IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

O.B., *et. al*., individually, and on behalf of a class,	)	
	)	No. 15-CV-10463
Plaintiffs,	)	
vs.	)	Judge: Charles P. Kocoras
	)	
FELICIA F. NORWOOD, in her official capacity as Director of the Illinois Department of Healthcare and Family Services,	)	Magistrate: Michael T. Mason
Defendant.	)	

DEFENDANT NORWOOD'S REPLY TO PLAINTIFFS' MEMORANDUM OPPOSING DEFENDANT'S MOTION TO DISMISS

NOW COMES Defendant, FELICIA F. NORWOOD, in her official capacity as Director of the Illinois Department of Healthcare and Family Services, by and through her attorney, LISA MADIGAN, Attorney General of Illinois, and submits her Reply to Plaintiffs' Memorandum Opposing Defendant's Motion to Dismiss, stating as follows:

I. DEFENDANT'S REPLY.

A. PLAINTIFFS' COMPLAINT SEEKS TO REMEDIATE ALLEGED SYSTEMIC SHORTCOMINGS IN ACCESS TO MEDICAID PROVIDERS OF IN-HOME SHIFT NURSING SERVICES BY REQUIRING DEFENDANT TO RAISE MEDICAID REIMBURSEMENT RATES.

Plaintiffs devote the lion's share of their Memorandum to attempting to persuade this Court that their Complaint is about something other than participants' access to Medicaid providers, of which Medicaid reimbursement rates Defendant pays to those providers is but one component. *See* 42 U.S.C. § 1396a(a)(30)(A) (Westlaw 2016). By way of example, Plaintiffs state at page 6 of their Memorandum, "Plaintiffs are not arguing that Defendant must raise

reimbursement rates for in-home nursing services." Plaintiffs' Memorandum at 6. First, the following allegations of the Complaint dispel Plaintiffs' "argument."

> 13. The Defendant failed to provide adequate in-home shift nursing services for the Plaintiffs and Class. Accordingly, the Plaintiff O.B. remains hospitalized (institutionalized); the Plaintiffs C.F., J.M., S.M., Sa.S and Sh.S receive inadequate in-home shift nursing services. *The Defendant's system-wide policies, practices, and procedures include a low reimbursement rate for the Plaintiffs' and the Class members' in-home shift nursing services.* The Defendant will not pay a nursing agency more than $35.03 per hour for an RN and $31.14 per hour for an LPN for in-home shift nursing services for the Plaintiffs and Class members. In contrast, the Defendant will pay $72.00 per hour for shift nursing under certain circumstances not applicable to the Plaintiffs . . .
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> 14. The Defendant compounded the nursing staffing problem in May 2015, when the Defendant imposed a system-wide 16.75% rate cut for the Plaintiffs' and Class members' in-home shift nursing services. As a result, for the months of May and June 2015, *the Defendant reduced RN rates to $29.16 per hour and LPN rates to $25.92 per hour, which resulted in a large number of nurses declining to serve the Plaintiffs and Class.*
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> 15. Upon information and belief, the Defendant's sister agency, the Illinois Department of Children and Family Services (DCFS) will pay a shift nursing rate of approximately $45.00 per hour for in-home shift nursing.
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> 16. The Medicaid program is jointly funded by the federal government and the states. In Illinois, the federal government pays approximately 50% of the Illinois's Medicaid costs. *Accordingly, if the state of Illinois increased nursing rates by $10.00 per hour, the net increase in cost to Illinois would be less than $10.00 per hour.*
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> 17. *This class action lawsuit asks this Court to order the Defendant to take all immediate and affirmative steps necessary to correct her system-wide policies, practices, and procedures* in order to arrange for adequate levels of previously-approved, medically necessary in-home shift nursing services to the Plaintiffs and Class. *It will be up to the Defendant to determine the manner in which to implement the Order.*

Complaint at ¶¶ 13-17 (emphasis added). The systemic relief Plaintiffs seek, in their own words, includes an increase to Medicaid provider reimbursement rates. *Id.*; *see also* Complaint at ¶¶ 5(g); 10; 129; 143.

