UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. 05-23037-CIV-JORDAN

FLORIDA PEDIATRIC SOCIETY/THE FLORIDA CHAPTER OF THE AMERICAN ACADEMY OF PEDIATRICS; FLORIDA ACADEMY OF PEDIATRIC DENTISTRY, INC., et al.,

Plaintiffs

vs.

HOLLY BENSON, in her official capacity as Secretary of the Florida Agency for Health Care Administration, et al.,

Defendants

ORDER DENYING THE DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

For the reasons stated below, the defendants' motions for summary judgment [D.E. 549, 560] are DENIED.

I. LEGAL STANDARD

A motion for summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Where the non-moving party fails to prove an essential element of its case for which it has the burden of proof at trial, summary judgment is warranted. *See Celotex Corp.*, 477 U.S. at 323. That is, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (*quoting First Nat'l Bank of Ariz. v. Cities Serv. Co.,* 391 U.S. 253, 289 (1968)). In making this assessment, the court "must view all the evidence and all factual inferences reasonably drawn from the evidence in the light most favorable to the nonmoving party," *see Stewart v. Happy Herman's Cheshire Bridge, Inc.,* 117 F.3d 1278, 1285 (11th Cir. 1997), and "resolve all

reasonable doubts about the facts in favor of the nonmovant." *See United of Omaha Life Ins. v. Sun Life Ins. Co.*, 894 F.2d 1555, 1558 (11th Cir. 1990). I therefore review the facts in the light most favorable to the plaintiffs.

II. FACTS & PROCEDURAL HISTORY

This case concerns the defendants' allegedly unlawful failure to provide Florida children enrolled in (and eligible for) Medicaid with essential medical and dental services as required by the Social Security Act. Specifically, Title XIX of the Social Security Act mandates that children enrolled in Medicaid be furnished with the primary, preventative, acute, and specialty care and services which are necessary to their good health and development. The plaintiffs allege, in part, that more than 500,000 Medicaid-enrolled children were not furnished with preventative healthcare in violation of federal law. The plaintiffs seek declaratory and injunctive relief to compel the defendants to meet their alleged obligations under the Medicaid Act on an going-forward basis.[1]

The defendants urge me to grant summary judgment because (1) the plaintiffs lack a private right of action to sue under the Medicaid provisions at issue, including 42 U.S.C. §§ 1396a(a)(8), (a)(10), (a)(30), and (a)(43); and (2) even if the plaintiffs have a private right of action, the term "medical assistance," included in §§ 1396a(a)(8) and (a)(10), is narrowly defined and precludes relief for failure to provide medical services.[2]

III. DISCUSSION

A. WHETHER 42 U.S.C. §§ 1396a(a)(8), (a)(10), AND (a)(30) CONFER INDIVIDUALLY ENFORCEABLE RIGHTS

[1]The plaintiffs do not seek any damages arising from the defendants' alleged continued and systematic violations of federal law.

[2]The defendants also contend that the plaintiffs lack standing. I reject this argument, and find that one individual plaintiff has standing to pursue the remaining three counts, as explained in the order on class certification. Additionally, I do not address the defendants' argument, presented for the first time in their reply brief, that Secretary Sheldon is entitled to summary judgment on Count 4 because DCF is not alleged to have outreach obligations under § 1396a(a)(43). I cannot, and should not, consider new arguments raised for the first time in a reply brief. *See Powell v. Carey Intern., Inc.*, 490 F. Supp. 2d 1202, 1204 n.4 (S.D. Fla. 2006).

The defendants assert that there is no private right of action under §§ 1396a(a)(8), (a)(10), and (a)(30). The Supreme Court has explained that to determine whether a federal statute creates an enforceable right against a state a court must analyze three factors:

> First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms.

Blessing v. Freestone, 520 U.S. 329, 340-41 (1997) (citations omitted). For statutory language to satisfy the first factor, it must be "rights-creating" and clearly impart an "individual entitlement" on the plaintiff with an "unmistakable focus on the benefitted class." *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 287 (2002). The defendants' contentions fail because the provisions at issue in this case meet the three-prong test established in *Blessing*, as refined by *Gonzaga*.

