UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

J.E.M., et al.,	)	
Plaintiffs,	)	
v.	)	
BRIAN KINKADE, et al.,	)	Case No. 2:16-cv-04273-SRB
Defendants.	)	

PLAINTIFFS' SUGGESTIONS IN OPPOSITION OF DEFENDANTS' MOTION TO DISMISS

Plaintiffs are low-income Missouri Medicaid beneficiaries who are infected with hepatitis C. Recent pharmaceutical breakthroughs have resulted in a cure for their condition—direct-acting antiretroviral (DAA) medications. Rather than seizing the opportunity to provide this curative treatment to Plaintiffs, Defendants, who run Missouri Medicaid, have withheld it. Contrary to prevailing clinical guidelines and the standard of care endorsed by both local experts and federal agencies, Defendants' policies require Plaintiffs and others like them to wait until their hepatitis C is significantly advanced before giving them a chance at a cure. Plaintiffs seek to enforce the federal Medicaid Act against Defendants pursuant to 42 U.S.C. § 1983 (§ 1983), alleging that Defendants' policies violate three separate Medicaid provisions: service availability, comparability, and reasonable promptness. Defendants have moved to dismiss, contending that Plaintiffs' are really relying on another Medicaid provision, that is not cited in the Complaint and that is not privately enforceable under § 1983. This argument ignores basic rules on pleading—the plaintiffs control the Complaint and, as a result, get to choose which claims for relief they will raise with the Court. The Court should deny Defendants' motion.

Standard of Review

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). Here, Plaintiffs' complaint contains factual allegations that support Plaintiffs' claims for relief under the service availability (42 U.S.C. § 1396a(a)(10)(A)), comparability (§ 1396a(a)(10)(B)), and reasonable promptness (§ 1396a(a)(8)) provisions of the Medicaid Act. Defendants' only argument for dismissal is that Plaintiffs' claims are not privately enforceable under 42 U.S.C. § 1983 (§ 1983). This argument is not supported by law or cases, as established below.

I. DEFENDANTS MAY NOT DISMISS PLAINTIFFS CLAIMS AS AN UNENFORCEABLE REASONABLE STANDARDS CLAIM.

A. Plaintiffs may choose their causes of action and have chosen not to claim relief under the reasonable standards provision of the Medicaid Act.

Defendants argue that Plaintiff's complaint must be dismissed because they are really seeking to enforce the reasonable standards provisions of the Medicaid Act, 42 U.S.C. § 1396a(a)(17), and that provision is not privately enforceable under § 1983. But Plaintiffs' complaint contains no claim for relief under the reasonable standards provision, nor have Plaintiffs argued for relief under that provision in any of their pleadings. Plaintiffs simply have not made a reasonable standards claim.

Defendants put aside the substance of the three causes of action actually alleged in Plaintiffs' complaint and assert that the "crux of all three of Plaintiffs' claims is methodology," and therefore, "their claim is ultimately a reasonable standards claim. . . . [and] such a challenge **must be brought** under the Act's reasonable standards requirement at 42 U.S.C. § 1396a(a)(17)." Suggestions in Support of Defendants' Motion to Dismiss (Defs. Sugg.) at 5, 6 (emphasis added).

Defendants do not cite any support for their contention that Plaintiffs are compelled to bring a reasonable standards claim simply because Plaintiffs make allegations in support of the causes of action pled in their complaint that could theoretically support such a claim. Rather, it is well settled that plaintiffs may choose their causes of action. See, e.g., Lowe v. Bateman, 586 F. Supp. 528, 531 (W.D. Mo. 1984).[1] Here, Plaintiffs have exercised that choice to exclude a reasonable standards claim, as is their right.[2]