Second, Plaintiffs' lead counsel has publicly described this case as follows: "On November 20, 2015 Attorney Robert H. Farley, Jr. . . . filed a Federal Class Action Lawsuit against the State of Illinois due to the failure of the State to pay adequate nursing rates." The Law for Children & Adults with Disabilities by Robert H. Farley, Jr., January 2016, attached as Defendant's Exhibit A. The *O.B.* Complaint was filed on November 20, 2015. Dkt. No. 1.

Third, Plaintiffs' reliance on *Memisovski v. Maram*, 2004 WL 1878332 (N.D. Ill. August 23, 2004) is both selective and misplaced. Plaintiffs' Memorandum at 6. This Court can take judicial notice that one of Plaintiffs' counsel of record here was also counsel of record for the named plaintiffs and class in *Memisovski*. Plaintiffs' theory of the case in *Memisovski* was that the HFS Defendant failed to provide EPSDT services because HFS violated 42 U.S.C. § 1396a(a)(30)(A). *Memisovski*, 2004 WL 1878332 at * 1-3, 11-20, 21-41. Among other things, the *Memisovski* plaintiffs and class complained that they did not receive health screenings required by EPSDT because HFS could not attract sufficient physician providers due to inadequate reimbursement rates. *Memisovski*, *Id.* The *Memisovski* court ruled that HFS violated Section 1396a(a)(30)(A) of the Medicaid Act by failing to accord participants access to physicians in order to receive the screening services that the EPSDT provisions of the Medicaid Act required. *Memisovski*, *Id.* at * 42-47, 56 (the court declares that defendants' policies and practices have violated and are violating plaintiffs rights under 42 U.S.C. § 1396a(a)(30)(A) and EPSDT). Since *Memisovski* resulted in a Consent Decree that, among other things, raised Medicaid reimbursement rates to physicians, Defendant's predecessor had no opportunity to test,

by an appeal, whether 42 U.S.C. § 1396a(a)(30)(A) created any privately enforceable rights. *See Memisovski v. Maram*, U.S. Civil Docket 92 C 1982 at Doc. No. 422. Moreover, all rulings in *Memisovski* regarding Section 1396a(a)(30)(A) obviously antedated *Armstrong v. Exceptional Child Center*, ___ U.S. ___, 135 S. Ct. 1378 (2015). The object of this litigation, in Plaintiffs' own words, is to raise Medicaid reimbursement rates to in-home shift nursing agencies in order that they may secure Medicaid services.

B. PLAINTIFFS WANT THIS COURT TO EVISCERATE AN ACT OF CONGRESS.

If this Court accepted Plaintiffs' arguments, there would be no reason for 42 U.S.C. § 1396a(a)(30)(A) to exist. Plaintiffs ignore the presumptions set forth in the next paragraph and argue, contrary to the plain language and structure of 42 U.S.C. § 1396a(a), that any and all substantive matters Congress allocated to Section 1396a(a)(30)(A) are also included in any section of the Medicaid Act that has been previously found to create privately enforceable rights to general Medicaid "services." *See, e.g.*, 42 U.S.C. § 1396a(a)(10)(A); 42 U.S.C. § 1396a(a)(8); 42 U.S.C. §§ 1396a(a)(43); d(r); 42 U.S.C. § 1396d(a). Were that so, Section 1396a(a)(30)(A) would be mere surplusage.

The Court's task is to give effect to the will of Congress and where Congress' will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive. *Negonsott v. Samuels*, 507 U.S. 99, 104 (1993). When Congress passes a law, it is presumed that Congress intended that law to have an effect and the statute should be construed so as to give it such effect. *Sutton v. United States*, 819 F.2d 1289, 1295 (5th Cir. 1987) (citations and footnote omitted); *Coyne & Delany Co. v. Blue Cross & Blue Shield*, 103 F.3d 712, 715 (4th Cir. 1996). It is also a commonplace of statutory construction that the specific governs the

general. *Morales v. Trans World Airlines*, 504 U.S. 374, 384-85 (1992) (Airline Deregulation Act preempts states from enforcing any laws relating to airline rates). Since the subjects of Medicaid reimbursement rates and access to Medicaid providers are expressly included in Section 1396a(a)(30)(A), the specific Section 1396a(a)(30)(A) is not subsumed into the general "right" to Medicaid services. It cannot possibly be Congress' intent that courts and parties are free to disregard the text of Section 1396a(a)(30)(A) while at the same time litigating over the substantive matters Congress committed to that statute's purview by invoking other general statutes that have been held to confer rights to Medicaid "services."

