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

MELISSA WILSON, et al., individually and on behalf of all others similarly situated, Plaintiffs, v. WENDY LONG, et al., Defendants.	Civil Action No.3:14-cv-01492 **PLAINTIFFS' RESPONSE TO DEFENDANTS' BRIEF IN SUPPORT OF DISMISSAL (D.E. 253)**

The Medicaid Act requires Defendants to "provide that all individuals wishing to make application for medical assistance under the plan shall have opportunity to do so, and that such assistance shall be furnished with reasonable promptness to all eligible individuals[.]" 42 U.S.C. § 1396a(a)(8) (the "reasonable promptness" provision). This right has a strong history of enforceability by Medicaid applicants and beneficiaries in precisely this context of timeliness of application decisions, as well as for Medicaid services.

The Defendants argue against this by, *first*, suggesting that under the precedent of *Gonzaga* and *Blessing*, § 1396a(a)(8) is not enforceable. This argument is meritless because this Court already rejected the same arguments when it granted a preliminary injunction, settling this issue for this case, and because courts have consistently applied these tests to § 1396a(a)(8) and concluded that it is enforceable. *Second*, they switch direction by suggesting that § 1396a(a)(8) may in fact be enforceable, but only as to payments, not to provision of services, citing *Brown v. Tennessee Department of Finance and Administration*, 561 F.3d 542 (6th Cir. 2009). They fail to mention that *Brown* involved a limited context wherein single State agencies are allowed to limit enrollment and maintain waiting lists for certain programs for community-based services, making

Brown inapposite to the more general Medicaid provisions at issue here, which are guaranteed to anyone who is eligible. *Third* and finally, Defendants throw a Hail Mary pass by suggesting that the Supreme Court has, *sub silentio,* overruled all the precedent finding § 1396a(a)(8) enforceable. This is clearly erroneous.

Simply put, this Court has already correctly found that § 1396a(a)(8) is enforceable, in conformity with voluminous caselaw. There is no reason to reverse course at this late juncture.

ARGUMENT

I. It is the law of the case that Plaintiffs can enforce § 1396a(a)(8).

Shortly after this case was filed, this Court granted Plaintiffs a preliminary injunction. In so doing, this Court specifically ruled that Defendants, as the single State agency, are responsible for ensuring that "reasonably prompt" determinations required under § 1396a(a)(8) are conferred to applicants. *Wilson v. Gordon,* 2014 WL 4347807 at *3 (M.D. Tenn. sept. 2, 2014) (hereinafter "P.I. Order"). Under the law-of-the-case doctrine, rulings made in litigation continue to govern in later stages of the same litigation. *Niemi v. NHK Spring Co., Ltd.*, 543 F.3d 294, 308 (6th Cir. 2008); *Rouse v. DaimlerChrysler Corp.*, 300 F.3d 711, 715 (6th Cir. 2002) (citation omitted). The doctrine applies to issues decided "either explicitly or by necessary inference from the [earlier] disposition." *Hanover Ins. Co. v. Am. Engineering Co.*, 105 F.3d 306, 312 (6th Cir. 1997).

Defendants argued, in opposition to Plaintiffs' Motion for a Preliminary Injunction, that § 1396a(a)(8) was unenforceable, raising the same arguments reiterated here. *See* D.E. 51-1 at 24-27. The Court rejected these arguments. P.I. Order at *3. And though the preliminary injunction remedy is based on the granting of a hearing, the P.I. Order was clearly providing a partial remedy to the violation of § 1396a(a)(8) because it requires a fair hearing within 45 days, while federal regulations related to the fair hearing process of § 1396a(a)(3) normally require a hearing in 90 days. *Compare* P.I. Order at *5 *with* 42 C.F.R. § 431.244. The Sixth Circuit affirmed this

injunction. *Wilson v. Long*, 822 F.3d 934 (6th Cir. 2016). There is therefore no reason this Court should revisit its prior decision. *Niemi*, 543 F.3d at 308 (6th Cir. 2008).

