistance" to its citizens under the terms of a plan "approved by the Secretary." 42 U.S.C. § 1396.
- Section 1396a(b) vests in the Secretary the responsibility for reviewing and approving healthcare plans submitted by States seeking federal grants.

- Section 1396a(a) informs the Secretary of the seventy features or services that state plans must provide – including the EPSDT services described in Section 1396a(a)(43).
- Section 1396d(r) directs the Secretary to set (and annually to review and revise) "participation goals for each State for participation of individuals" in the State's federally financed EPSDT program.
- Section 1396c(2) authorizes the Secretary, in his discretion, to reduce or cut off federal funding to any state plan in which the Secretary finds "a failure to comply substantially" with the requirements listed in Section 1396a(a).[4]
- In order to facilitate the Secretary's policing of state compliance, Section 1396a(a)(43)(D) requires States to report statistics about their EPSDT programs to the Secretary, including data revealing "the State's results in attaining the participation goals set for the State under section 1396d(r) of this title."
- CMS, which reports to the Secretary, conducts "[m]onitoring, surveillance, and overall administrative control of the [plan or waiver] certification process including its financial aspects." State Medicaid Manual § 2084.2. On behalf of the Secretary, CMS's Regional Offices ("ROs") "[a]nalyze[] certification budgets and State spending patterns to assure that funds are economically and appropriately utilized" and "[e]valuate the performance of SAs [State Agencies] in applying and enforcing health and safety standards, the States' assessments of facilities for compliance with standards, and the States' adherence to required and appropriate administrative procedures." State Medicaid Manual § 2084.2.

[4] The Secretary's computation of the amounts of grant money to be paid to the States is governed by Section 1396b.

Thus, rather than creating individual rights, most of the federal statute's terms "serve primarily to direct the Secretary['s] distribution of public funds." *Gonzaga*, 536 U.S. at 290. As in *Gonzaga*, the Secretary is expressly authorized to enforce compliance with the requirements of the federal statutory program and to cut funding to States that do not comply. *Id.* at 289. Once again, this analysis has been adopted by the Sixth Circuit. *See Hughlett*, 2006 U.S. App. LEXIS 16823, *16 ("[T]he Secretary may reduce the funding to [the State] by up to five percent. 45 C.F.R. § 305.61. This scheme typifies the remedies found in spending legislation."); *Westside Mothers II*, 454 F.3d at 543 (" '[P]lan review by the Secretary is the central means of enforcement intended by Congress' ") (citation omitted).

These features of the EPSDT federal grant regime have led the Court of Appeals for the Fifth Circuit to hold that Section 1396a(a)(43) does not create rights to programmatic screening, outreach, and treatment results that are enforceable under Section 1983. In *Frazar v. Gilbert*, 300 F.3d 530 (5th Cir. 2002), *rev'd on other grounds sub nom. Frew v. Hawkins*, 540 U.S. 431 (2004), the Fifth Circuit considered a class action, similar to this case, in which plaintiffs complained that the Texas EPSDT program had failed to provide federally mandated services and failed to meet the requirements of 42 U.S.C. §§ 1396a(a)(43) and 1396d(r). *Id.* at 534. The *Frazar* court reviewed the text and structure of the same EPSDT provisions at issue here and found no unambiguous congressional intent to confer a private right of action under Section 1983. *Id*. at 544-45. The Fifth Circuit's opinion is worth quoting at length:

> [L]ooking to § 1396a(a)(43), even though it refers in subpart (A) to providing notice to "all persons," and refers in subpart (B) to the provision of EPSDT screening services in "all cases" where such services are requested, the opening text of § 1396a(a) and § 1396a(a)(43) modify all of this language by only requiring that a state "plan" must "provide for" meeting these requirements. In § 1396a(b), Congress vested in the Secretary … the initial responsibility for approving state plans. Section 1396a(a)(43)(D) requires that the state plan provide for reporting certain data including "the State's results in attaining the

> participation goals set for the State under section 1396d(r) of this title." … In § 1396c, the Secretary is authorized to reduce or eliminate, in its discretion, federal funding for state plans which are not in compliance with § 1396a.
>
> In our view, Congress has therefore spoken to the success expected of a state plan: it should meet EPSDT participation goals set by the Secretary. Under the third prong of *Blessing*, these are the only participation goals which are unambiguously imposed on the states. We do not read the statute as allowing a federal district court to require a higher standard of success. Congress did not in our view create such a federal right.

Frazar, 300 F.3d at 544-45.

The Supreme Court reversed *Frazar* on other grounds, but "did not pass on the Fifth Circuit's analysis of whether the Medicaid provisions created enforceable rights …. It is this undisturbed analysis that is relevant to the case at hand." *Westside Mothers v. Olszewski*, 368 F. Supp. 2d 740, 767 (E.D. Mich. 2005), *aff'd in part, rev'd in part*, 454 F.3d 532 (6th Cir. 2006).[5]

The Fifth Circuit's analysis in *Frazar* was quoted at great length by the district court in *Westside Mothers* following remand from the first Sixth Circuit decision. *See* 368 F. Supp. 2d at 765-68, 770. Like the Fifth Circuit in *Frazar*, the *Westside Mothers* district court accepted that there might be a Section 1983 remedy for *individual* EPSDT violations in some circumstances, but concluded that any such right "created in those who are eligible and who are denied specific services *does not* include a right to force the State to ensure 100% participation of every