B. 42 U.S.C. §§ 1396a(a)(8) & (a)(10)

Count 1 alleges a violation of the "reasonable promptness" clause of the Social Security Act, 42 U.S.C. § 1396a(a)(8). As stated in my order on the motion to dismiss, the Eleventh Circuit in *Doe v. Chiles*, 136 F.3d 709, 719 (11th Cir. 1998), expressly held that § 1396a(a)(8) meets all three requirements of the *Blessing* test. It is for the Eleventh Circuit to decide whether *Doe* has been so eroded by *Gonzaga* that it should be overruled. My job, as a district judge, is to follow *Doe* at this time. *See, e.g.*, *United States v. Baxter*, 2009 WL 106649, *1 (11th Cir. 2009) ("Because *Moore* [a prior Eleventh Circuit decision] has not been overruled by this Court sitting *en banc* or the Supreme Court, the district court was bound to follow its holding"). In any event, I do not believe that *Doe* has been called into doubt by *Gonzaga*. My prior decision is supported by several post-*Gonzaga* opinions which agreed with the opinion in *Doe*. *See Bryson v. Shumway*, 308 F.3d 79, 89 (1st Cir. 2002); *Newark Parents Ass'n v. Newark Pub. Sch.*, 547 F.3d 199, 208 (3d Cir. 2008); *Sabree ex. rel. Sabree v. Richman*, 367 F.3d 180, 194 (3d Cir. 2004); *Doe v. Kidd*, 501 F.3d 348, 356 (4th Cir. 2007); *Westside Mothers v. Olszewski*, 454 F.3d 532, 536-37 (6th Cir. 2006).

Count 1 also alleges a violation of § 1396a(a)(10), which provides that a state plan for medical assistance must "provide for making medical assistance available." Consistent with my decision on the motion to dismiss, and with the seven courts of appeal that have squarely addressed this issue post-*Gonzaga*, I hold that § 1396a(a)(10) confers enforceable rights on the plaintiffs. *See Newark Parents Ass'n*, 547 F.3d at 208; *Sabree*, 367 F.3d at 190; *S.D. ex rel. Dickson v. Hood*, 391 F.3d 581, 607 (5th Cir. 2004); *Westside Mothers*, 454 F.3d at 536-37; *Katie A. ex rel. Ludin v. L.A. County*, 481 F.3d 1150, 1153 n.7 (9th Cir. 2007); *Watson v. Weeks*, 436 F.3d 1152, 1154 (9th Cir. 2006).

C. 42 U.S.C. § 1396a(a)(30)(A)

The defendants also argue that § 1396a(a)(30)(A) -- the equal access provision -- has an aggregate focus and does not confer enforceable rights on the plaintiffs. Because of the similarity of the statutory language in § 1396a(a)(30)(A) and the language of the Boren Amendment, which the Supreme Court found sufficient to confer a private right of action, I conclude that the individual plaintiffs may bring an action under § 1396a(a)(30)(A) in light of *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 519-20 (1990).

In *Wilder*, the Supreme Court held that health care providers could sue to enforce the Boren Amendment because they were the "intended beneficiaries" of a provision that imposed a "binding obligation" on states to adopt reasonable rates. *See id.* at 509-510. The text of the Boren Amendment required states to:

> "[P]rovide . . . for payment . . . of the hospital services, nursing facility services, and services in an intermediate care facility for the mentally retarded provided under the plan through the use of rates (determined in accordance with methods and standards developed by the State . . .) *which the State finds, and makes assurances satisfactory to the Secretary are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities* in order to provide care and services in conformity with applicable State and Federal laws, regulations, and quality and safety standards and to assure that individuals eligible for medical assistance have reasonable access . . . to inpatient hospital servies of adequate quality.