A recent case from the Northern District of Illinois is instructive here. In O.B. v. Norwood, Plaintiffs sued Defendants for violations of the Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) provisions of the Medicaid Act, concerning requirements for the services state Medicaid programs must provide to children, and the reasonable promptness provision of the Act. 170 F. Supp. 3d 1186, 1193 (N.D. Ill.), aff'd, 838 F.3d 837 (7th Cir. 2016). The O.B. plaintiffs alleged that the defendant had failed to make available medically necessary in-home nursing services for children enrolled in Medicaid. Id. at 1190. The complaint included allegations that low payment rates to in-home nurses were contributing to plaintiffs' access problems. Id. at 1193. The defendant argued that, notwithstanding plaintiffs' pleadings, they "really [sought] 'to raise Medicaid reimbursement rates to in-home shift nursing agencies in order that they may secure Medicaid services'" and their claims therefore were "converted" into a claim under the Medicaid equal access provision, 42. U.S.C. § 1396a(a)(30)(A). O.B., 170 F. Supp. 3d at 1192-93. Several

[1] While Plaintiffs may be precluded from later arguing a claim not included in their complaint if it arises out of the "same transaction or factual setting," they are not **compelled** to make any possible claim that their facts and allegations may support. Id.; see also Shelter Mut. Ins. Co. v. Pub. Water Supply Dist. No. 7 of Jefferson Cty., Mo., 747 F.2d 1195, 1198 (8th Cir. 1984) (finding that a party may waive its right to claims it could have included in its pleadings, but chose to exclude).

[2] Such challenges are typically brought under a variety of provisions of the Medicaid statute. See, e.g. Lankford v. Sherman, 451 F.3d 496 (8th Cir. 2006); Weaver v. Reagen, 886 F.2d 194 (8th Cir. 1989); Hiltibran v. Levy, 793 F. Supp. 2d 1108 (W.D. Mo. 2011); J.D. v. Sherman, No. 06-4153-CV-C-NKL, 2006 U.S. Dist. LEXIS 78446 (W.D. Mo 2006).

courts, including the Supreme Court, have held that the equal access provision of the Medicaid Act cannot be privately enforced. See, e.g., Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1387 (2015). The District Court easily rejected the defendant's argument, holding that

> the inclusion of these allegations (largely in support of different claims under different statutes) does not convert Plaintiffs' claims into a request for higher Medicaid reimbursement rates to be paid to in-home nursing service providers. To hold otherwise would improperly convert a claim for services under the EPSDT and reasonable promptness provisions of the Medicaid Act—long recognized by a multitude of courts, including the Seventh Circuit—into one for an increase in rates under § 1396a(a)(30)(A), just to strike it down under Armstrong.

O.B., 170 F. Supp. 3d at 1193. Similarly, in this case, the Court should hold that Plaintiffs allegations about the unreasonableness of Defendants' prior authorization criteria in support of their Medicaid Act claims do not convert them to a claim under the reasonable standards provision, particularly when the Eighth Circuit has held that provision of the Act to be unenforceable under § 1983. Plaintiffs have brought claims under a variety of theories that fit the facts of the case, and those claims must be judged on their own merit.

B. Plaintiffs are not challenging utilization control procedures; rather, they challenge a policy that denies medically necessary treatment.

Defendants continue to argue that they are permitted to use preferred drug lists and utilization controls under the Medicaid Act. Defs. Sugg. at 4-5. However, Plaintiffs have not challenged Defendants' entire process as legally deficient, but have taken issue with one instance where the process has apparently failed, resulting in illegal criteria applied to limit access to medically necessary prescription drugs.[3] That is to say that Plaintiffs do not challenge Defendants'

[3] Contrary to Defendants' arguments, Plaintiffs do not argue that they are entitled to "any drug under the sun" (Defs. Sugg. at 10). Rather, they argue that the law requires Defendants to cover drugs that are medically necessary as determined by their treating physicians consistent with prevailing community standards, and which will cure a life-threatening disease. See Weaver v. Reagen, 886 F.2d 194, 199-200 (8th Cir. 1989); J.D. v. Sherman, No. 06-4153-CV-C-NKL, 2006 U.S. Dist. LEXIS 78446 (W.D. Mo 2006) at *14.