Furthermore, if the Court accepted the Plaintiffs' arguments, then the parties and the court would be free to fashion for and hold the Medicaid agency to an access standard that 1) deviates from the requirements of Section 1396a(a)(30)(A) and 2) removes all oversight concerning Section 1396a(a)(30)(A) from the Secretary of the U.S. Department of Health and Human Services and lodges it in the court. Defendant is well aware of the holdings of the cases Plaintiffs cite at pages 2 through 4 of their Memorandum. These cases do not stand for the proposition that privately enforceable "rights" to Medicaid services encompass everything committed to Section 1396a(a)(30)(A) to effectuate those services. Even assuming, *arguendo*, that those cases could be read in that fashion, *Armstrong* clearly curtailed remediating any so-called right to Medicaid services by entering "judicially unadministrable" orders. *Armstrong*, 135 S. Ct. at 1385. Stated another way, *Armstrong* bars any attempt to privately enforce any provision of the Medicaid Act when it would require the Court to undertake the activities included in Section 1396a(a)(30)(A), like Medicaid rate-setting, or creating, or overseeing the adequacy of Medicaid provider networks. *Armstrong* bars this activity in the guise of any remedy. *Armstrong*, *Id*. at 1383-88.

C. PLAINTIFFS CANNOT CIRCUMVENT *ARMSTRONG* BY SEEKING AN INJUNCTION TO REQUIRE DEFENDANT "TO DETERMINE THE MANNER IN WHICH TO IMPLEMENT THE ORDER."

Defendant has raised the arguments set forth below as part of her Response in Opposition to Plaintiffs' Motion for Preliminary Injunction. Dkt. No. 25 at 3-5. To the extent Plaintiffs oppose the Motion to Dismiss the Complaint by arguing that the relief they seek in this lawsuit would not implicate Section 1396a(a)(30)(A), they are really asking the Court to award injunctive relief that runs afoul of Fed. R. Civ. P. 65, both under its plain language and as construed. Plaintiffs' Memorandum at 2-8. Under those circumstances, the following material from Defendant's Response in Opposition is particularly appropriate here.

> Plaintiffs seek the following injunction from this Court:
>
> A) Enter a Temporary Restraining Order and Preliminary Injunction ordering the Defendant, Felicia F. Norwood, to take immediate and affirmative steps to arrange directly or through referral to appropriate agencies, organizations, or individuals, corrective treatment of in-home shift nursing services to the Plaintiffs and Class at the level approved by the Defendant, as required by the Medicaid Act, the ADA, and the federal Rehabilitation Act pending final judgment in this action or until further order of Court.

Dkt. No. 6 at p. 6, ¶ A; Dkt. No. 7 at p. 16, ¶ A; *and see* Complaint at p. 45, ¶¶ 4-5.

Federal Rule of Civil Procedure 65(d) requires that injunctions be stated specifically and "describe in reasonable detail . . . the act or acts restrained or required." An injunction that merely instructs the enjoined party not to violate a statute is generally overbroad and increases the likelihood of unwarranted contempt proceedings for acts that are unrelated to what was originally contemplated as unlawful. *Lineback v. Spurlino Materials*, 546 F.3d 491, 504 (7th Cir. 2008) (citing *International Rectifier Corp. v. IXYS Corp.*, 383 F.3d 1312, 1315 (D.C. Cir. 2004)). Rule 65 was designed to prevent uncertainty and confusion on the part of those faced with

