

2006 WL 1201261 (M.D.Ala.) (Trial Motion, Memorandum and Affidavit)
United States District Court, M.D. Alabama.
Northern Division

SUSAN J., et al., Plaintiffs,
v.
Bob RILEY, in his official capacity as Governor of the State of Alabama, et al., Defendants.

Civil Action No. CV-00-S-918-F.
March 20, 2006.

Plaintiffs' Memorandum of Law Opposing Defendants' Motion for Judgment on the Pleadings

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I. INTRODUCTION

Defendants' Motion for Judgment on the Pleadings should be denied. As the Eleventh Circuit has already held, plaintiffs may utilize 42 U.S.C. § 1983 to bring a cause of action under Title XIX, which establishes the Medicaid program. Contrary to defendants' assertion, subsequent case law developments do not alter this conclusion. Rather, there is a long-standing jurisprudence, both before and after *Gonzaga* that the types of Medicaid claims at issue in this case are enforceable through 42 U.S.C. § 1983. Finally, plaintiffs also may pursue their Fourteenth Amendment claim through § 1983.

II. PLAINTIFFS HAVE ENFORCEABLE CLAIMS UNDER 42 U.S.C. § 1983.

A. A Motion For Judgment on the Pleadings Must Be Strictly Construed.

As indicated by the defendants, this Court must construe the Complaint liberally, accepting "the facts in the complaint as true and viewing them in the light most favorable to the nonmoving party." *Horsley v. Feldt*, 304 F.3d 1125, 1131 (11th Cir. 2002). "Judgment on the pleadings is appropriate only when the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Moore v. Liberty Nat'l Life Ins. Co.*, 267 F.3d 1209, 1213 (11th Cir.2001) (internal marks omitted), *cert. denied*, 535 U.S. 1018, 122 S.Ct. 1608, 152 L.Ed.2d 622 (2002). As will be demonstrated, application of this standard dictates that defendants' Motion should be denied.

B. Title XIX Provides Numerous Entitlements to Persons Eligible for Services Under the Statute.

Title XIX establishes the federal Medical Assistance program. "Medicaid is a cooperative federal-state program through which the Federal Government provides financial assistance to States so that they may furnish medical care to needy individuals." *Doe v. Chiles*, 136 F.3d 709, 714 (11th Cir. 1998), *citing Wilder v. Va. Hosp. Assn.*, 496 U.S. 498, 502 (1990). The purpose of the Medical Assistance program includes the provision of services to help such individuals "attain or retain capability for independence or self-care" 42 U.S.C. § 1396; *accord W. Va. Univ. Hosps., Inc. v. Casey*, 885 F.2d 11, 20 (3d Cir. 1989), *aff'd on other grounds*, 499 U.S. 83 (1991).

A state is not required to participate in the Medical Assistance program. However, if it participates, it must adopt a "state

plan” which delineates the statute’s standards for determining eligibility. The plan will also identify the Medical Assistance services to be provided. The state plan *must* comply with the Medical Assistance statute and implementing regulations. *See* 42 U.S.C. § 1396a; *Schweiker v. Gray Panthers*, 453 U.S. 34, 36-37 (1981); *Harris v. McRae*, 448 U.S. 297, 301 (1980); *Doe v. Chiles*, 136 F.3d at 714. It is undisputed that Alabama has adopted a State Plan. Defendants’ Motion incorporates several exhibits referencing components of the State Plan.

“Medical assistance” is defined to include certain mandatory types of services, along with those “optional” types of services, as defined in 42 U.S.C. § 1396d, which a state chooses to include in its state plan. 42 U.S.C. §§ 1396a(a)(10)(A)(i)-(ii). Such optional “Medical Assistance” services can include “[s]ervices in an [ICF/MR]... for *individuals* who are determined in accordance with [42 U.S.C. § 1396a(a)(31)] to be in need of such care.” 42 U.S.C. § 1396d(a)(15) (emphasis added); *Portland Residence, Inc. v. Steffen*, 34 F.3d 669, 670 (8th Cir. 1994). Alabama has chosen to include such services in its state plan, to include day treatment, habilitation and other services which are the subject of this case. Ala. Admin. Code 560-X-35-.01 (2005). “[W]hen a state elects to provide an optional service, that service becomes part of the state Medicaid plan and is subject to the requirements of federal law.” *Tallahassee Mem’l Reg’l Med’l. Ctr.*, 109 F.3d 693, 698 (11th Cir. 1997). Title XIX also requires states to furnish Medical Assistance services, including day treatment, habilitation and other services, with reasonable promptness. 42 U.S.C. § 1396a(a)(8). *E.g.*, *Bryson v. Shumway*, 308 F.3d 79, 89 (1st Cir. 2002); *Boulet v. Cellucci*, 107 F. Supp.2d 61, 76 (D. Mass. 2000); *Lewis v. N.M. Dep’t of Health*, 94 F. Supp.2d 1217, 1234 (D.N.M. 2000), *aff’d on other grounds*, 261 F.3d 970 (10th Cir. 2001).

Title XIX is commonly referred to as an “entitlement” statute because of the rights it confers to each Medical Assistance recipient. *Schweiker v. Gray Panthers*, 453 U.S. 34, 36-37 (1981) (“An individual is *entitled* to Medicaid if he fulfills the criteria established by the state in which he lives.”)(Emphasis supplied.). Indeed, Title XIX unequivocally mandates that: “A State plan for medical assistance must -- ... provide -- for making medical assistance available... to -- ... *all individuals*” who fall within specified eligibility categories (e.g., persons who receive Supplemental Security Income benefits). 42 U.S.C. § 1396a(a)(10)(A)(i) (emphasis supplied).

C. Plaintiffs’ Complaint Alleges Violations of the Medicaid Act

Plaintiffs’ second amended complaint alleges that plaintiffs are persons with significant disabilities, including physical disabilities and mental retardation. (Pls’ Second Amended Comp., ¶¶ 6-36). In addition to identifying the structure of the Medicaid Act, as it applies to Alabama, the complaint alleges that Alabama has chosen to provide residential placement in ICF/MR facilities, which constitutes the state’s main residential program in its state plan. Many of these placements are provided through small community-based, home-like settings. (Pls’ Second Comp. ¶¶ 1, 160-167). Defendants are also required to provide an array of other medical services, to include therapeutic and habilitation services. To be eligible for medical assistance, plaintiffs must meet three criteria. It is undisputed that plaintiffs meet these criteria and that they have been on a waiting list, sometimes for over ten years. (Pls’ Second Comp. ¶¶ 164-171).