Id. at 502-03. The judiciary was competent to enforce the requirement that a state adopt rates that were "reasonable and adequate to meet the costs" of medical facilities because "[w]hile there may be a range of reasonable rates, there certainly are *some* rates that no State could ever find to be reasonable and adequate." *Id*. at 519-20.

The Supreme Court in *Wilder* applied a less stringent three-prong test than the one adopted by *Gonzaga* to determine whether the Boren Amendment conferred a private right of action. The *Wilder* Court's analysis, however, was expressly preserved by *Gonzaga*, which stated that the language of the Boren Amendment "left no doubt of its intent for private enforcement . . . because the provision required States to pay an 'objective' monetary entitlement to individual health care providers." *See Gonzaga*, 536 U.S. at 281. *Wilder*, then, remains good law.

In this case, § 1396a(a)(30)(A) requires a state program to:

> [P]rovide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan . . . as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care and *are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area . . .*

§ 1396a(a)(30)(A) (emphasis added). In my view, § 1396a(a)(30)(A) imposes a mandate on states that mimics the Boren Amendment and contains similar "rights-creating language." *See Gonzaga*, 536 U.S. at 290. The Boren Amendment required states to create programs that provided reasonable payment to provide access to adequate medical assistance, while § 1396a(a)(30)(A) requires states to create programs that provide sufficient payment to ensure that adequate access to medical assistance is "available under the plan."[3] The only distinction between the two provisions is that § 1396a(a)(30)(A)'s beneficiaries are Medicaid enrolled individuals who utilize the care and services "available under the plan" and the Boren Amendment's beneficiaries are medical providers. *See Penn. Pharm. Ass'n v. Houstoun*, 283 F.3d 531, 543-44 (3d Cir. 2002) (*en banc*) (Alito, J.) (holding that § 1396a(a)(30)(A)'s provisions for quality of care and adequate access were "draft[ed] . . . with an unmistakable focus on Medicaid beneficiaries"). But the fact that health care providers are mentioned in the text of the Boren Amendment and plan participants are not explicitly discussed in

[3]Private enforcement of a provision is not unavailable merely because the statutory provision discusses the requirements of a state Medicaid plan. *See* 42 U.S.C. § 1320a-2 ("In an action brought to enforce a provision of this chapter, such provision is not deemed unenforceable because of its inclusion in a section of this chapter requiring a State plan or specifying the required contents of a State plan.").

the text of § 1396a(a)(30)(A) does not compel a different result: plan participants are given a right of enforcement through the language requiring states to make available services "under the plan."[4]

I acknowledge that several circuits have determined, post-*Gonzaga*, that § 1396a(a)(30)(A) does not expressly create an enforceable individual right. *See Long Term Care Pharm. Alliance v. Ferguson*, 362 F.3d 50, 59 (1st Cir. 2004); *Equal Access for El Paso v. Hawkins*, 509 F.3d 697, 703 (5th Cir. 2007); *Westside Mothers*, 454 F.3d at 542; *Sanchez v. Johnson*, 416 F.3d 1051, 1060 (9th Cir. 2005); *OKAAP v. Fogarty*, 472 F.3d 1208, 1210, 1215 (10th Cir. 2007); *Mandy R. ex rel. Mr. and Mrs. R. v. Owens*, 464 F.3d 1139, 1148 (10th Cir. 2006). With the exception of *Long Term Care* and *Mandy R.*, however, none of the cases distinguish *Wilder* and are therefore not very persuasive. *Long Term Care* evaluates only whether § 1396a(a)(30)(A) provides a private right of action for providers, and though the First Circuit acknowledges that "the Boren Amendment and subsection (30)(A) contain[] nearly identical substantive requirements," it dismisses the similarity and concludes that "*Gonzaga* requires clear statutory language for the create of private rights enforceable under 1983." *See* 362 F.3d at 58.[5] *Mandy R.* similarly expressed credulity that *Gonzaga* preserved *Wilder* and found that *Gonzaga* "tightened the first requirement" of finding a private right to enforce statutory violations and therefore no relief was available. *See Mandy R.*, 464 F.3d at 1147.