II. Section 1396a(a)(8) confers a private right enforceable under § 1983.

A. It is well settled that § 1396a(a)(8) can be enforced by private individuals.

The Supreme Court has "traditionally looked at three factors when determining whether a particular statutory provision gives rise to a federal right." *Blessing v. Freestone,* 520 U.S. 329, 340 (1997). First, Congress must intend the provision in question to benefit the plaintiff; second, the right must not be so "vague and amorphous" that its enforcement would strain judicial competence; third the statute must impose a binding obligation on the state. *Id.* at 340-41 (citations omitted); *see also Gonzaga Univ. v. Doe,* 536 U.S. 2743, 284 (2002) (clarifying that, under first prong, Congress must use unambiguous "rights-creating" language).[1]

Numerous courts have applied this test to find that § 1396a(a)(8) is enforceable.[2] *See, e.g., Koss v. Norwood,* 305 F. Supp. 3d 897, 911 (N.D. Ill. 2018), *Walker v. Selig,* No. 2:15-00166, 2015 WL 12683818, at *17 (E.D. Ark. Oct. 30, 2015); *Ability Ctr. of Greater Toledo v. Lumpkin,* 808 F. Supp. 2d 1003, 1019–22 (N.D. Ohio 2011)*; Westside Mothers v. Olszewski,* 368 F. Supp. 2d 740, 757–63 (E.D. Mich. 2005)*, aff'd in part, modified in part and rev'd in part,* 454 F.3d 532 (6th Cir. 2006)*; Crawley v. Ahmed,* No. 08-14040, 2009 WL 1384147, at *16-19 (E.D. Mich. May 14, 2009)*; Romano v. Greenstein,* 721 F.3d 373, 377–79 (5th Cir. 2013); *Sabree v. Richman,* 367 F.3d 180, 190–92 (3d Cir. 2004); *Bryson v. Shumway,* 308 F.3d 79, 88–89 (1st Cir. 2002); *Doe v. Chiles,* 136 F.3d 709, 715–19 (11th Cir. 1998).

[1] Defendants concede that the third "binding obligation" component is met. Def. Br. 3.

[2] More recently, the Sixth Circuit in *Unan v. Lyon* reviewed *de novo* the granting of summary judgment in a case very similar to this one; the Court raised concerns about the factual findings, but not the determination of § 1396a(a)(8) enforceability. 853 F.3d 279 (6th Cir. 2017).

Defendants acknowledge this history but repeat the arguments they have raised before.

First, they suggest § 1396a(a)(8) does not "unambiguously confer" any rights to Plaintiffs. *Compare* Def. Br. 3-6 *with* D.E. 51-1 at 25-26 (raising same argument). This Court rejected this argument, P.I. Order at *3, joining numerous courts to conclude that this provision has precisely the type of individual focus contemplated by *Gonzaga*. *See, e.g.*, *Romano*, 721 F.3d at 378; *Westside Mothers,* 368 F. Supp. 2d at 762. *See also S.R. by and through Rosenbauer v. Pa. Dep't of Human Servs.,* 309 F. Supp. 3d 250, 259 (M.D. Pa. 2018) (rejecting argument that (a)(8) is unenforceable following *Armstrong v. Exceptional Child Ctr.*, 135 S. Ct. 1378 (2015), because the mandate speaks to the benefits to the individuals covered by Medicaid, rather than simply requirements of the plan); *Doctors Nursing & Rehab. Ctr., LLC v. Norwood*, No. 1:16-10255, 2017 WL 2461544, at *6 (N.D. Ill. June 7, 2017) (finding the language Congress used in § 1396a(a)(8) is unambiguously intended to benefit specific individuals).

Second, Defendants switch direction by suggesting that § 1396a(a)(8) may in fact be enforceable, but only as to payments, not to provision of services, citing *Brown v. Tennessee Department of Finance and Administration*, 561 F.3d 542 (6th Cir. 2009), and *Westside Mothers*. Def. Br. at 6; *compare* D.E. 51-1 at 25 n.7 (raising same argument). *Brown* did not address enforceability of § 1396a(a)(8) but simply found that in that case that plaintiffs could not use that section to challenge a waiting list for HCBS waiver services. 561 F.3d at 545. HCBS waiver services are permitted to limit enrollment in the waiver program. The *Brown* court also based its decision on an interpretation of medical assistance that limited it to payment for services, which was an interpretation corrected in the ACA. Patient Protection and Affordable Care Act, Pub. L. 111-148, § 2304 (2010). Courts have consistently read that the reasonable promptness provision applies both to the provision of services and to timely eligibility determinations.

Third, Defendants argue that § 1396a(a)(8) is too "vague and ambiguous." Def. Br. 7-8; *compare* D.E. 51.1 at 26-27 (same argument). Defendants suggest that it is inappropriate to rely on regulations to clarify what constitutes "reasonable promptness," but again, this ignores well-settled caselaw to the contrary. *See, e.g.*, *Koss v. Norwood*, 305 F. Supp. 3d at 909 (finding plaintiffs were enforcing the statute in relying on the timeliness deadlines in 42 C.F.R. § 435.912 and that parsing out the language in the statute was an inappropriate reading); *Vaughn v. Wernert*, 326 F. Supp. 3d 624 (S.D. Ind. 2018) (delay in provision of services caused by Defendants' administrative choices violated § 1396a(a)(8); *Walker v. Selig*, 2015 WL 12683818, at *17 (recognizing right to timely application determination under § 1396a(a)(8) when application submitted to Federal exchange); *Romano*, 721 F.3d at 378–79 (quoting *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990)) (§ 1396a(a)(8) and the implementing regulations clearly require prompt determination within the timeframes); *see also Bryson v. Shumway*, 308 F.3d at 79 (finding that courts regularly enforce reasonableness).