Plaintiffs’ complaint also alleges that defendants are, or should have been, aware that there are a significant number of persons with mental retardation, including plaintiffs, who, while they are eligible for residential placement and other services, have not been provided these necessary services. As a result, plaintiffs have been harmed. Plaintiffs have been denied the care and services they need, for which they are eligible under law. Plaintiffs also have languished for years on waiting lists maintained by the State Defendants. (Pls’ Second Comp. ¶ 171, 173-180).

Plaintiffs have alleged three types of statutory violations. Count I of plaintiffs’ complaint alleges defendants failed to provide medical assistance, to include ICF/MR and/or waiver services, with reasonable promptness in violation of, *inter alia*, 42 U.S.C. §§1396a(a)(8) and (10)(a). (Pls’ Second Comp. ¶¶183-187).

Count II of plaintiffs’ complaint alleges that defendants failed to provide services to plaintiffs in an amount, duration and scope equal to services provided to other persons. Such constitutes a violation of, *inter alia*, 42 U.S.C. § 1396(a)(10)(B). (Pls’ Second Comp. ¶ 188-191).

Count III of plaintiffs’ complaint alleges that, in contrast to the treatment afforded to others, defendants have denied plaintiffs’ right to apply for services and have a decision rendered on their application, in violation of, *inter alia*, 42 U.S.C. §

1396a(a)(8).

Each of these statutory violations state a valid claim under 42 U.S.C. 1983.

D. Numerous Courts, Including the Supreme Court and the 11th Circuit Have Recognized the Enforceability of Certain Provisions of Title XIX through Section 1983.

Contrary to defendants' assertions, numerous courts, including the United States Supreme Court and the Eleventh Circuit, have recognized that Medicaid claims can be enforced through 42 U.S.C. § 1983. Subsequent case law developments do not alter these holdings.

1. The Requirements for Enforcing a Statute Under 42 U.S.C. § 1983.

A plaintiff who wishes to bring a cause of action under 42 U.S.C. § 1983 must first demonstrate that the statute upon which he or she relies affords a federal right. Courts have historically applied a three part test to assure the existence of a privately created and enforceable federal right. First, is the plaintiff the intended beneficiary of the statutory language? Second, is the plaintiff's interest so vague and amorphous as to be incapable of judicial enforcement? And, third does the statute place a binding obligation on the state?

If the Court determines the existence of a federal right, a rebuttable presumption exists that the statute may be enforced through § 1983. *Blessing v. Freestone*, 520 U.S. 329, 341 (1997). The claim will then only be dismissed if the Court determines that Congress has foreclosed the use of § 1983, either expressly or by creating an enforcement scheme which is sufficiently comprehensive. A defendant has a heavy burden of proof to prevail on this issue. (*Blessing*; *See also Wilder v. Va. Hosp. Ass'n.*, 496 U.S. 498 (1990)).

2. The U.S. Supreme Court has Adopted these Principles to Claims Under the Medicaid Act.

Since at least 1990, the U.S. Supreme Court has recognized the applicability of these principles to violations of a plaintiff's rights under the Medicaid Act. In *Wilder v. Va. Hosp. Ass'n*, 110 S.Ct. 2510, 496 U.S. 498 (1990), the U.S. Supreme Court held that Medical Assistance providers could pursue a Section 1983 lawsuit to enforce the "Boren Amendment" to Title XIX. That amendment requires states to pay "reasonable and adequate" reimbursement rates to providers. *Id.* at 509. The Court held that the Boren Amendment conferred on providers an enforceable right on providers to reasonable and adequate reimbursement rates. *Id.* at 510-20. In reaching this decision, the Court rejected an argument that 42 U.S.C. § 1396c, which allows the federal government to terminate funding, demonstrated any Congressional intent to foreclose the application of Section 1983 as an enforcement of Title XIX provisions. *Wilder*, 496 U.S. at 521-22.¹

In 1997, the Court applied these principals in *Blessing* which involved Title IV-D of the Social Security Act (the analog of 42 U.S.C. § 1396c in Title XIX). While the Court ultimately rejected plaintiffs' contention that they could enforce the "substantial compliance" provision of the Act, the Court recognized that certain provisions within Title IV-D could give rise to individually enforceable rights. The Court, thus, remanded the case to the District Court for a more detailed review of plaintiff's complaint, finding it unclear as to which rights plaintiffs intended to invoke. Significantly, the Court also rejected defendants' argument that Congress had demonstrated its intent to foreclose § 1983 as a remedial statute. The statute which allowed the federal government to terminate funding did not compel the conclusion that Congress had intended to foreclose § 1983 lawsuits on an enforcement mechanism. *Id.* at 345-46. *See also Wright v. Roanoke Redevel & Hous. Auth.*, 479 U.S. 418, 107 S.Ct. 7666 (1990).

3. The "Suter Fix."

In 1992, the United States Supreme Court dealt a blow to the utilization of 42 U.S.C. § 1983 to enforce a provision contained in the Adoption Assistance and Child Welfare Act. *Suter v. Artist M.*, 503 U.S. 347, 112 S.Ct. 1360 (1992). In *Suter*, the Court declined to recognize an enforceable federal right when the language at issue was contained in a statutory provision which identified what must exist in a state's plan in order for the state to receive federal funds. *Suter* had the potential to affect claims under the Social Security Act, given that some of the language typically relied upon by plaintiffs was contained in 42 U.S.C. 1936a.

Following the Court's decision in *Suter*, however, Congress acted swiftly to amend the Social Security Act to clarify that it did not intend to foreclose § 1983 as a mechanism for enforcing an entitlement which was contained in the statutes articulating the requirements for a state's plan. That amendment states:

In an action brought to enforce a provision of the Social Security Act, such provision is not to be deemed unenforceable because of its inclusion in a section of the Act requiring a State plan or specifying the required contents of a State plan.