I admit that, if I were to apply the *Gonzaga* test to § 1396a(a)(30)(A) on a blank slate, it might be difficult to find sufficient "rights creating language" to allow for private enforcement. But it is not for the lower courts to decide that a Supreme Court case on point has been eroded to the point of no longer being binding precedent. *See, e.g.*, *Hohn v. United States*, 524 U.S. 236, 252-53 (1998); *Powell v. Barrett*, 541 F.3d 1298, 1302 (11th Cir. 2008). The First and Tenth Circuits, in my opinion, gave too little deference and weight to *Wilder*.

I find further support for the conclusion that § 1396a(a)(30)(A) allows for private enforcement in the analysis of another district court case which holds that the " structure and

---

[4]Although it is unclear whether the judiciary has sufficient competence to determine if a state has assured sufficient payments to enlist enough providers as it does to determine if a state has made reasonable payment to meet the costs of facilities (as in *Wilder*), the defendants have not argued that § 1396a(a)(30)(A) does not allow for enforcement because it is too vague and amorphous.

[5]*Long Term Care* cites the repeal of the Boren Amendment in 1997 as a reason to ignore *Wilder*. *See* 362 F.3d at 58. That makes no sense. The subsequent repeal of an amendment to increase "the flexibility of the states" may shed light as to Congress' later views as to private enforcement of the Boren Amendment, but does not alter the Supreme Court's analysis that the text of the Boren Amendment was sufficient to confer private enforcement.

language of [the Boren Amendment and § 1396a(a)(30)(A)] are nearly identical, and each focuses on mandatory obligations [that] a state plan must meet" there is "no principled basis to say that a private right of action is unavailable in this case." *See Memisovski v. Maram*, 2004 WL 1878332, at *8 (N.D. Ill. 2004). *See also Clark v. Richman*, 339 F. Supp. 2d 631, 639-40 (M.D. Pa. 2004) (applying the reasoning of *Memisovski* to find that § 1396a(a)(30)(A) confers privately enforceable rights); *Pediatric Specialty Care, Inc. v. Ark. Dept. of Human Servs.*, 443 F.3d 1005, 1014-16 (8th Cir. 2007) (finding that § 1396a(a)(30)(A) confers a privately enforceable right to Medicaid recipients), *cert. granted and order vacated as to individual defendants only*, 551 U.S. 1142 (2007).

D. 42 U.S.C. § 1396a(a)(43)(A)

I decline the defendants' invitation (contained in a footnote in their argument on standing) to reconsider my decision that § 1396a(a)(43)(A) created enforceable rights. The defendants identify no cases to contradict my prior ruling, and various courts have found that the provision creates enforceable rights. *See Bonnie L. v. Bush*, 180 F. Supp. 2d 1321, 1346 (S.D. Fla. 2001), *aff'd on other grounds and vacated in part*, *31 Foster Children v. Bush*, 329 F.3d 1255 (11th Cir. 2003); *Westside Mothers*, 454 F.3d at 543-44; *Clark*, 339 F. Supp. 2d at 638-40; *Memisovski*, 2004 WL at *8-11, *Health Care for All v. Romney*, 2005 WL 1660677, at *13 (D. Mass. 2005); *A.M.H. v. Hayes*, 2004 U.S. Dist. Lexis 27387, at *19 (S.D. Ohio 2004).