[5] The losing plaintiffs in *Frazar* petitioned for certiorari on the Section 1983 issue but the Supreme Court limited its grant of review to the separate Eleventh Amendment issues on which it reversed the Fifth Circuit. On remand from the Supreme Court, Texas apparently abandoned its prior argument that Section 1983 did not provide a cause of action supporting the relief granted in the consent decree. Unlike Tennessee in this case, Texas had failed to expressly preserve in the consent decree the legal issue of whether the statutory provisions created federal rights enforceable under Section 1983. *Frazar v. Ladd*, 457 F.3d 432, 438 (5th Cir. 2006) (" 'In choosing to voluntarily enter into the Consent Decree, Defendants waived the opportunity to litigate the merits of the claims.' ") (quoting district court order). The Fifth Circuit ultimately affirmed the denial of Texas' motion to modify the consent decree because Texas failed to establish a "significant change in factual circumstances" since the time the decree was entered. *See id*. at 440.

potentially eligible citizen." *Id*. at 768-69 (emphasis added). As the Sixth Circuit recently observed, "an aggregate or system-wide focus" is "inconsistent with individually enforceable rights." *Hughlett*, 2006 U.S. App. LEXIS 16823, *15.

And, even with respect to that avowedly aggregate goal, "there is no *private* enforceable right to ensure that the State 'substantially comply' with even the 80% [screening] participation goal." *Westside Mothers*, 368 F. Supp. 2d. at 769 (citing *Blessing*, 520 U.S. at 343-44). To be sure, the trial court did find that Section 1396a(a)(43) conferred a narrow individual right to screening services, but only in "'cases where they are requested,' " *id*. at 770 (quoting 42 U.S.C. § 1396a(a)(43)(B)). The court emphasized that this right is limited to "those individuals who qualify for and actually request such services." *Id*. Accordingly, Section 1983 provides a cause of action only where plaintiffs can allege that the State "has a policy or practice of not providing the EPSDT services to those eligible children who have in fact requested them." *Id*.

The district court in *Westside Mothers* likewise found a narrowly drawn individual right, enforceable under Section 1983, in Section 1396a(a)(43)(A) to be informed of the availability of EPSDT services. *Id*. at 775. The court emphasized that the right is limited to children who have been determined to be eligible; "[t]he plain meaning of this text does not create a duty on behalf of the State to inform every potential eligible child of the availability of EPSDT services." *Id*. The trial court dismissed the claim brought under Section 1396a(a)(43)(A) because it found that "Plaintiffs have failed to allege that a person who has been determined eligible for medical assistance was denied notice of the EPSDT services available." *Id*. The court also held that the text of the statute did not require the State to "effectively" inform all potentially eligible children of the availability of EPSDT services. *Id*.

In *Westside Mothers II*, the Sixth Circuit did not reach the question whether Section 1396a(43)(A) confers *any* individual rights that are enforceable in a Section 1983 action, nor did it address the scope of such rights if they exist. Rather, the Court of Appeals considered only the trial court's holding that the Section 1396a(a)(43)(A) count must be dismissed because of a deficiency in pleading – plaintiffs had not alleged that they had not been informed of the availability of EPSDT services. The Sixth Circuit held that the trial court had erred by concluding that the statute did not require the State to "effectively" inform eligible plaintiffs, explaining that the implementing regulation imposed that requirement. The Court of Appeals concluded that plaintiffs may have adequately pleaded a failure to "effectively inform" them of the availability of such services, and the court accordingly remanded for further proceedings. *See* 454 F.3d at 543-44.

While the Sixth Circuit thus concluded that plaintiffs "stated a cognizable claim under § 1983 for violations of § 1396a(a)(43)(A)," *id*. at 544, it did not specifically analyze the question whether that sub-paragraph, or any other portion of Section 1396(a)(43), creates *individual* rights that are enforceable under Section 1983. As noted, the Court did analyze that question with respect to another Medicaid provision relating to EPSDT, Section 1396a(a)(30), *see id.* at 541-43, and its analysis in that regard is equally applicable to subsection (43). The Court of Appeals reasoned that statutory provisions with "an aggregate focus" negate an inference of "congressional intent to confer an individually enforceable right." *Id.* at 542; *see also Hughlett*, 2006 U.S. App. LEXIS 16823, *10-11, *15 (holding that child-support services provisions of the Social Security Act, 42 U.S.C. §§ 657(a) & 654b(c), do not confer individual rights actionable under § 1983). When a "provision focuse[s] on 'the aggregate services provided by the State,' rather than 'the needs of any particular person,' it confer[s] no individual

rights and thus [cannot] be enforced by § 1983." *Gonzaga*, 536 U.S. at 282 (quoted in *Westside Mothers II*, 454 F.3d at 542). Subsection (43), like subsection (30), "speaks not of individual benefits, but rather" of aggregate EPSDT services and of "the State's obligation to develop" a plan to meet statutory requirements to provide services to the entire eligible population. *Westside Mothers II*, 454 F.3d at 542. Thus, the provision speaks not of the form and timing of notice to which individual beneficiaries are entitled, but of the need for the State to develop an *overall plan* for "informing all persons in the State who are under the age of 21 and who have been determined to be eligible for medical assistance" of the availability of EPSDT services. 42 U.S.C. § 1396a(a)(43)(A).