42 U.S.C. § 1320a-2; *accord* 42 U.S.C. § 1320a-10. In enacting this statute, Congress recognized that:

Social Security beneficiaries, parents, and advocacy groups have brought hundreds of successful lawsuits alleging failure of the State and/or locality to comply with State plan requirements of the Social Security Act. ... Much of this litigation has resulted in comprehensive reforms of Federal-State programs operated under the Social Security Act, and increased compliance with the mandates of the Federal statutes.

H.R. Rep. No. 102-631, at 364-65 (1992). *See also* H.R. Conf. Rep. No. 102-1034, at 1304 (1992) (quoting H.R. Rep. No. 102-631, at 366 (1992)). Congress stated that "the purpose of this provision [was] to assure that individuals who have been injured by a state's failure to comply with the state plan requirements are able to seek redress in the federal courts to the same extent they were able to prior to the decision in *Suter v. Artist M.*" *Id.* (quoting H.R. Rep. No. 102-631, at 366 (1992)).²

4. Subsequently, Numerous Other Courts, Including the Eleventh Circuit, Recognized that Certain Title XIX Provisions Create Rights which are Enforceable Through Section 1983 by Medical Assistance Recipients.

Subsequently, numerous courts, including the Eleventh Circuit, have recognized that certain Title XIX provisions such as those relied upon by plaintiffs, create rights which are enforceable through 42 U.S.C. 1983 by individual Medical Assistance recipients.³

In *Doe v. Chiles*, *supra*, the Eleventh Circuit held that Medicaid recipients may bring an action under 42 U.S.C. § 1983 in a factual situation almost identical to this case.⁴ The case involved persons with disabilities who had been on a waiting list for services for several years. Plaintiffs claimed that they were denied services with reasonable promptness in violation of 42 U.S.C. § 1396a(a)(8). Rejecting defendants' argument to the contrary, the Eleventh Circuit found that the plaintiffs in *Doe* had the right to bring their claim under § 1983. 42 U.S.C. § 1396a(a)(8)(b) was intended to benefit plaintiffs who were Medicaid "eligible individuals under the Medicaid statute."⁵ The Eleventh Circuit also found that the Medicaid statutory right was "not so 'vague and amorphous' that its enforcement would strain judicial confidence." *Doe*, 136 F.3d at 716, citing *Blessing*. Rather, the "reasonable promptness" language was "specific and definite." *Id.* at 717. Because the language unambiguously created an obligation which was binding on the states, the language was mandatory. Finally, the Court easily found that Congress had not foreclosed such a remedy by creating "a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Id.* at 719, citing *Blessing*.⁶

E. The U.S. Supreme Court's Decision in *Gonzaga* does not Overrule *Wilder* And its Progeny.

Defendants' primary argument in support of their motion to dismiss is that *Gonzaga* overruled *Wilder* and its progeny. However, defendants are wrong. *Gonzaga* does not support the dismissal of plaintiffs' complaint, as it is distinguishable on several grounds.

The issue before the Court in *Gonzaga* was whether a plaintiff could bring a 1983 claim to enforce the Family Education Rights to Privacy Act (FERPA), which protected certain educational records from public disclosure. The significant language in *Gonzaga* stated:

No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein ...) of students without the written consent of their parents to any individual, agency, or organization.

20 U.S.C. § 1232g(b)(1) (emphases added), *quoted in Gonzaga University*, 122 S. Ct. at 2273.

In concluding that FERPA did not create enforceable rights, the Court looked at several factors, including whether the statute included “ ‘rights-creating’ language.” 122 S. Ct. at 2277, 2279. Contrasting Titles VI and IX of the Civil Rights Act which use “individually focused terminology,” the FERPA provision simply forbade the Secretary of Education from providing federal funds to an “educational agency or institution” which engaged in a prohibited “policy or practice.” Accordingly, the FERPA language was “two steps removed from the interests of individual students and parents and clearly does not confer the sort of ‘individual entitlement’ that is enforceable under § 1983.” *Id.* (citation omitted; emphasis in original).

The Court also found that the FERPA provision addressed merely “institutional policy and practice, not *individual* instances of disclosure.” *Gonzaga University*, 122 S. Ct. at 2278 (emphasis added). Thus, the statute had an “ ‘aggregate’ focus” and it was “not concerned with ‘whether the needs of any particular person have been satisfied’” *Id.* (citations omitted).⁷ Accordingly, *Gonzaga* neither dictates the dismissal of plaintiffs' complaint, nor does it overrule *Doe v. Chiles*. The FERPA statutory provision at issue did not contain the same type of rights creating language as found in the statute giving rise to plaintiffs' claims. The FERPA provision also addresses public policy practice issues, rather than a person's individual rights.

Moreover, *Gonzaga* did not overrule *Wilder* and its progeny. Rather, *Gonzaga* cited *Wilder* with favor, recognizing that in *Wilder*, plaintiffs were able to enforce a provision of the Medicaid Act through 42 U.S.C. 1983. *Gonzaga*, 122 S. Ct. at 2274, 2279.

1. The Statutes Implicated in Plaintiffs' Complaint Are Grounded in Statutory Provisions, Contrary to Rights-Creating Language Which Have an Individual Focus.

The allegations contained in plaintiffs' complaint are easily distinguishable from FERPA. Each of the statutes relied upon by plaintiffs identify plaintiffs as the intended beneficiaries of the statutory language. Moreover, plaintiffs' interests are not so vague and amorphous so as to escape this Court's enforcement power. Finally, the statutory language unequivocally places a binding obligation on the state. Thus, a rebuttable presumption exists that each of the statutes relied upon by plaintiffs may be enforced via 42 U.S.C. § 1983.

42 U.S.C. § 1396a(a)(10)(A) mandates that states “must” make “medical assistance available” to “*all individuals*” who are eligible for such services. (Emphasis added). Alabama's State Plan, defines “medical assistance” to include day treatment, habilitation and other services. Ala. Admin. Code 560-X-35-.01 (2005). Plaintiffs in this action each allege they need such services. *See* Second Amended Complaint, generally.