E. DEFINITION OF MEDICAL SERVICES

The defendants argue that, even if I find that §§ 1396a(a)(8) and (a)(10) contain enforceable rights, relief under Count 1 is precluded because the term "medical assistance" in each of the statutory provisions is narrowly defined by the Medicaid Act to include only payment for medical services. In *Doe*, however, the Eleventh Circuit followed *Sobky v. Smoley*, 855 F. Supp. 1123, 1145 (E.D. Cal. 1994), which held that "medical assistance under the plan . . . can only mean medical services." *See* 136 F.3d 709, 716 n.13. Based on this understanding, *Doe* upheld a claim that the Florida Department of Health & Rehabilitative Services violated § 1396a(a)(8) by failing to provide medical assistance, which consisted of the "therapies, training and other active treatment to which [the plan participants were] entitled." *Id.* at 711. The Eleventh Circuit in *Doe*, then, considered and rejected the argument that the term "medical assistance" is limited to payment alone. Indeed, the state had argued that it had "no obligation to place individuals in facilities; but were obligated only to reimburse the ICF providers with reasonable promptness." *See* Brief of Appellee at 17-18, *Doe v. Chiles*, No. 96-5144 (11th Cir. Apr. 9, 1997). Furthermore, the Eleventh Circuit's broad interpretation of "medical assistance" as including medical services is supported by decisions of the

First and Ninth Circuit, though there is admittedly a split in the circuits. *See Bryson v. Shumway*, 308 F.3d 79, 89 (1st Cir. 2002); *Katie A*, 481 F.3d at 1154. *But see Equal Access for El Paso, Inc. v. Hawkins*, 562 F.3d 724, 728-29 (5th Cir. 2009) (holding that medical assistance means payment for medical services); *Westside Mothers*, 454 F.3d at 540-41 (same); *Bruggeman ex rel. Bruggeman v. Blagojevich*, 324 F.3d 906, 910 (7th Cir. 2003) (same); *OKAAP*, 472 F.3d at 1210 (same).

Finally, the text and structure of the Medicaid Act support the *Doe* panel's interpretation that medical assistance includes medical services. To determine the meaning of a statutory term, a court consider the definition and context of the term. *See Wachovia Bank, N.A. v. United States*, 455 F.3d 1261, 1268 (11th Cir. 2006) ("[W]e do not read words or strings of them in isolation. We read them in context. We try to make them and their near and far kin make sense together, have them singing on the same note, as harmoniously as possible."). The Medicaid Act defines "medical assistance" as "payment of part or all of the cost of the [listed] care and services." 42 U.S.C. § 1396d(a), Additionally, § 1396a(a)(10) states that a plan must provide "for making medical assistance available, *including at least the care and services* listed" in § 1396d(a), which specifies access to hospital services and physician services. *See* § 1396a(a)(10) (emphasis added); §§ 1396a(a)(d)(1), (d)(5). Because the word "include" shows that the statute's drafters "intended to provide a non-exhaustive list of examples to clarify the meaning of a term," the structure of § 1396a(a)(10), read together with § 1396d(a), suggests that care and services are contained within the definition of medical assistance." *See Jean v. Nelson*, 863 F.2d 759, 777 (11th Cir. 1988). Several other provisions in § 1396a(a) also describe "medical assistance" as including care and services. *See*, *e.g.*, §§ 1396d(a)(43), 1396a(10)(C)(iii) and (C)(iv). Additionally, regulations enacted pursuant to the Medicaid Act require that a state plan "specify that" recipients are "furnished" listed "services," *see* 42 C.F.R. §§ 440.210, 440.220, and require the state agency administering EPSDT provide recipients "services" including dental care and immunizations. *See* 42 C.F.R. § 441.56(c). These regulations are consistent with the plaintiffs' definition of "medical services."[6] Given *Doe*, the language of §§ 1396a and 1396d, and the regulations discussed above, I reject the defendants' narrow definition of "medical assistance" and conclude that medical assistance includes the provision of medical services.

[6]I reject the defendants' contention that the term "medical services" is ambiguous. Rather, the regulations discussed merely provide further support for my interpretation of the plain language of the statute. And even if the statutory language is ambiguous, the agency's interpretation is entitled to deference so long as it is reasonable. *See Friends of Everglades v. S. Fla. Water Mgt. Dist.*, 570 F.3d 1210, 1227-28 (11th Cir. 2009).

IV. CONCLUSION

The defendants' summary judgment motions are DENIED.

DONE and ORDERED in chambers in Miami, Florida, this 30th day of September, 2009.

Adalberto Jordan
United States District Judge

Copy to: All counsel of record