Similarly, subsection (43)(D) speaks not to the EPSDT needs of any particular person, but of the State's obligation to report, in the aggregate, the State's statistical progress in attaining the EPSDT participation goals set by the Secretary. 42 U.S.C. § 1396a(a)(43)(D). This section provides a means "for the Secretary to measure the *systemwide* performance of a State's Medicaid program." *Westside Mothers II*, 454 F.3d at 543 (brackets and quotation marks omitted). It is " 'concerned with overall methodology rather than conferring individually enforceable rights on Medicaid recipients.' " *Id*. (citation omitted). Put another way, these provisions focus "upon the state as the person regulated rather than individuals protected." *Id.* at 542 (quotation marks omitted); *see also Hughlett*, 2006 U.S. App. LEXIS 16823, *12-13 ("[T]he provision is *directed* toward the administering body . . . . The district court properly found that the statute is intended to provide instruction to the States and does not contain the rights-creating language necessary to create an enforceable individual right."). Therefore, Section 1396a(a)(43) "does not focus on individual entitlements" and does not provide unambiguous evidence of congressional intent to confer an individual right. *Westside Mothers II*, 454 F.3d at 543.

As noted above, the *Westside Mothers* district court did find that Section 1396a(a)(43) confers narrowly defined rights that are individually enforceable under Section 1983. The court based this conclusion on its belief that the provision could not be distinguished from the provision at issue in *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498 (1990) (holding that Section 1396a(a)(13)(A) is enforceable in a Section 1983 action), and that the *Gonzaga* Court did not overrule *Wilder* even though its approach to Section 1983 in its more recent decision appears to be in tension with the result in *Wilder*. *See* 368 F. Supp. 2d at 761, 770. However, the Supreme Court left only the result of *Wilder* intact, expressly disavowing its approach to the question whether an action may be brought under Section 1983.[6] Accordingly, to the extent that *Wilder* retains any vitality at all, it clearly has no application beyond the specific provision at issue in that case – Section 1396a(a)(13)(A). Analysis of Section 1396a(a)(43) is governed instead by *Gonzaga* and *Westside Mothers II*, which make clear that subsection (43) does not support a private right of action at all, or at most, provides a private right that is narrowly limited to instances where individual beneficiaries have specifically requested, and been denied, services covered by subsection (43). The Consent Decree in this case provides remedies that sweep far

[6] In *Gonzaga*, after noting the holding in *Wilder*, the Supreme Court observed that its "more recent decisions, however, have rejected attempts to infer enforceable rights from Spending Clause statutes," 536 U.S. at 281, and the Court continued that trend in *Gonzaga*. In particular, the Court acknowledged that *Wilder* might be misunderstood to support the view that a cause of action will lie under Section 1983 even in the absence of statutory language clearly conferring an individual right. The Supreme Court emphatically laid this view to rest: "We now reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983." *Id*. at 283. As Judge McConnell recognized in *Mandy R.*, "[a]lthough professing not to overrule *Wilder*, *Gonzaga* recharacterized the earlier decision as a case finding an enforceable private right in a 'provision [that] required States to pay an 'objective' monetary entitlement to individual health care providers." 464 F.3d at 1147 (quoting *Gonzaga*, 536 U.S. at 280). There are no claims by health-care providers in this case, and *Wilder* is therefore inapposite.

beyond the narrow rights recognized by the *Westside Mothers* trial court. The Decree thus goes beyond the scope of any legitimate Section 1983 cause of action, as we demonstrate below.

B. Section 1396a(a)(43) Does Not Confer On EPSDT Recipients A Right To Enforce The State's Systemic Compliance With Federal Statutory Requirements.

The Supreme Court has unanimously stressed that it is essential not only to specify the statutory provisions involved, but also "to determine exactly what rights, considered in their most concrete, specific form, [plaintiffs] are asserting." *Blessing*, 520 U.S. at 346. "Lest the court run afoul of *Blessing*, it must not paint 'with too broad a brush' by failing to 'separate out the particular rights … broken down into manageable analytic bites' " on which the plaintiffs seek relief. *Frazar*, 300 F.3d at 543 (quoting *Blessing*, 520 U.S. at 342, 345). It is well established that, when interpreting the features of a Medicaid plan required by Section 1396a(a), courts must "draw[] the distinction between enforceable rights … in specific covered individuals and purported rights to ensure substantial and complete compliance" by the State as a systemic matter. *Westside Mothers II*, 368 F. Supp. 2d at 769 & n.8.

Hence, it is necessary to distinguish between an individual right "created in those who are eligible and who are denied specific services," on the one hand, and a systemic right to enforce state compliance with the EPSDT mandates of federal law with respect to "every potentially eligible citizen," on the other. *Id*. at 768-69. As the Fifth Circuit held in *Frazar*, "Congress did not intend that a court can require that a state participating in the Medicaid program must always provide every EPSDT service to every eligible person at all times." 300 F.3d at 544; *see also Westside Mothers*, 368 F. Supp. 2d at 767 (same). In *Blessing*, the Supreme Court made clear that statutory provisions "designed only to guide the State in structuring its *systemwide* efforts" to furnish Medicaid services are *not* intended to benefit any specific individuals who may be

eligible for services. 520 U.S. at 344 (emphasis added). Any benefits conferred on individuals by such provisions are "indirect[]" and therefore do not rise to the level of a congressionally conferred federal *right* protected by 42 U.S.C. § 1983. *Id.* The "organizational requirements" imposed on States by Medicaid "do not … give rise to federal rights." *Id.* at 345. Thus the "scope of th[e] individual rights" under Section 1396a(a)(43) is crucial, as the district court reiterated in *Westside Mothers*: "Again, this does not create a right to ensure that every child who resides in [the state] and who may be eligible for EPSDT services actually receive these services." 368F. Supp. 2d at 770.