42 U.S.C. § 1396a(a)(8), too, embodies the type of “rights-creating” language identified by the Supreme Court as evidence of an enforceable right. The provision required that “[a] State plan for medical assistance must -- provide that... such [medical] assistance shall be furnished with reasonable promptness to *all eligible individuals*[.]” 42 U.S.C. § 1396a(a)(8) (emphasis added). This language focuses expressly on the individual plaintiffs and the benefits to which they are entitled. Thus, unlike the FERPA provision at issue in *Gonzaga*, the reasonable promptness mandate is directly related to individual Medical

Assistance recipients; and, it states unequivocally that “all eligible individuals” must be furnished with Medical Assistance services with reasonable promptness. Similarly, 42 U.S.C. § 1396a(a)(8) also provides “that *all individuals* wishing to make application for medical assistance under the plan shall have opportunity to do so...” (emphasis added). Accordingly, the statutory language at issue here is distinct from that in *Gonzaga*, which was “two steps removed from” an individual’s right. Here, Medical Assistance provisions relied upon by plaintiffs have direct and “unmistakable focus,” on the rights of plaintiffs who are, undisputedly, eligible for the Medical Assistance. In direct contrast, the FERPA provision did not even directly reference individuals. Rather, the statute merely prohibited “policies and practices” by educational institutions. It did not identify with precision, as is the case here, a service or benefit to be provided to a person.

Indeed, the language relied upon by plaintiffs reflects precisely “the sort of ‘*individual* entitlement’ that is enforceable under § 1983.” *Gonzaga* at 2277 (emphasis in original). Because it is undisputed that plaintiffs are “individuals” who are eligible for “medical assistance,” these services must be made available to them. 42 U.S.C. § 1396a. *Gonzaga* simply requires that the statute to be enforced focus on the *individual* who seeks to enforce it. 122 S. Ct. at 2275-77. “For a statute to create such private rights, its text must be ‘phrased in terms of the person benefited,’ ” and have ‘an *unmistakable focus* on the benefited class’ ” *Id.* at 2275 (emphasis in original). Title XIX’s statutory requirements focus directly and unmistakably on individuals eligible for Medical Assistance. This is all that is necessary under the *Gonzaga* analysis to create an enforceable right.⁸

The statutory language which is at issue in this case also has an “individual,” versus an “aggregate,” focus. Title XIX’s entitlement provisions do not allow states to provide Medical Assistance services to some eligible people. Nor, does it require services with reasonable promptness to “most” eligible persons. Finally, the statute does not require that states merely have certain limited “policies and practices” which comply with Title XIX. Rather, 42 U.S.C. § 1396a(a)(10)(A) requires Alabama to make Medical Assistance benefits available with reasonable promptness to “*all individuals* ” who fall within the eligibility categories. 42 U.S.C. § 1396a(10)(A)(i) (emphasis added). Rather, unlike FERPA, the Medicaid provisions which plaintiffs seek to enforce here, focus exclusively on Medical Assistance recipients and their right to receive services in a timely manner.⁹

2. Defendants failed to Demonstrate that Congress Intended to Foreclose § 1983.

Defendants have also failed to meet their burden of proof to demonstrate that Congress intended to foreclose 42 U.S.C. § 1983 as a remedy. As an initial matter, Congress has not expressly foreclosed such relief. Rather, the “*Suter* Fix” demonstrates that Congress expressly intended to continue to allow plaintiffs to rely on § 1983 to enforce substantive provisions in Medicaid. Indeed, in at least two post-*Gonzaga* cases discussed below, the Fifth and Second Circuits have acknowledged the continuing viability of the “*Suter* fix.” See discussion of *Hood* and *Rabin*, at 15, 16, *infra*.

Moreover, defendants have failed to meet their burden to demonstrate that the use of any so-called administrative enforcement scheme is sufficiently comprehensive so as to meet the heavy burden imposed upon defendants.¹⁰ And, as explained in *Wilder supra*, the Medicaid Act does not contain comprehensive remedial scheme for the purpose of making the difficult showing needed to rebut the presumption of enforceability. See also *Doe v. Chiles, supra*.

3. Subsequent to *Gonzaga*, Numerous Courts have Continued to Enforce a Recipients’ Medicaid Claims Through 42 U.S.C. § 1983.

Since *Gonzaga*, numerous courts, including many Circuit Courts of Appeal, have held the statutory language relied upon by plaintiffs is enforceable through § 1983. Accordingly, defendants’ assertion that *Gonzaga* overruled the principles articulated *Doe v. Chiles* must be rejected.

In *S.D. v. Hood*, 391 F.3d 581, 604 (5th Cir. 2004), the Fifth Circuit held that section 1396a(a)(10) features “precisely the sort of ‘rights-creating’ language identified in *Gonzaga* as critical to demonstrating a congressional intent to establish a new right.” The only “potentially material difference” between section 1396a(a)(10) and the *Gonzaga*-approved rights-creating language of Titles VI and IX is that section 1396a(a)(10) requires state action under a medical assistance plan. However, the “*Suter* fix” renders the language enforceable. *Id.*

In *Sabree v. Richman*, 367 F.3d 180, 182 (3rd Cir. 2004) (Alito concurring), the Third Circuit recognized that *Gonzaga* “set the bar high for plaintiffs.” However, the Court held that Congress, nevertheless, unambiguously conferred on plaintiffs the right to enforce through §1983 the precise provisions of the Medicaid Act that plaintiffs seek to enforce in this action. Further, the *Sabree* Court found that *Gonzaga* did not overrule *Wilder* or *Wright*. *Id.* at 184.

In *Watson v. Weeks*, 436 F.3d 1152 (9th Cir. 2006), the Ninth Circuit found that 42 U.S.C. 1396a(a)(10) created individual rights enforceable under 42 U.S.C. 1983. “In holding that this statutory provision creates a right enforceable by section 1983, [the Circuit] joins five federal circuit courts that have already so held.” *Id.* at 1159. “No circuit court has held that section 1396a(a)(10) does not create a section 1983 right.” *Id.* at 1159-60. “Because section 1396a(a)(10) requires states to provide particularly specified benefits to particularly specified types of individuals, there is a presumption of a section 1983 right under *Blessing*.” *Id.* 1161.