Defendants again raise *Cook v. Hairston*, an old, unpublished table decision finding § 1396a(a)(8) was not enforceable. 948 F.2d 1288 (6th Cir. 1991), but the Sixth Circuit made no mention of *Cook* in *Westside Mothers v. Olszewski*, 454 F.3d 532, 540 (6th Cir. 2006) ("*Westside Mothers II*"). Defendants suggest that the Sixth Circuit in *Westside Mothers II* did not hold that § 1396a(a)(8) was enforceable. Def. Br.at 1. But as explained in Plaintiffs' Response in Opposition to Defendant's Motion to Dismiss (D.E. 92 at 12-13), however, the court implicitly did just that. In that case, the court affirmed the dismissal of the reasonable promptness claim because the plaintiffs sought relief that the statute did not confer. *Id*. It did so without prejudice, however, stating that the plaintiffs "may be able to amend the complaint to allege" a different theory of how the provision had been violated. *Id.* at 541. If the court had doubts that the provision was

enforceable, it would hardly have put the plaintiffs and the district court through the futile exercise of considering whether the provision had been violated.[3] Moreover, since *Cook* was decided, district courts in this circuit have consistently found that § 1396a(a)(8) confers enforceable rights. *See supra* at 3, 5 (collecting cases).

B. The Supreme Court's decision in *Armstrong* does not affect these holdings.

Defendants make much of the recent Supreme Court decision in *Armstrong v. Exceptional Child Center*, but it does not support their sweeping arguments. 135 S. Ct. 1378 (2015). Indeed, *Armstrong* does not address § 1983 enforceability at all. The case was filed by health care providers who sought to bring their claim pursuant to the Supremacy Clause, not § 1983. *Id.* at 1382-83. The case focused not on § 1396a(a)(8), which extends protections to "all individuals" eligible for medical assistance, but rather on § 1396a(a)(30)(A), which does not refer to individuals and requires states to use "methods and procedures" regarding payment to ensure that services are available. *Armstrong* held that Congress did not intend health care providers in enforce § 1396a(a)(30)(A) in an action for equitable relief. *Id.* at 1385.

Therefore, *Armstrong* does not concern, and certainly does not overrule or abrogate, private enforcement of laws that create "federal rights" under § 1983 and it neither addresses nor undermines the consistent judicial track record holding that Medicaid beneficiaries have federal rights under § 1983 to enforce the reasonable promptness provision. *See, e.g., Fishman v. Paolucci,* 628 Fed. App'x 797, 801 n. 1 (2d Cir. 1995) (rejecting argument that *Amstrong* precludes beneficiaries from enforcing Medicaid provisions because it did not address enforceability of

[3] Indeed, in the same opinion, the court explicitly and unequivocally held that another Medicaid provision, § 1396a(a)(30)(A) did not pass the *Gonzaga/Blessing* test and was therefore could not be enforced by individuals. *Id.* at 542-43. In contrast, it did not provide the opportunity to amend and show that the provision could be enforced under another theory.

federal rights through § 1983); *S.R. by and through Rosenbauer v. Penn. Dep't of Human Servs.*, 309 F. Supp. 3d 250 (M.D. Pa. 2018) (holding that § 1396a(a)(8) and another provision were enforceable by beneficiaries, rejecting contention that *Armstrong* required reassessment of *Sabree* precedent because it addressed a different provision); *J.E. v. Wong,* No. 14-00399, 2015 WL 5116774 (D. Haw. Aug. 27, 2015) (distinguishing *Armstrong* and holding that child plaintiffs can enforce Medicaid provision mandating certain services for "*individuals"* under age 21). *See also Legacy Comm'ty Health Servs. Inc., v. Smith,* 881 F.3d 358, 372 (5th Cir. 2018) (noting that *Armstrong* concerned providers' rights to enforce Medicaid provisions, not beneficiaries and was therefore inapplicable); *Barry v. Lyon,* Case No. 13-cv-13185, 2015 WL 12838828 (E.D. Mich. 2015) (holding *Armstrong* did not preclude relief on claims of violation of SNAP Act because they had right of action under § 1983 to enforce the provision, which *Armstrong* did not address).[4]

