UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. 05-23037-CIV-JORDAN

FLORIDA PEDIATRIC, et. al.	)
Plaintiffs	)
vs.	)
ANDREW AGWUNOBI, et. al.	)
Defendants	)

ORDER DENYING MOTION TO RECONSIDER MOTION TO DISMISS AND TO CERTIFY ISSUES AS IMMEDIATELY APPEALABLE

The defendants previously urged me to dismiss the complaint in this case because the organizational plaintiffs did not have standing to bring this action and because the statutes which the defendants allegedly violated do not create enforceable rights. I concluded, however, that the plaintiffs have standing to sue, and that -- with the exception of 42 U.S.C. § 1396u-2(B)(5) -- the statutes under which the plaintiffs bring suit confer individually enforceable rights. As a result, I dismissed only Count III and denied the motion to dismiss in all other respects.

The defendants have now asked me to reconsider my prior ruling denying their motion to dismiss. Additionally, they have requested me to certify certain issues as immediately appealable to the Eleventh Circuit. The defendants have not set forth reasons warranting a reconsideration of my order denying the motion to dismiss, nor have they established the requirements necessary for certification. There is no need to delay further prosecution of this case. As a result, their motion [D.E. 41-1] is DENIED.

LEGAL STANDARD

"A court has the power to revisit prior decisions of its own court or of a coordinate court in any circumstance, although as a rule courts should be loath to do so in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'" *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817(1988).

The Eleventh Circuit has stated that "Courts must rarely invoke the 'clear error' exception, less the exception swallow the rule." *Jenkins Brick Co. v. Bremer*, 321 F.3d 1366, 1370 (11th Cir.

2003). However, if new developments convince a court that it erred in an earlier ruling, it would be "wasteful and unjust to require the court to adhere to its earlier ruling." *Robinson v. Parrish*, 720 F.2d 1548, 1550 (11th Cir. 1983). Thus, in order to prevail upon a motion for reconsideration, a party must demonstrate that the court's prior ruling was clearly erroneous or that new developments have rendered the ruling incorrect.

Additionally, in exercising my discretion, I may certify certain issues for immediate appeal to the Eleventh Circuit if doing so involves controlling questions of law to which there are "substantial" differences in opinion, the resolution of which would "materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). *See generally McFarlin v. Conseco Services,* 381 F.3d 1251, 1257-59 (11th Cir. 2004) (explaining § 1292(b) standard).

DISCUSSION

The defendants have failed to demonstrate that my prior ruling was clearly erroneous or that new developments have rendered the ruling incorrect. Rather, the defendants continue to recite the same theories that they initially relied upon in their motion to dismiss. Furthermore, the defendants have failed to introduce any new legal authority or evidence that would support their contentions that I previously erred in denying their motion to dismiss.

With respect to Count I, I continue to agree with the Third, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits, which have all squarely addressed the issue of whether 42 U.S.C. § 1396a(a)(43) creates an enforceable right and have concluded that under *Blessing* and/or *Gonzaga*, §1396a(a)(10) confers enforceable rights on the plaintiffs. *See Watson v. Weeks*, 2006 WL 288147, *8 (9th Cir. 2006); *Sabree,* 367 F.3d at 190; *S.D. ex. rel. Dickson,* 391 F.3d 581, 607 (5th Cir. 2004); *Westside Mothers v. Haveman*, 289 F.3d 852, 862-63 (6th Cir. 2002); *Pediatric Specialty Care, Inc., v. Arkansas Dept. Of Human Services,* 293 F.3d 472, 477 (8th Cir. 2002); *Miller v. Whitburn,* 10 F.3d 1315, 1319-20 (7th Cir. 1993).[1]

In regard to Count II, I concluded -- and the defendants still have not persuaded me otherwise -- that "the recipient plaintiffs have an individual entitlement to the equal access guarantee." *Evergreen Presbyterian Ministries Inc. v. Hood*, 235 F.3d 908 (5th Cir. 2000); *See also Pediatric*

[1] Indeed, no circuit has held to the contrary.

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

And with respect to Count IV, I agree with the Eleventh Circuit's decision in *31 Foster Children v. Bush*, 329 F.3d 1255 (11th Cir. 2003), which held that 42 U.S.C. §1396a(a)(43)(A) created enforceable rights. I do not think -- nor have the defendants introduced new authority to the contrary -- that *31 Foster Children* has been called into question by *Gonzaga University v. Doe*, 536 U.S. 273, 287 (2002), and I concur with those other district courts that have addressed this issue post-*Gonzaga* and concluded that §1396a(a)(43)(A) confers enforceable rights on the plaintiffs.

Finally, the defendants' request to immediately appeal seven issues to the Eleventh Circuit is similarly denied. This is not the type of case contemplated by § 1292(b). The defendants have not demonstrated that a substantial difference of opinion exists in regard to the seven issues they seek to appeal. *See McFarlin*, 381 F.3d at 1258-59.

CONCLUSION

For the foregoing reasons, the defendants' motion for reconsideration and for certification of issues immediately appealable is DENIED.

DONE and ORDERED in chambers in Miami, Florida, this 24th day of April, 2007.

Adalberto Jordan
United States District Judge

Copy to: All counsel of record