In *Rio Grande Cmty. Health Ctr. v. Rullan*, 397 F.3d 56 (1st Cir. 2005), the First Circuit found that, while *Gonzaga* “tightened up” claims under § 1983, a federally qualified health center (FQHC), could enforce the state’s obligation to make payments under 42 U.S.C. §1396a(bb). *Id.* at 72-75. *Inter alia*, the statutory provision at issue identified a FQHC as a discrete beneficiary group and it spoke in “individualistic terms,” rather than focusing on the aggregate level of institutional policy or practice. The highly specific provision also identified how to calculate payments. Finally, the fact that the provision was in a state plan statute did not mean the provision could not be enforced. 42 U.S.C. 1320a-2. *See also, Rolland v. Romney*, 318 F.3d 42, 47-56 (1st Cir. 2003) (Medical Assistance recipients can enforce Title XIX nursing facility standards).

In *Rabin v. Wilson-Coker*, 362 F.3d 190 (2d Cir. 2004), the Second Circuit held that 42 U.S.C. § 1396r-6, a Medicaid Act provision requiring that transitional Medicaid assistance (TMA) be provided to certain individuals, was enforceable through §1983. *Gonzaga* was distinguished because the Medicaid provision’s language focuse[d] much more directly than does the FERPA provision [at issue in *Gonzaga*] on the individual’s entitlement. In particular, it contains no qualifying language akin to FERPA’s “policy or practice.” *Id.* at 201. Pursuant to the “*Suter* Fix,” the fact that the provisions spoke in terms of requiring state plan provisions did not change its enforceability. *Id.* at 202.

Other lower courts are in accord. *Rosie D. v. Romney*, 2006 WL 181393 (D. Mass. 2006), (could be used to enforce 1396a(a)(8) and 1396a(a)(10)). *Westside Mothers v. Olszewski*, 368 F.Supp.2d 740 (E.D. Mich. 2005) (a private right of action exists under 1983 to enforce 1396a(a)(8) and 1396a(a)(10)). *Okla. Chapter of Am. Acad. of Pediatrics v. Fogarty*, 366 F.Supp.2d 1050 (N.D. Okla. 2005) (Medicaid recipients could bring a private suit under 1983 to enforce 1396a(a)(8) and 1396a(a)(10)(A)(III)). *Reynolds v. Giuliani*, 2005 WL 342106 (S.D.N.Y. Feb. 14, 2005) (1396a(a)(8) gives rise to a 1983 claim). *Michelle P. ex rel. Deisenroth v. Holsinger*, 356 F.Supp.2d 763 (E.D. Ky. 2005) (42 U.S.C. § 1983 may be used to enforce 42 USC §1396a(a)(10)(A); 1396a(a)(10) (B); 1396a(a)(8);). *Clark v. Richman*, 339 F.Supp.2d 631 (M.D. Pa. 2004) (1396a(a)(8) and 1396a(a)(10) are enforceable under § 1983). *Mendez v. Brown*, 311 F.Supp.2d 134 (D. Mass. 2004) (1396a(a)(8) and 1396a(a)(10) each create a private right of action for Medicaid recipients). *Kerr v. Holsinger*, 2004 WL 882203 (E.D. Ky. Mar. 25, 2004) (1396a(a)(8) and 1396a(a)(10)(A) create a private right of action under § 1983). *Kenny A. ex rel. Winn v. Perdue*, 218 F.R.D. 277 (N.D. Ga. 2003) (1396a(a)(10)(A) confers a private right of action under § 1983). *Lewis v. N.M. Dept. of Health*, 275 F.Supp.2d 1319 (D.N.M. 2003) (1396a(a)(8) creates a private right of action under § 1983). *Ass’n of Residential Resources in Minn. v. Minn. Comm’r of Human Services*, 2003 WL 22037719 (D. Minn. Aug. 29, 2003) (notwithstanding *Gonzaga*, the provisions of the Medicaid Act are privately enforceable through 42 U.S.C. § 1983). *Mo. Child Care Ass’n v. Martin*, 241 F.Supp.2d 1032 (W.D.Mo.2003) (“If the Supreme Court had intended to overrule *Wilder*, one would expect the criticisms or clarification [of *Gonzaga University*] to be directed at *Wilder*, and not *Blessing* and *Suter*”). *White v. Martin*, 2002 WL 32596017 (W.D. Mo. Oct. 3, 2002) (1396a(a)(8) has been repeatedly found to give a Medicaid recipient the right to pursue action under § 1983). *Martin v. Taft*, 222 F.Supp.2d. 940 (S.D. Ohio 2002) (“Reasonable promptness” requirement 1396a(a)(8) was enforceable under § 1983). *Alexander A. ex rel. Barr v. Novello*, 210 F.R.D. 27 (E.D.N.Y. 2002) (1396a(a)(8) is enforceable under § 1983);¹¹ *Bryson v. Shumway*, 308 F.3d 79, at 88-89 (1st Cir. 2002) (Medical Assistance recipients can enforce Title XIX’s reasonable promptness mandate). Finally, in declining to reverse “three decades of case law” that allowed *Ex parte Young* lawsuits for injunctive relief to enforce Title XIX, one court wrote: “Reversing these precedents would require a dramatic -- and unwarranted -- departure from both the common understanding of *Ex parte Young* and its historic role in administering the Social Security Act.” *Rosie D. ex rel. John D. v. Swift*, 310 F.3d 230, 237 (1st Cir. 2002) (footnoted omitted).¹²

Significantly, defendants’ Memorandum makes no mention of these cases. However, in light of the clarity of the federal

rights which are created by the statutes relied upon by plaintiffs, as well as the overwhelming case law which recognizes the right to enforce such statutes, defendants motion should be denied.

III. THE LAW OF THE CASE MANDATES THAT DEFENDANTS' MOTION SHOULD BE DENIED.

The "law of the case" doctrine has been termed "an amorphous concept" that developed in this country nearly one century ago. *Arizona v. California*, 460 U.S. 605, 618 (1983); *See also Messenger v. Anderson*, 225 U.S. 436 (1912). In order for the doctrine to be applicable, an issue must be previously determined, either implicitly or explicitly. *Wheeler v. City of Pleasant Grove*, 746 F.2d 1437, 1440 (11th Cir. 1984). Although courts have been reluctant to import wholesale "law of the case" doctrine into original actions, prior rulings in such cases "should be subject to the general principles of finality and repose, absent changed circumstances or unforeseen issues not previously litigated. *Wyoming v. Oklahoma*, 502 U.S. 437, 446 (1992).