Nor does *Armstrong* concern, much less overrule, the precedents established in *Wilder, Blessing*, and *Gonzaga* for discerning when there is a private right of enforcement under § 1983. It also did not address 42 U.S.C. § 1320a-2 or § 1320a-10, which contain Congress' "express recognition of beneficiaries" rights to enforce provisions of the Social Security Act (these sections are commonly known as the "Suter fix"). Finally, it did not address or undermine the consistent

[4] The Defendants cite *Does v. Gillespie*, 867 F.3d 1034 (8th Cir. 217) in support of their claim that *Armstrong* has overruled precedent recognizing that § 1983 confers individually enforceable rights. Def. Br. at 10. However, the Eighth Circuit is the only court to reach this conclusion. The other courts of appeals to address this issue have rejected this argument. *See Planned Parenthood of Kansas v. Anderson,* 882 F.3d 1205, 1226 (10th Cir. 2018); *Planned Parenthood of Gulf Coast, Inc. v. Gee,* 837 F.3d 477, 492 (5th Cir. 2016). The Supreme Court is currently considering whether to grant writs of certiorari in the Tenth and Fifth Circuit cases. *Anderson, petition for cert. filed,* (U.S. Mar. 21, 2018) (No. 17-1340); *Gee, petition for cert. filed,* (U.S. Apr. 27, 2018) (No. 17-1492). None of these cases, however, address § 1396a(a)(8) nor do they address claims by beneficiaries.

appellate court track record holding that Medicaid beneficiaries have a federal right under § 1983 to enforce 42 U.S.C. § 1396a(a)(8).[5]

III. Defendants' Remaining Arguments Are Misplaced.

Defendants argue that, because the Medicaid Act provides for termination of funding to states that do not substantially comply with Medicaid requirements, it precludes private enforcement of § 1396a(a)(8). Def. Br. at 9, citing 42 U.S.C. § 1396c(2) . This provision has been in existence for decades, yet no other court has found this provision to defeat individual enforcement of specific requirements. In fact, courts have specifically rejected the contention that this provision precluded enforcement through § 1983. The *Wilder* Court held that Medicaid's administrative process "to curtail federal funds to States whose plans are not in compliance with the Act [42 U.S.C. § 1396c] . . . cannot be considered sufficiently comprehensive to demonstrate a congressional intent to withdraw the private remedy of § 1983." 496 U.S. at 521-22; see also *City of Rancho Palo Verdes v. Abrams*, 544 U.S. 113, 121-22 (2005) (Scalia, J.) (including *Wilder* and Medicaid in listing of previous cases and statutes where § 1983 enforcement is not foreclosed by a statutory enforcement scheme); *Gonzaga Univ*., 536 U.S. at 280-81 (noting Wilder held the Medicaid Act contains "no sufficient administrative means of enforcing the requirement against States that failed to comply"); *Doe v. Kidd,* 501 F.3d 348, 356-57 (4th Cir. 2007) (holding that the availability of other forms of recourse in the Medicaid Act does not preclude enforcement under § 1983).

[5] The language Defendants cite from *Armstrong* does not support their sweeping conclusion that it abrogated *Wilder*. The *Armstrong* court merely observed that "later opinions plainly repudiate the ready implication of a § 1983 action that *Wilder* exemplified." Def. Br. at 2, citing *Armstrong,* 135 S. Ct. at 1386 n. *. This is true but it is merely an observation, as this has been the case for nearly 20 years since *Gonzaga Univ.* was decided and narrowed the test for § 1983 enforcement.

Defendants also argue that § 1396a(a)(3) of the Medicaid Act, which provides for administrative hearings, is a comprehensive remedy that make courts hesitant to infer that a Medicaid provision is enforceable through § 1983. Def. Br. at 9-10. Defendants cite no authority for the proposition that § 1396a(a)(3) is a comprehensive remedial scheme. In fact, courts that have addressed the issue have held precisely the opposite—including cases enforcing the reasonable promptness provision. *See, e.g., Sabree v. Richman,* 367 F.3d 180, 193 (3d Cir. 2004) (finding reasonable promptness provision enforceable and rejecting argument that administrative hearings are a comprehensive remedial scheme); *Doe v. Kidd,* 501 F.3d at 356-7 (same).

* * *

For all the foregoing reasons, and because this Court has already conclusively determined that § 1396a(a)(8) is enforceable, Plaintiffs respectfully request the Court deny Defendants' motion and allow full consideration of Plaintiffs' claims based on the trial record.

DATED: October 29, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this day a true and correct copy of the foregoing has been filed with the Court through the CM/ECF filing system, and that by virtue of this filing notice will be sent electronically to all counsel of record, including:

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