right to limit access to prescription drugs using a preferred drug list, prior authorization, or utilization review, but they do maintain that under the service availability, comparability, and reasonable promptness provisions of the Medicaid Act, the specific limits Defendants have placed on DAAs are illegal.[4]

II. PLAINTIFFS' ACTUAL CLAIMS ARE PRIVATELY ENFORCEABLE

Defendant ignores the fact that Plaintiffs' complaint makes claims for relief under three separate provisions of the Medicaid Act, all of which have been consistently upheld by the courts as privately enforceable under § 1983. Spending Clause legislation, like the Medicaid Act, creates a right of action under § 1983 when the following conditions are met: (1) Congress intended the statutory provision in question to benefit Plaintiffs; (2) the asserted right is not so "vague and amorphous" that its enforcement would strain judicial competence; and (3) the provision clearly imposes a mandatory obligation upon the states. Lankford v. Sherman, 451 F.3d 496, 508 (8th Cir. 2006) (citing Blessing v. Freestone, 520 U.S. 329, 340-41 (2006)).[5] Here, all three of the causes of action actually asserted by Plaintiffs meet this test.

[4] To support their argument that the Plaintiffs' case is really a claim against their utilization control mechanisms under the reasonable standards provision, § 1396a(a)(17), Defendants cite a federal regulation, 42 C.F.R. § 440.230(d). Defs. Sugg. at 1, 3, 5. However, that regulation was not promulgated to implement § 1396a(a)(17); it was promulgated to implement 42 U.S.C. § 1396a(a)(10), which is one of the claims for relief in this case. See 42 C.F.R. § 440.200.

[5] When these prerequisites are met, the provision is presumptively enforceable, as the Supreme Court has held that the Medicaid program lacks "a remedial scheme that is 'sufficiently comprehensive to demonstrate congressional intent to preclude the remedy of suits under § 1983.'" Wilder v. Virginia Hospital Assn., 496 US 498, 521 (1990) (quoting Middlesex County Sewerage Authority v. National Sea Clammers Assn., 453 U. S. 1, 20 (1981)).

A. Plaintiffs' service availability claim is enforceable under § 1983.

Every federal circuit court of appeals to have reviewed the question, including the Eighth, has held (a)(10)(A) is privately enforceable. See Bontrager v. Ind. Fam. & Soc. Servs. Admin., 697 F.3d 604 (7th Cir. 2012); Westside Mothers v. Olszewski, 454 F.3d 532 (6th Cir. 2006); Watson v. Weeks, 436 F.3d 1152 (9th Cir. 2006); Sabree v. Richman, 367 F.3d 180 (3d. Cir. 2004); S.D. v. Hood, 391 F.3d 581 (5th Cir. 2004); Pediatric Specialty Care, Inc. v. Ark. Dept. of Human Servs., 293 F.3d 472 (8th Cir. 2002).

Indeed, under the first Blessing element, the service availability provision contains rights-creating language that requires that state Medicaid plans "provide for making medical assistance available . . . to . . . all individuals" who are qualified enrollees. 42 U.S.C. § 1396a(a)(10)(A). The provision is clearly directed at individuals and meant to confer individually-enforceable rights. See Sabree, 367 F.3d at 190 (noting that the language of the provision is nearly identical to provisions held up as having rights-creating language by Gonzaga University v. Doe, 536 U.S. 273 (2002) and Blessing). Under the second Blessing prong, the language is not vague or amorphous. The Plaintiffs ask the Court to determine with DAAs are medically necessary to treat their hepatitis C. "That level of statutory analysis does not 'strain judicial competence;' it is the sort of work in which courts engage every day." S.D., 391 F.3d at 605. Finally, under the third part of the Blessing test, the service availability provision of the act places a clear obligation on the state. It reads: "A State plan for medical assistance *must* . . . . provide for making medical assistance available." 42 U.S.C. § 1396a(a)(10)(A) (emphasis added). The provision is "couched in mandatory rather than precatory language." Westside Mothers, 454 F.3d at 537. The service availability provision of the Medicaid Act is enforceable under § 1983.