1. This Court Previously Denied Defendants' Motion to Dismiss for Failure to State a Claim under 42 U.S.C. § 1983.

"When a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983). In other words, an issue decided at one stage of a case is binding on later stages of the same case. *Toole v. Baxter Healthcare Corp.*, 235 F.3d 1307, 1313 (11th Cir. 2000). The State Defendants have already argued that the plaintiffs failed to state a claim upon which relief can be granted, relying heavily on arguments about Medicaid Act provisions that are recycled at greater length in their latest motion. Defendants' original Motion to Dismiss was denied by this Court. As demonstrated, *supra*, the defendants' claim that *Gonzaga* changed the law on plaintiffs' ability to state a claim is not well-founded regarding the specific Medicaid Act provisions at issue in this case.

2. The Defendants have not Alleged any Changed Circumstances or Unforeseen Issue in their Latest Motion to Dismiss.

The defendants' use of *Gonzaga* to resurrect their Motion to Dismiss is unfounded. Every post-*Gonzaga* Circuit court faced with this issue has recognized the enforceability of certain provisions of Title XIX through Section 1983. *Rio Grande Community Health Center v. Rullan*, 2005 US App. LEXIS 2390 (1st Cir. Feb. 14, 2005), *Rabin v. Wilson-Coker*, 362 F.3d 190 (2d Cir. 2004), *Sabree v. Richman*, 367 F.3d 180 (3rd Cir. 2004), *S.D. v. Hood*, 391 F.3d 581 (5th Cir. 2004), *Watson v. Weeks*, 436 F.3d 1152 (9th Cir. 2006). In the interest of finality and judicial economy, this court should deny the defendants' latest Motion to Dismiss.

IV. PLAINTIFFS ARE ENTITLED TO PURSUE THEIR CLAIMS UNDER THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION.

In defendants' memorandum in support of its motion for judgment on the pleadings, the defendants limit their Motion to plaintiffs' substantive due process claim under the Fourteenth Amendment to the United States Constitution. Thus, defendants have not moved to dismiss plaintiffs' procedural due process rights or equal protection claims. (Pls' Second Comp., ¶ 1; Counts I and II). It is well established that persons with disabilities, to include mental retardation, are entitled to equal protection under the Fourteenth Amendment. *See City of Cleburne v. Cleburne Living Ctr.*, 473, 454 U.S. 432 (1985) (acknowledging the "history of unfair and often grotesque mistreatment" of persons with such disabilities). *Alexander v. Choate*, 469 U.S. 287, 295 fn 12 (1985) ("well cataloged instances of invidious discrimination against the handicap do exist."). Such includes "lengthy and tragic history of discrimination, which includes segregation and denial of basic civil and constitutional rights for persons with disabilities, to include the plaintiffs here. *Cleburne*, 473 U.S. p. 461

Count II of plaintiffs' complaint alleges that eligible recipients, such as plaintiffs, are entitled to receive mandatory services and any optional service, to include residential placement and/or day habilitation and other services, in an amount, duration

or scope that is no less than those services available to other eligible recipients. 42 U.S.C. 1396a(a)(10)(B). The statute also requires that eligible recipients, to include plaintiffs, must receive services in an equal amount, duration and scope as available to other eligible recipients within their covered group. (Pls' Second Comp. ¶ 188-191).

Count III denotes that defendants have failed to provide such rights available to other eligible recipients with reasonable promptness. 42 U.S.C. 1396a(a)(8). (Pls' Second Comp. ¶ 192-195). As such, plaintiffs have alleged violations of the Fourteenth Amendment, in addition to violations of their substantive right to due process. Given that defendants have not moved to dismiss on either of these grounds, such claims may proceed. It is well established that discrimination on the basis of disability may include the equal provision of services based on, *inter alia*, the severity of a disability. *See, generally, Messier v. Southbury Training School*, 14 NDLR (Conn. 1999). Thus, given plaintiffs' allegations, it cannot be said that no set of facts would establish a violation of the equal protection clause.

Further, in *Youngberg v. Romeo*, 457 U.S. 307, 102 S.Ct. 2452 (1982), the Supreme Court established the right of persons with mental retardation who resided in state-run facilities to sue under the Due Process Clause of the Fourteenth Amendment. Here, plaintiffs are similarly situated to persons with mental retardation who reside in state-run facilities. Indeed, pursuant to Medicaid-eligibility rules, many of the named plaintiffs have already been determined -- by virtue of the placement on waiting lists maintained by the State Defendants -- to be eligible for placement in a state-run facility or, in the alternative, in a community placement.

Though no constitutional right to community placement exists, *P.C. v. McLaughlin*, 913 F.2d 1033, 1042 (2d Cir. 1990), state actors must comply with the *Youngberg*, professional judgment standard in deciding if mentally retarded residents should be placed at an institution or in the community. *Thomas S. v. Flaherty*, 902 F.2d 250, 252 (4th Cir. 1990); *Society for Good Will to Retarded Children v. Cuomo*, 737 F.2d 1239, 1249 (2d Cir. 1984); *Messier v. Southbury Training School*, 916 F.Supp. 133, 140 (D.Conn. 1996). In *Messier v. Southbury Training School*, 14 Nat. Disability Law Rep. ¶218 (D.Conn. 1999), the Court declined to award summary judgment to plaintiffs on their substantive due process claims, but allowed the claims to be heard.

Here, some plaintiffs have not been allowed to apply for services and other plaintiffs are receiving limited or no services. All have waited for years for needed services. In such circumstances, the due process question is not solely **where** plaintiffs should receive services, i.e., in a state-run facility or in the community. Rather, the question is also **whether** the State Defendants may deny the provision of services to persons deemed eligible to receive them, and *whether* in doing so the state has denied these plaintiffs their right to substantive due process. Thus, based on the standard which must be applied to a motion to dismiss, defendants' motion should be denied.

V. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Court deny the Defendants' Motion.