injunctive orders to avoid a contempt citation on an order too vague to be understood. *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974) (footnotes and citations omitted). Since an injunction prohibits or commands conduct under threat of judicial sanction, basic fairness requires that the party enjoined receive explicit notice of what conduct is outlawed or required. *Schmidt*, *Id*. These are no mere technical requirements. *Schmidt*, *Id*. The specificity requirement, thus, also has a constitutional dimension. An injunction must be more specific than a simple command that the defendant obey the law. *City of New York v. Mickalis Pawn Shop*, 645 F.3d 114, 144 (2nd Cir. 2011). An injunction, like the one sought here, that directs the defendant to undertake "immediate and affirmative steps" does not comport with Rule 65(d)(1) or *Schmidt*. *Mickalis*, *Id*.

The injunctive relief that Plaintiffs seek as the preliminary and ultimate remedy in the case, if awarded by the Court, would run afoul of Fed. R. Civ. P. 65(d)(1) for the following reasons. First, Defendant provides in-home shift nursing services to children who qualify and Plaintiffs admit this. Complaint at *passim*. Second, the proposed injunction quotes verbatim a substantial portion of 42 U.S.C. § 1396a(a)(43)(C). This statute is a part of the Social Security Act that sets forth the EPSDT requirements for the State Medicaid plan. See 42 U.S.C. § 1396a(a). In other words, Plaintiffs want to enjoin Defendant to "follow the law." Further evidence of this is found in the portion of the proposed injunction that relates the acts that are being enjoined to what is "required by the Medicaid Act, the ADA and the federal Rehabilitation Act" without specifying what obligations those federal laws require. Third, the injunction sought would require Defendant "to take immediate and affirmative steps" to follow the law without any description of what immediate and affirmative steps should be taken to follow the law. Finally, by simply parroting an Act of Congress, the proposed injunction builds in conclusions as to what

Defendant's ultimate legal duties are respecting the provision of EPSDT services to Medicaid-eligible children. Stated another way, the proposed injunction builds in a requirement that each child's case is staffed at 100% of the approved hours, or at whatever level the Court decides constitutes compliance, with no corresponding description of what Defendant must do in order to reach that requirement. This is clearly contrary to the letter and spirit of Rule 65(d) and *Schmidt v. Lessard*, 414 U.S. 473 (1974). From the foregoing, it is evident that Plaintiffs want this Court to evade *Armstrong* by awarding injunctive relief that, while never using the words and concepts contained in Section 1396a(a)(30)(A), adjudicates those provisions through back-door means.

D. *A.H.R. v. WASHINGTON STATE HEALTH CARE AUTHORITY* IS NOT DISPOSITIVE.

Defendant was unable to find any discussion of *Armstrong* by the District Court in *A.H.R. v. Washington State Health Care Authority*, 2016 WL 98513 (W.D. Washington January 7, 2016). Moreover, Defendant found apparent concessions by Washington State's agency that their Medicaid reimbursement rates for private duty nursing may be too low. *AHR*, 2016 WL 98513 at * 13. In light of Washington's admissions, the District Court concluded that "Plaintiffs are likely to prevail over HCA on the merits of this issue." *AHR, Id.* Aside from the fact that this Court is not bound to follow decisions from other District Courts, *AHR* does not inform on any of the arguments that Defendant made in support of her Motion to Dismiss.

II. CONCLUSION.

WHEREFORE, for the foregoing reason, Defendant respectfully requests that Plaintiffs' Complaint be DISMISSED without leave to amend.

Respectfully submitted,

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DATED: February 16, 2016

CERTIFICATE OF SERVICE

KAREN KONIECZNY, one of the attorneys of record for Defendant, hereby certifies that on February 16, 2016, she caused a copy of the **DEFENDANT'S REPLY TO PLAINTIFFS' MEMORANDUM OPPOSING DEFENDANT'S MOTION TO DISMISS AND EXHIBIT** to be served by the Court's ECF/electronic mailing system upon ECF filing users, and that I shall comply with LR 5.5 as to any party who is not a filing user or represented by a filing user.

/s/ *Karen Konieczny*___