Yet it is precisely this nonexistent, systemic "right" that plaintiffs invoke here, and that has spawned the Consent Decree under which this Court now administers the TennCare EPSDT program. This is the very vice against which Judge Kleinfeld – whose view was unanimously embraced by the Supreme Court – warned in *Blessing*: "What this lawsuit seeks to accomplish is to lodge the power to decide if the states are trying hard enough, and whether their plans to try harder are good enough, in federal judges instead of the Secretary of Health and Human Services. That is contrary to what Congress did." *Freestone v. Cowan*, 68 F.3d 1141, 1157 (9th Cir. 1995) (Kleinfeld, J., dissenting), *rev'd*, 520 U.S. 329 (1997).

The plaintiffs' exclusive focus on systemic violation of EPSDT requirements in the aggregate is plain on the face of the Complaint. The very first paragraph announces plaintiffs' goal of "injunctive relief … to remedy *systemic violations* of federal and state laws." Complaint ¶ 1 (emphasis added). This focus is repeated throughout the Complaint. *See, e.g.,* Complaint. at ¶ 32 ("systemic deficiencies in TennCare"); ¶ 113 ("systemic state failings"); ¶ 123 ("systemic deficiencies with the TennCare system"); ¶ 174 ("systemic deficiencies in services"). Although allegations of the denial of adequate healthcare to individual children are sprinkled throughout

much of the Complaint, *see* Complaint at ¶¶ 6-22, 55-173, no specific relief is sought for these particular alleged violations. Instead, the Complaint seeks only systemic injunctive relief "prohibiting the defendants from violating *the rights of the plaintiff class* as complained of herein." Complaint at p. 58 ("Request for Relief") (emphasis added).

This was not a mere oversight, nor need we speculate as to the relief plaintiffs anticipated when they brought this case, because the exclusive focus on aggregate, systemic violations of EPSDT is confirmed by the Consent Decree itself – which was filed simultaneously with the Complaint. The Consent Decree, like the Complaint, is directed at "systemic failures" to provide EPSDT services. Consent Decree ¶ 10. Indeed, the Decree *expressly disavows* the provision of any relief that would address the claims of the individual class representatives, whose individual allegations are pleaded in such detail in the Complaint. The Decree explicitly states that "the remedies provided under this consent [decree] are limited to cases presenting class-wide civil rights violations under 42 U.S.C. § 1983 rather than adjudications of individual claims." Consent Decree at ¶ 110. The Decree provides exclusively a "systemic remedy" carefully designed not to "affect the right of any individual class member to seek any and all relief that is otherwise available through administrative review proceedings authorized by state and federal law, or through proceedings against the State before the Tennessee Claims Commission… ." Consent Decree at ¶ 110. Individual class members are expressly denied "the remedy of contempt" to enforce their individual claims for EPSDT services – contempt will be available only for "significant violations" of the defendants' systemic obligations under TennCare. Consent Decree at ¶ 110.

Moreover, the specific requirements placed on defendants by the Decree make clear that it is aimed not at vindicating individual rights, but rather at achieving systemic reform. Like a

decree criticized by the Seventh Circuit, this "consent decree reads not like a judgment rectifying a violation of law but like a statute setting an agency's agenda – complete with deadlines for the promulgation of rules and promises designed to mollify diverse interest groups." *B.H. v. McDonald*, 49 F.3d 294, 302 (7th Cir. 1995) (Easterbrook, J., joined by Goodwin, J., concurring). The district "court permitted the [advocacy groups] to set themselves up as the legislative arm for [the State] for child welfare policy." *Id.*

Section B(1) of the Decree (Paragraphs 39 and 40), which sets forth the Decree's outreach and informing requirements, has an aggregate, systemic focus.

- Paragraph 39 requires the State to "adopt any policies and procedures necessary to ensure that TennCare rules and guidelines clearly describe and allocate responsibility for, and require compliance with, each specific outreach and informing requirement under federal law." By their very nature, such regulatory rules and guidelines are not aimed at specific individuals but rather are designed to address the functioning of the outreach program as a whole.
- Paragraph 40 removes any doubt that the outreach provisions of the Decree are addressed to systemic relief by stating that the outreach efforts required by Paragraph 39 must be "designed to reach all members of the plaintiff class."

The Decree's Screening requirements (Section B(2) of the Decree (Paragraphs 41 to 52)) are likewise aimed at systemwide compliance as opposed to ensuring an individual beneficiary's right to an EPSDT screen when requested.

- Paragraphs 45 to 52 create screening performance standards whereby the defendants' compliance with the Decree is measured in terms of "screening ratios" derived from CMS 416 reports that measure number of screens performed

and percentages of children screened – not individual children. Once defendants have achieved an Adjusted Periodic Screening Percentage ("APSP")[7] of 80% and Dental Screening Percentage ("DSP") of 80%, they "shall be presumed to be in compliance with their screening obligation under the law and terms of this order." By its plain terms, this section of the Decree deals in ratios, proportions, and percentages, but not with the right of an individual beneficiary to a screen upon request. These are precisely the sort of aggregate, population-based measures that are not subject to Section 1983 enforcement.

Likewise, Section C (Paragraphs 53 to 77), which addresses "Compliance with the Diagnosis and Treatment Mandate," has a clear focus on systemic compliance rather individual access to medical care and treatment.

- Paragraph 53 requires that defendants "establish and maintain a process for reviewing the practices and procedures of the MCOs and DCS, and require such modifications of those practices and procedures as are necessary to ensure that children can be appropriately referred from one level of screening or diagnosis to another. . . ."
- Paragraph 55 requires defendants to "review MCO practices with regard to making decisions about medical necessity" and to "identify any practices that are inconsistent with the federal laws cited herein."