DATED: March 20, 2006

Footnotes

¹ To the extent that the Defendants rely on 42 U.S.C. § 1396c to support a claim that Title XIX creates no enforceable rights, (Def's. Memo. at 6), the argument ignores the fact that plaintiffs here do not seek to enforce 42 U.S.C. § 1396c. Further, compare *Sabree v. Richman*, 367 F.3d 180 (3d Cir. 2004) (enforcing 42 U.S.C. § 1396a(a)(8, 10) and noting plaintiffs were not seeking to enforce 1396c), with *Blessing* (finding "substantial compliance" provision similar to 1396c does not create federal right and remanded to determine whether another provision of the Social Security Act title in question did). Such an argument also ignores the Supreme Court's ruling in *Wilder*. The analysis used to assess whether Congress intends to foreclose private lawsuits under Section 1983 is also essentially the same as that employed to determine whether the Eleventh Amendment bars private lawsuits for injunctive relief ("*Ex parte Young*" lawsuits) based on the existence of a detailed remedial scheme. *Missouri Child Care Ass'n v. Cross*, 294 F.3d 1034, 1039 (8th Cir. 2002). Both before and after *Gonzaga University*, appellate courts have held that the Social Security Act's provisions allowing the federal government to terminate funding do not create the type of detailed remedial scheme that would preclude private enforcement through *Ex parte Young* lawsuits. *Id.* at 1038-39; *Antrican v. Odom*, 290 F.3d 178, 190 (4th Cir.

2002), *cert. denied*, 537 U.S. 973, 123 S. Ct. 467 (2002).

- 2 This is not the only instance in which Congress has acknowledged that some provisions of Title XIX may be enforced through private lawsuits. In fact, Congress rejected proposals in the mid-1990s to repeal Title XIX, transform Medical Assistance from an entitlement program to a block grant program, and prohibit individuals from using Section 1983 to challenge a state's failure to comply. *See* H.R. Rep. No. 104-651, at 213-14, 731-32, 2019-20 (1996); H.R. Rep. No. 104-350, at 211, 270, 288, 1069 (1995). *See also* H.R. Rep. No. 97-158, vol. II, at 301 (1981) (in proposing amendment to Title XIX, the House Committee noted that "in instances where the States or the Secretary fail to observe these statutory requirements, the courts would be expected to take appropriate remedial action."); *Wilder*, 496 U.S. at 516-18 & n.15 (discussing federal legislation and related history affecting states' immunity to suit under Title XIX's rate provision, the Court concluded that Congress understood that Title XIX conferred enforceable rights on Medical Assistance providers).
- 3 For example, Courts have routinely held that Medical Assistance recipients may use Section 1983 to enforce their entitlements to benefits under 42 U.S.C. § 1396a(a)(10)(A). *E.g.*, *Pediatric Specialty Care, Inc. v. Ark. Dep't of Human Services*, 293 F.3d 472, at 477-49 & n.5 (8th Cir. 2002); *Westside Mothers v. Haveman*, 289 F.3d at 862-63 (6th Cir. 2002), *cert. denied*, 537 U.S. 1045, 123 S.Ct. 618 (2002); *Antrican v. Buell*, 158 F. Supp.2d 663, 672-73 (E.D.N.C. 2001), *aff'd on other grounds sub nom. Antrican v. Odom*, 290 F.3d 178 (4th Cir. 2002), *cert. denied*, 537 U.S. 973, 123 S. Ct. 467 (2002); *Parry ex rel. Parry v. Crawford*, 990 F. Supp. 1250, 1254-55 (D. Nev. 1998) (ICF/MR services); *cf. K&A Radiologic Technology Services, Inc. v. Comm'r of Dep't of Health*, 189 F.3d 273, 280-81 (2d Cir. 1999) (while providers cannot enforce service provisions of Section 1396a(a)(10), (Medical Assistance recipients can enforce those provisions). *See also, Evergreen Presbyterian Ministries, Inc. v. Hood*, 235 F.3d 908, 927, 930-32 (5th Cir. 2000) (Medical Assistance recipients may enforce Title XIX rate provision, but provider may not).
- 4 In *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981), the Supreme Court noted that "in those instances where Congress has intended to fund certain entitlements as a condition of receiving federal funds, it has proved capable of saying so explicitly." *Id.* at 17-18. As an example of an instance in which Congress explicitly intended to create an enforceable entitlement, the *Pennhurst* Court cited the Social Security Act provision at issue in *King v. Smith*, 392 U.S. 309, 333 (1968), which "creates a federally imposed obligation [on the States] to furnish aid to families with dependent children ... with reasonable promptness as to all eligible individuals'" *Pennhurst*, 451 U.S. at 18 (emphasis added).
- 5 Defendants rely on *Harris v. James*, 127 F.3d 993 (11th Cir. 1997) to argue that federal regulations do not create individual rights enforceable through 42 U.S.C. 1983. However, defendants have mischaracterized plaintiffs' claims. Plaintiffs do not rely on the regulations implementing Medicaid to bring their claims under §1983. Rather, plaintiffs rely on the language contained within the Medicaid **statute** to create such rights. Further, in *Harris*, the Court found that the regulation at issue was contained in a federal regulation and **not** in the Medicaid Act. The Eleventh Circuit also made it clear that in reaching its decision in *Harris* was "not deciding the issue of whether § 1396a(a)(8) gives rise to a federal right to reasonably prompt provision of assistance." *Doe*, 136 F.3d at 715. Likewise, *Alexander v. Sandoval*, 532 U.S. 275, 121 S.Ct. 1511 (2001) is inapplicable as plaintiffs rely on the Medicaid Act, not implementing regulations, to create enforceable federal rights. Finally, several courts are in accord with *Doe*. *Boulet v. Cellucci*, 107 F. Supp.2d at 79-81; *Kirk T. v. Houstoun*, Civil Action No. 99-3253, 2000 WL 830731 at *4 (E.D. Pa. June 27, 2000); *Rolland v. Cellucci*, 52 F. Supp.2d 231, 239-40 (D. Mass. 1999); *Sobky v. Smoley*, 855 F. Supp. 1123, 1147-48 (E.D. Cal. 1994). Further, the absence of any time frame within which services will be provided is itself a violation of the reasonable promptness mandate. *See Kirk T. v. Houstoun*, 2000 WL 830731 at *3.
- 6 Defendants' argument that plaintiffs cannot enforce contractual provisions between state and federal government must also be rejected. *Wehunt v. Ledbetter*, 875 F.2d 1558 (1989). The majority opinion in *Blessing* recognized that, even though plaintiffs were beneficiaries of the agreement, Title IV-D, in certain situations, could be enforced through 42 U.S.C. 1983. The court then remanded the case to "separate out the particular rights (the Court) believed arise from the statutory scheme. . . ." *Blessing*, 117 S.Ct. at 1362. And, as defendants have already recognized, both the Third and Sixth Circuits have held that, while recipients of Title XIX services are the intended beneficiaries of 42 U.S.C. 1396a(a)(8), (10), and (15), they, nonetheless, may enforce the statutes via 42 U.S.C. 1983. *Sabree v. Richmond*, 367 F.3d 180 (3rd Cir. 2004); *Westside Mothers v. Haveman*, 289 F.3d 1852 (6th Cir. 2002) (holding that Medical Assistance statute is no mere contract between federal and state governments; that Spending Clause statutes are the supreme law of the country; and that entitlement provision of Title XIX is enforceable by Medical Assistance recipients). The state, while disagreeing with such conclusions, has failed to articulate any problem with these decisions' reasoning. Finally, the U.S. Supreme Court's decision in *Barnes v. Gorham*, 536 U.S. 101, 122 S.Ct. 2997 (2002), does not imply otherwise. *Barnes* examined the issue as to whether plaintiffs were entitled to punitive damages in an action brought pursuant to certain civil rights statutes which invoked Congress' power under the Spending Clause. While the Court found under a contract law analogy that punitive damages were not available, it recognized the availability of compensatory type damages in spending clause litigation. Further, see fn 7, which recognizes that the contract analysis is not an overlay onto federal statutes..
- 7 The Court also cited FERPA's unique enforcement mechanism -- a centralized, federal review board that allowed students and parents to file individual complaints -- to support its conclusion that FERPA did not create rights enforceable through Section 1983 suits. *Gonzaga*, 122 S. Ct. at 2278. This centralized review provision was established to prevent multiple interpretations of FERPA.