B. Plaintiffs' comparability cause of action is enforceable under § 1983.

Plaintiffs claim under the Medicaid comparability provision, 42 U.S.C. § 1396a(a)(10)(B), is also privately enforceable under § 1983. The only federal circuit court of appeal to have decided the question has concluded that this provision is enforceable. See Davis v. Shah, 821 F.3d 231 (2d Cir. 2016). Moreover, a district court in the Eighth Circuit has found that the comparability provision creates an enforceable right of action under § 1983. See Thoreson v. Palmer, No. C96-2051, 1997 WL 33558625, at *7 (N.D. Iowa Apr. 25, 1997).[6]

First, the comparability provision addresses benefits to be received by "any [categorically needy] individual," and it is "obviously intended" to benefit Plaintiffs. Thoreson, at *7 (citing 42 U.S.C. § 1396a(a)(10)(B)). Next, the comparability provision is not vague or amorphous. As § 1396a(a)(10)(B) mandates that states must provide the categorically needy with medical assistance that is equal in "amount, duration, or scope," to that provided to the medically needy or to any another categorically needy individual, the provision "presents a straightforward, identifiable standard ... readily susceptible of judicial evaluation." Thoreson, at *7 (quoting Sobky v. Smoley, 855 F. Supp. 1123, 1139 (E.D.Cal.1994)). Given this "objective benchmark" by which courts can evaluate a comparability provision claim, the provision meets the "vague and amorphous" standard of the second *Blessing* prong. Cherry v. Tompkins, No. C-1-94-460, 1995 WL 502403, at *11 (S.D. Ohio Mar. 31, 1995). Finally, the terms Congress used in the statute,

[6] The provision has also been enforced by district courts in the First, Second, Fifth, Sixth, Ninth, and Eleventh Circuits. See, e.g., Cruz v. Zucker, 116 F. Supp. 3d 334, 345–46 (S.D.N.Y. 2015); Women's Hosp. Found. v. Townsend, No. CIV A 07-711-JJB-DLD, 2008 WL 2743284, at *6–7 (M.D. La. July 10, 2008); Equal Access for El Paso, Inc. v. Hawkins, 428 F. Supp. 2d 585, 616–17 (W.D. Tex. 2006), rev'd and remanded on other grounds, 509 F.3d 697 (5th Cir. 2007); Gaines v. Hadi, No. 06-60129-CIV-SEITZMC, 2006 WL 6035742, at *25 (S.D. Fla. Jan. 30, 2006); Michelle P. ex rel. Deisenroth v. Holsinger, 356 F. Supp. 2d 763, 768 (E.D. Ky. 2005); Mendez v. Brown, 311 F. Supp. 2d 134, 138 (D. Mass. 2004).

"must" and "shall," are mandatory, rather than precatory, as required under the third Blessing element. Thoreson, at *7. The comparability provision of the Medicaid Act is enforceable under § 1983.

C. Plaintiffs' reasonable promptness claim is enforceable under § 1983.

This court has previously held that 42 U.S.C. § 1396a(a)(8) (the reasonable promptness provision) creates a private right of action under § 1983. White v. Martin, No. 02-4154-CV-C-NKL, 2002 WL 32596017, at *6 (W.D. Mo. Oct. 3, 2002). Every federal circuit court of appeals to have reviewed the question has also concluded that (a)(8) is enforceable under § 1983. See Romano v. Greenstein, 721 F.3d 373 (5th Cir. 2013); Doe v. Kidd, 419 F. App's 411 (4th Cir. Mar. 24, 2011), reaff'g, 501 F.3d 348 (4th Cir. 2007); Westside Mothers v. Olszewski, 454 F.3d 532 (6th Cir. 2006); Sabree v. Richman, 367 F.3d 180 (3d Cir. 2004); Bryson v. Shumway, 308 F.3d 79 (1st Cir. 2002); Lewis v. N.M. Dep't of Health, 261 F.3d 970 (10th Cir. 2001); Doe v. Chiles, 136 F.3d 709 (11th Cir. 1998); see also, e.g., Guggenberger v. Minnesota, No. CV 15-3439 (DWF/BRT), 2016 WL 4098562, at *18 (D. Minn. July 28, 2016).