[7] The APSP is a further way in which the Decree focuses on ratios rather than individuals. The APSP is calculated by conducting an annual statistically valid medical record review of a sample of encounters coded as periodic screens to determine whether these were "complete" screens." The proportion of required components of a complete screen found in each record in the sample of encounters is used to calculate an overall proportion for the entire sample and that proportion is in turn multiplied by the percentage of screens reported on the annual CMS 416 report to produce an APSP.

- Paragraph 65 requires the State to "issue any necessary policy clarifications so that the defendants or their contractors understand their duty to provide EPSDT diagnosis and treatment services …."
- Paragraph 73 requires the State to monitor "a sample of children entering DCS custody and assess the adequacy of services provided to them …."

This sampling of provisions from Section C of the Decree demonstrates that the focus is not the vindication of an individual child's right to medical care and treatment, but rather on reforming the policies of the State and its contractors and the overall adequacy of the program. "'Statutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons.' " *Hughlett*, 2006 U.S. App. LEXIS 16823, *13 (quoting *Alexander v. Sandoval*, 532 U.S. 275, 289 (2001) (other quotation marks and citation omitted). Such aggregate or systemic "rights" are not enforceable under Section 1983.

Finally, the provisions of the Decree (Section D (Paragraphs 78 to 83)) addressing "Compliance with the Mandate to Coordinate EPSDT Services with Other Programs Services" have a systemic focus as well.

- Paragraph 80 requires defendants to "coordinate EPSDT outreach, screening, and treatment services with services or programs" on a statewide list.
- Paragraph 82 requires defendants to "issue regulations and policy guidance . . . which incorporate strategies for ensuring coordination of EPSDT services . . . ." Once again, the sole aim of these paragraphs is at population-based remedies, not individual rights.

The manifestly systemic nature of the plaintiffs' claims is thus confirmed by the remedial terms of the Consent Decree itself: the Decree covers only claims to enforcement of federal EPSDT rules in the aggregate; claims of denial of services to individual beneficiaries are relegated to "administrative review proceedings" or "proceedings against the State before the Tennessee Claims Commission." Consent Decree ¶ 110. It is therefore beyond cavil that the Consent Decree abjures resolution of individual claims of *denial of federal rights* enforceable under Section 1983, and embraces only claims to *systemic compliance with federal law* that are not enforceable under Section 1983.

The Fifth Circuit confronted a parallel situation in the EPSDT class action in *Frazar*: the absence of actionable claims of federal right was confirmed by the exclusively systemic relief ordered by the district court.

> [T]he district court did not direct that particular individuals receive EPSDT services to which they were entitled under federal law. It has instead taken upon itself the task of reworking the procedures and mechanisms whereby EPSDT services are provided to the totality of eligible participants. The court has become the overseer of the State's Medicaid plan. As such, the court assumes the role of assuring that the State's plan meets federal mandates….

300 F.3d at 544. As explained above, the Fifth Circuit held that Congress did not intend in Section 1396a(a)(43) to create a right to compel systemic state compliance with EPSDT requirements. *Id.*

Judge Nixon's 2001 ruling, issued prior to the decisions in *Gonzaga* and *Westside Mothers II*, likewise confirms that plaintiffs have invoked, and obtained relief for, claims of systemic violations of federal EPSDT provisions that are not actionable under Section 1983. *See John B. v. Menke*, 176 F. Supp. 2d 786 (M.D. Tenn. 2001). The Court identified the entire "TennCare system" as the problem, the "failed experiment." *Id.* at 791-92; *see also id.* at 792 n.18 (" 'dysfunctional' State Government"); *id*. at 796 ("systemic deficiencies"); *id.* at 798

("system break[] down"). The Court found that the Defendants' violation of the Consent Decree stemmed not from any "recalcitrance" on their part, "but from a systemic black hole into which any agreement to comply with a court order would collapse." *Id.* at 806. The problem was that TennCare's managed care regime as a whole "has proven to be unworkable." *Id.* at 807. Significantly, the Court did not identify any actionable claim by an individual EPSDT beneficiary who had been denied benefits guaranteed by the statute, but instead only a failure of TennCare in the aggregate: a "fundamental, systemic inability to merge managed care and EPSDT." *Id.* at 803. It is now clear that such claims are not actionable under 42 U.S.C. § 1983. Accordingly, pursuant to Defendants' reservation of rights in Paragraph 15 of the Consent Decree and the principles of *Rufo*, such relief must be vacated.

In the appeal in *Frazar*, which likewise arose on the plaintiffs' application for enforcement of the EPDST consent decree, the Fifth Circuit held that "[b]efore the district court can remedy a violation of a provision of the consent decree, plaintiffs must demonstrate that any such consent decree violation is also a violation of a federal right." 300 F.3d at 543. The Court of Appeals unanimously vacated the consent decree in its entirety because "the district court did not conduct a particularized *Blessing* analysis as to each alleged violation of the consent decree." *Id.* at 542; *see also id. at* 546 ("Rather than focusing on the statutory requirements, the court focused on the consent decree requirements and proceeded to find numerous consent decree violations. These consent decree provisions impose standards and requirements on the State which are not required by the Medicaid statute."). "Regardless of the terms of the consent decree, the district court cannot impose higher performance standards than those set by the Secretary, and cannot under Section 1983 impose systemwide performance or participation standards." *Id*. at 546.

Accordingly, no provision of the Consent Decree pertaining to the provision of EPSDT services can continue in force unless and until the plaintiffs can demonstrate that said remedial provision is justified by a specific violation of an individual right granted by the EPSDT statute that is actionable under Section 1983.