It is undisputed that Title XIX does not create the type of centralized, federal review process cited in *Gonzaga*.

- 8 By analogy, the Supreme Court cited Titles VI and IX of the Civil Rights Act, which prohibit “discrimination,” as examples of statutes that unequivocally conferred enforceable rights because they focus on the individual. “Discrimination” under those statutes may take a variety of forms, but whether a particular action constitutes discrimination in a particular case does not undermine the enforceability of the statutes. Thus, whether defendants here have violated Title XIX’s reasonable promptness mandate by failing to establish any time frame for the provision of Medicaid services and by maintaining lengthy waiting lists relates to the merits of the case -- not whether the underlying right is enforceable by the plaintiffs.
- 9 The State Defendants’ reliance on *31 Foster Children v. Bush*, 329 F.3d 1255 (11th Cir. 2003) (alleging violations of Adoption Assistance and Child Welfare Act), and *Arrington v. Helms*, -- F.3. -- (11th Cir. 2006), 2006 WL 321955 (11th Cir. Ala. Feb. 13, 2006), is misplaced. Neither case addresses the Medicaid provisions at issue in this case. Nor does either case overrule *Doe v. Chiles*, *supra*. First, in *31 Foster Children*, the Court noted with favor, the U.S. Supreme Court’s decision in *Wilder*. Further, in *31 Foster Children*, the Court found that the plaintiffs relied upon statutory language contained within a definitional section, as well as the existence of a vague “case review system.” In *Arrington*, the Court found that the language at issue required only that the state distribute child support payments in a certain manner, rather than to individual parents. As such, it did not have an “unmistakable focus” on the persons to be benefited.
- 10 Defendants do not seriously assert otherwise. While defendants reference 42 U.S.C. § 1396a(a)(3), as well as 42 U.S.C. § 1396c, which allows a federal agency to withhold payments to a state which has not “substantially complied” with requirements contained in its plan, these provisions do not equate to the conclusion that Congress has intended to foreclose plaintiffs’ utilization of 42 U.S.C. § 1983. (Defs’ Brf. pp. 5-6, 15-16). See *Blessing*, *supra*; *Wilder*, *supra*. Title XIX’s statutory provisions are written in terms of the state plan’s requirements, this does not change the result, especially given the “*Suter* Fix.” 42 U.S.C. § 1320a-2. Further, *Gonzaga* reiterates that the underlying purpose of the inquiry is a determination of congressional intent to create an enforceable right. The enactment of 42 U.S.C. § 1320a-2 crucially reflects Congress’s understanding that certain provisions of the Social Security Act are enforceable through private lawsuits. *Hood*, *supra*; *Rabin*, *supra*.
- 11 Nor, is the mandate is rendered unenforceable because it is phrased in terms of ‘reasonableness.’ (“While there may be a range of reasonable [time periods for provision of assistance], there certainly are *some* [time periods] outside that range that no State could ever find to be reasonable ... under the [Medicaid] Act.” “Common law courts have reviewed actions for reasonableness since time immemorial.” *Bryson v. Shumway*, 308 F.3d at 89; *Martin v. Taft*, 222 F. Supp.2d at 978.) Moreover, defendants, at minimum, must establish time lines to measure reasonable promptness for a particular Medical Assistance service. *Kirk T. v. Houstoun*, 2000 WL 830731 at *3. Defendants’ failure to establish any maximum time limit on the provision of services -- whether six months or six years -- within which Medicaid services must be provided violates the reasonable promptness mandate. Second, the Court can look to the administrative procedures used by the defendants to determine whether they result in a system that generally yields undue delays in the provision of the service. See 42 C.F.R. § 435.930(a). Here, for example, the State Defendants have significant control over the development and provision of Medicaid services need by plaintiffs, yet have adopted a policy that restrains the development of new services, resulting in lengthy waiting lists such as those experienced by the Plaintiffs’ Compl. ¶1, at 3. The Court can examine this and other administrative policies and practices implemented by the State Defendants to assess objectively whether those policies and practices have led to a shortage of services to meet plaintiffs’ needs. Finally, the Court can examine evidence concerning the general time needed by providers to develop the services.
- 12 Nor should *Gonzaga University* be construed to limit private enforcement of Spending Clause statutes. Cf. *Farley v. Philadelphia Housing Auth.*, 102 F.3d 697, 703-04 (3d Cir. 1996) (rejecting argument that Supreme Court rulings sought to limit private enforcement of Spending Clause statutes).