By its terms, the provision is intended to benefit "all eligible individuals" such as Plaintiffs. Bryson v. Shumway, 308 F.3d at 88 (quoting § 1396a(a)(8)). As required by Gonzaga, the provision contains "rights-creating" language phrased in terms of the persons benefited. Second, the reasonable promptness provision "presents a sufficiently specific and definite standard readily susceptible to judicial assessment." Doe v. Chiles, 136 F.3d at 717. Finally, section 1396a(a)(8) "unambiguously impose[s] a binding obligation on the States," with its mandatory language that state plans "must" provide that medical assistance "shall" be furnished with reasonable

promptness. Romano v. Greenstein, 721 F.3d at 378 (quoting Blessing, 520 U.S. at 341). The reasonable promptness provision is enforceable under § 1983.[7]

For the reasons expressed herein, this Court should deny Defendants' Motion to Dismiss.

Respectfully submitted,

/s/ Joel Ferber
Joel Ferber # 35165
Jamie L. Rodriguez # 64323
Legal Services of E. Missouri
4232 Forest Park Avenue
St. Louis, Missouri 63108
(314) 534-4200 telephone
(314) 534-1028 facsimile
jdferber@lsem.org
jlrodriguez@lsem.org

/s/ John J. Ammann
John J. Ammann # 34308
Saint Louis University
Legal Clinic
321 N. Spring Street
St. Louis, Missouri 63108
(314) 977-2778 telephone
(314) 977-1180 facsimile
ammannjj@slu.edu

/s/ Abigail K. Coursolle
Abigail K. Coursolle
M. Jane Perkins
National Health Law Program, Inc.
3701 Wilshire Blvd, Suite #750
Los Angeles, CA 90010
(310) 204-6010, Ext. 107 telephone
(213) 368-0774 facsimile
coursolle@healthlaw.org
perkins@healthlaw.org

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ATTORNEYS FOR PLAINTIFFS

[7] Under Defendants' "contract" theory of enforceability, no Medicaid provision could be enforced in federal court. The argument ignores controlling precedent. See e.g., Barnes v. Gorman, 536 U.S. 181, 188 n.2 (2002) ("We do not imply … that suits under Spending Clause legislation are suits in contract, or that contract-law principles apply to all issues that they raise."); Gonzaga Univ. v. Doe, 536 U.S. 273 (2002) (discussing test for determining when a spending clause provision creates an enforceable right under § 1983). The Defendants' argument also cites a portion of Armstrong v. Exceptional Child Ctr., 135 S. Ct. 1378, 1337 (2015), Part IV, that was not joined by a majority of the justices and, thus, holds no precedential value for this Court. Finally, the law allows Medicaid beneficiaries to enforce plaintiffs' federal Medicaid claims without requiring that the specific treatments (e.g., DAAs) be named in the statute as long as they are within the scope of benefits and "medically necessary." See 42 U.S.C. §§ 1396a(a)(10), 1396d(a). And when establishing the scope of benefits, there was no way that Congress could have foreseen every treatment or every advance in medical science when it crafted the Medicaid statute, whether it is AZT (Weaver, 886 F.2d), medical equipment and supplies (Lankford, 451 F.3d), or life-saving DAAs (B.E. v. Teeter, No. C16-227-JCC, 2016 WL 3033500 (W.D. Wash. May 27, 2016) and the instant case). Nevertheless, as courts have consistently held, existing provisions on service availability, comparability, and reasonable promptness impose mandatory and enforceable obligations requiring the state Medicaid agency to provide the type of relief requested in this case.

CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2017, I electronically filed the foregoing with the clerk of the Court using the CM/ECF system which sent notification of such filing to the following counsel of record: Colleen Joern Vetter, Assistant Attorney General, P.O. Box. 861, St. Louis, MO 63101.

/s/ John J. Ammann