IV. THE SECTIONS OF THE ADOPTION ASSISTANCE ACT INVOKED BY PLAINTIFFS DO NOT CONFER ENFORCEABLE RIGHTS.

Plaintiffs have also sought relief under Section 1983 for the alleged violation of rights conferred on them by several provisions of the Adoption Assistance and Child Welfare Act of 1980 ("Adoption Act"), 42 U.S.C. §§ 620-640, 670-679a. *See* Complaint p. 55 (Claims for Relief D). Specifically, the Complaint invokes Sections 622(b)(2), 625(a)(1)(A), (C), (D) and (F), 629a(a)(1)(C), 629a(b), 629b(a)(3), 673(c), and 675(1)(B). None of these sections, however, meets the *Blessing-Gonzaga* standard for conferral of a federal right enforceable under 42 U.S.C. § 1983, and the Consent Decree must therefore be vacated insofar as it addresses these claims.

The Adoption Act, like the Medicaid Act discussed above, is part of the Social Security regime – specifically, it makes up Title IV, which is entitled "*Grants to States* for Aid and Services to Needy Families with Children and for Child-Welfare Services." *See* 42 U.S.C. § 620 *et seq.* (emphasis added). As previously explained, such federal grant programs enacted under the Spending Clause rarely create enforceable federal rights, *see Gonzaga*, 536 U.S. at 280, 290; *Hughlett*, 2006 U.S. App. LEXIS 16823, *17, and the Adoption Act is no exception.

The first Adoption Act provisions cited by plaintiffs, Sections 622 and 629b, are lists of features that state plans for child-welfare services must contain to qualify for federal funding, which hardly constitutes unambiguous congressional intent to confer enforceable rights upon the beneficiaries of such plans. *See Suter,* 503 U.S. at 351, 358, 359, 361, 363; *Gonzaga*, 536 U.S.

at 281. More important, the specific provision of the Adoption Act invoked in the Complaint (at ¶ 205) is not even the part of the statute that requires states to operate child-service programs and case-review systems (§ 622(b)(10)(B)), but is instead merely a section mandating state efforts to "provide for coordination" among various federally financed child-service programs. 42 U.S.C. § 622(b)(2). Likewise, Section 629b(a)(3), invoked in the Complaint at ¶ 204, directs the states to "provide[] for coordination, to the extent feasible and appropriate," of services under the state's Adoption Act plan. Notably, the other programs that are to be coordinated with Adoption Act services are defined not by any supposed rights they might confer on individual recipients of aid, but instead by whether those other "federally assisted programs serv[e] the same *populations*." 42 U.S.C. § 629b(a)(3) (emphasis added). The aggregate, rather than individual, focus of these provisions is manifest.

Plaintiffs also invoke Sections 625(a)(1)(A), (C), (D) and (F), 629a(a)(1)(C), 629a(b), 673(c), and 675(1)(B). Complaint ¶ 205(a), (b) & (c). These provisions are equally administrative: they simply provide statutory definitions of the "child welfare," "family preservation," and "adoption assistance" programs that are to be financed by the federal grant program. Sections 625, 629a and 675 are all entitled "Definitions," and Section 673(c) defines "children with special needs." The purely administrative nature of these "Definition" provisions is underscored by the second half of Section 625, which provides the nitty-gritty, bookkeeping detail that "[f]unds expended with respect to nonrecurring costs of adoption proceedings in the case of children placed for adoption with respect to whom assistance is provided under a State plan for adoption assistance" that has been approved by the Secretary of Health and Human Services "shall be deemed to have been expended for child welfare services." 42 U.S.C. § 625(a)(2). None of these provisions of the Adoption Act "unambiguously" contains " 'rights-

creating' language that reveals congressional intent to create an individually enforceable right." *Westside Mothers II*, 454 F.3d at 542 (quoting *Gonzaga*, 536 U.S. at 287).

These provisions of the Adoption Act, like the provisions of another Title IV welfare program at issue in *Blessing v. Freestone,* are insufficient to confer on recipients of the federally financed program an individual "right to require the [State] to bring the State's program into substantial compliance" with the federal statute. 520 U.S. at 343. Like other provisions of the Adoption Act considered in *Suter v. Artist M.*, the sections at issue here concern, at most, "merely another feature which the state plan must include to be approved by the Secretary" – they "do[] not afford a cause of action" to the program's beneficiaries. 503 U.S. at 359 n.10 (discussing 42 U.S.C. §§ 671(a)(3), 671(a)(9), 671(a)(15)). The provisions invoked by plaintiffs are merely "condition[s] on the receipt of funds from the Federal Government." *Id.* at 362.

As the Supreme Court observed in *Gonzaga* when it reaffirmed its *Suter* decision, statutory provisions such as these can be " 'plausibly read to impose only a rather generalized duty on the State, to be enforced not by private individuals, but by the Secretary in the manner [of reducing or eliminating payments].' " *Gonzaga*, 536 U.S. at 281 (quoting *Suter*, 503 U.S. at 363) (bracketed material supplied by the *Gonzaga* Court). Indeed, it would be a stretch to read the provisions of the Adoption Act invoked by plaintiffs here as conferring even a "generalized duty" on the State – these provisions merely provide "Definitions" of statutory terms or direct the states to "coordinate" the various state programs financed by this and other federal grant programs. Such nuts-and-bolts provisions of a statute cannot fairly be said even to confer federal rights ambiguously, let alone to do so "unambiguously," as *Blessing* and *Gonzaga* require.

Further proof of the administrative and nonactionable nature of the "coordination" and other program requirements imposed by these parts of the Adoption Act may be found in the

Consent Decree itself. Paragraphs 88 through 93 of the Decree originally set forth the remedy for the Complaint's "coordination" cause of action. Paragraph 88 mandates that "the service testing process" used by the Defendants to assess the medical services provided to children in state custody (including foster care) "shall include … an audit of EPSDT compliance with regard to the children sampled" in that testing process. Consent Decree ¶ 88. Although Paragraphs 89-93 are no longer enforceable,[8] their provisions confirm that Plaintiffs' Adoption Assistance Act claims did not implicate individual rights that are enforceable under Section 1983.

Paragraph 89 required Defendants to "create an expert review process" to (1) evaluate the State plan for providing EPSDT services to children in State custody "to ensure compliance with EPSDT law" and (2) "to provide the required coordination of EPSDT with other non-medical services." The State was required to execute a contract with an appropriate "coordination" expert within a given time frame. Consent Decree ¶ 89. Remedies detailing "audit" and "compliance" and "coordination" processes – as essential as such things may be to administration of a program – do not reflect claims of individual rights enforceable under Section 1983. Paragraph 90 also underscored the fact that the plaintiffs are suing for systemic reform of a federal program rather than to enforce individual federal rights. It instructed experts hired by the State to evaluate "proposed arrangements" and "policy alternatives" for providing EPSDT services to children in DCS custody "in terms of their likelihood of producing, in a timely

[8] It is the State's view that Paragraphs 89 to 93 of the Decree were effectively vacated by the Court's Order of August 14, 2002 (Doc. 291). Those paragraphs required the creation of an expert review process and the formulation of a "remedial plan." The process was completed and the remedial plan was approved by the Court. *See* Doc. 57, 59. The Court subsequently rescinded those orders, *see* Doc. 291 at 3. However, to the extent Plaintiffs argue that the State still has substantive obligations under these paragraphs, they must be vacated now for the reasons stated in the text. Specifically, by imposing an expert-review process and calling for the formulation of a remedial plan, Paragraphs 89 to 93 seek to enforce systemic rather than individual rights and are therefore unenforceable under Section 1983.

fashion, a system which can adequately meet children's needs for medically necessary care." Consent Decree ¶ 90.

The Decree also sets up a regime of "Systems Monitoring" to keep track of the court-ordered reforms (Consent Decree ¶ 96), and even the prescribed mode of such monitoring reveals the aggregate focus of the rights claimed by Plaintiffs. The Decree dictates that "services testing" be performed on "a sample of plaintiff class members" in the custody of DCS that constitutes "a representative group of beneficiaries." Consent Decree ¶ 99. "The evaluators shall report their initial findings in writing to both parties" to the Decree but *"[s]uch findings shall not contain identifying information regarding any TennCare enrollee*." Consent Decree ¶ 92 (emphasis added). That is, the Decree's terms expressly forbid any evaluation of whether the healthcare complaints of any individual child in DCS custody are being addressed by the Decree's remedies, whether that child is a named plaintiff in this case or otherwise. This demonstrates that the Plaintiffs claim a right not to individual entitlements to EPSDT services or other medical care under the Adoption Act, but to systemic reform of the services regime that Tennessee has established for children in State custody. Indeed, as explained above, the Decree in this case expressly *disavows* any relief that would resolve the claims of the individual class representatives, and restricts itself to providing a "*systemic* remedy … limited to cases presenting class-wide civil rights violations under 42 U.S.C. § 1983 rather than adjudications of individual claims." Consent Decree ¶ 110 (emphasis added).

In sum, the sections of the Adoption Act invoked by Plaintiffs in their Complaint and Consent Decree merely provide "Definitions" of state service programs eligible for federal financing and mandate state "coordination" of such services. These provisions, and the relief Plaintiffs have been given in the Consent Decree, address "the *systemwide* performance" of the

State programs financed by the Adoption Act's federal grants. *Blessing*, 520 U.S. at 343 (emphasis in original). "Because the[se] provision[s] focus[] on 'the aggregate services provided by the State,' rather than 'the needs of any particular person,' [they] confer[] no individual rights and thus [can]not be enforced by § 1983." *Gonzaga*, 536 U.S. at 282 (quoting *Blessing*, 520 U.S. at 340).

V. PLAINTIFFS MAY NOT SUE UNDER 42 U.S.C. § 1983 TO ENFORCE THE MEDICAID AND ADOPTION ACT STATUTES BECAUSE THEY ARE THIRD PARTY BENEFICIARIES OF, RATHER THAN PARTIES TO, THOSE SPENDING CLAUSE CONTRACTS.

The most salient fact about the Medicaid statute and the Adoption Act is that they were both enacted pursuant to congressional power under the Spending Clause of Article I of the Constitution. The Medicaid statute furnishes federal money to a State on the condition that the State submit to the Secretary of Health and Human Services a healthcare plan complying with Medicaid's statutory requirements, including the provision of EPSDT services. 42 U.S.C. § 1396a(a)(43). The Adoption Act likewise provides federal funds to the States on the condition that the States comply with the statutory requirements set out in the Act. The Supreme Court has therefore recognized that "legislation enacted pursuant to the spending power is much in the nature of a contract." *Pennhurst* at 17. As a result, programs like Medicaid and the Adoption Act are not only federal laws, but also federal-state contracts in which the parties (the States and the Federal Government) have undertaken to assist third party beneficiaries (the recipients of the spending program). The "contractual nature" of Spending Clause legislation "has implications for [the] construction of the scope of available remedies." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998).

"Until relatively recent times, the third-party beneficiary was generally regarded as a stranger to the contract, and could not sue upon it." *Blessing*, 520 U.S. at 349 (Scalia, J.,

concurring). This was the law in 1871 when Section 1983 was enacted as § 1 of the Civil Rights Act. *See, e.g.,* 1 Francis Hilliard, THE LAW OF CONTRACTS 422 (1872) ("In general, the party with whom a contract is made is the proper plaintiff in a suit upon such contract, although the beneficial interest is in other persons."); 1 William W. Story, A TREATISE ON THE LAW OF CONTRACTS 509 (M. Bigelow ed. 1874) ("tendency of the courts" is "that no stranger to the consideration can take advantage of a contract, though made for his benefit"); Christopher C. Langdell, A SUMMARY OF THE LAW OF CONTRACTS 79 (2d ed. 1880) (explaining that "a person for whose benefit a promise was made, if not related to the promise, could not sue upon the promise," adding that this "proposition is so plain upon its face that it is difficult to make it plainer by argument"); *id.* ("A binding promise vests in the promise, and in him alone, a right to compel performance of the promise"); 2 Francis Wharton, A COMMENTARY ON THE LAW OF CONTRACTS 155 (1882) ("no one can sue on a contract to which he was not a party").[9] Therefore, the Congress that enacted Section 1983 would not have regarded Spending Clause legislation as conferring upon third-party beneficiaries the right to sue to enforce the promises made by the recipients of federal funds.

That contemporaneous understanding is an important factor in determining the scope of Section 1983. *See City of Newport v. Fact Concerts Inc.*, 453 U.S. 247, 258 (1981) ("It is by now well settled that the tort liability created by Section 1983 cannot be understood in an historical vacuum."). As the Supreme Court has explained, "one important assumption underlying the Court's decisions in this area is that members of the 42d Congress were familiar with common-law principles, … and that they likely intended these common-law principles to

[9] The law at the time recognized only narrow exceptions to this rule, such as where a third party was related to the promisee, or where the third party was owed a duty by the promisee as a result of performance amounting to consideration. *See* 2 Wharton, *supra*, at 162-63. Neither exception has any application here.

obtain, absent specific provisions to the contrary." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 67 (1989) (quotation omitted); *see also Kalina v. Fletcher*, 522 U.S. 118, 123 (1997) ("Congress intended [Section 1983] to be construed in light of common-law principles that were well-settled at the time of its enactment.").

Although it is now generally accepted that third-party beneficiaries have enforceable rights under a contract, *see* 13 Samuel Williston, A TREATISE ON THE LAW OF CONTRACTS § 37:12 at 103 (Richard A. Lord ed., 4th ed. 2000), that was not the case when Congress enacted Section 1983. It is the common law as it stood in 1871 – not today – that informs judicial construction of Section 1983. *See, e.g., Buckley v. Fitzsimmons*, 509 U.S. 259 (1993); *Will, supra*; *Fact Concerts, supra; Carey v. Piphus*, 435 U.S. 247 (1978); *Pierson v. Ray*, 386 U.S. 547 (1967); *Blessing*, 520 U.S. at 350 (Scalia, J., concurring). This approach – reaffirmed time and again by the Supreme Court – leads to the conclusion that Section 1983 "creates no right for beneficiaries of federal programs enacted pursuant to the Spending Power to sue" to enforce conditions on federal grants to states. *Westside Mothers v. Haveman*, 133 F. Supp. 2d 549, 581 (E.D. Mich. 2001), *rev'd on other grounds*, 289 F.3 852, 858 (6th Cir. 2002).

VI. THE CONSENT DECREE MUST BE VACATED IN ITS ENTIRETY.

As explained above, the provisions of the Medicaid Act and the Adoption Act invoked by the Plaintiffs, when reviewed against the teaching of the Sixth Circuit's decision in *Westside Mothers II*, do not confer individual rights that are enforceable under Section 1983. These are the only statutory bases for the rights claimed in this case. Everything else in the Complaint and the Consent Decree is ancillary to those statutory provisions. As the Sixth Circuit explained when reviewing *en banc* a complex institutional reform injunction in the *Sweeton* case, once the "foundation upon which the claim for injunctive relief was built has crumbled," there is no

doctrine of federal law, whether statutory or judge-made, constitutional or merely prudential, that "requires that old injunctions remain in effect when the old law on which they were based has changed." 27 F.3d at 1166-67. Therefore, the Consent Decree here must be vacated *in toto*.

CONCLUSION

For the foregoing reasons, we respectfully submit that the Consent Decree should be modified as stated in the accompanying Motion to eliminate those provisions which depend on the enforcement of a federal right for which it is now clear there is no Section 1983 cause of action.

November 20, 2006 Respectfully submitted,

ROBE RT E. COOPER, JR.
Attorney General

s/ Linda A. Ross
Linda A. Ross TN BPR #4161
Deputy Attorney General
Office of the Attorney General
P.O. Box 20207
Nashville, TN 37202
(615) 741-1771

s/ Charles J. Cooper
Charles J. Cooper
Michael W. Kirk
Nicole J. Moss
COOPER & KIRK, PLLC
555 11 St., N.W., Suite 750
Washington, D.C. 20004
(202) 220-9600

s/ Aubrey B. Harwell, Jr.
Aubrey B. Harwell, Jr.

Ronald G. Harris
Philip D. Irwin
NEAL & HARWELL, PLC
One Nashville Place, Suite 2000
150 4th Avenue North
Nashville, TN 37219
(615) 244-1713

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing document has been served on the following by electronic mail, on this 20th day of November, 2006:

Gordon Bonnyman
Michele Johnson
Tennessee Justice Center
301 Charlotte Avenue
Nashville, TN 37201

Counsel for Plaintiffs

_s/ Charles J. Cooper_____