IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

PLANNED PARENTHOOD ARKANSAS & EASTERN OKLAHOMA, d/b/a PLANNED PARENTHOOD OF THE HEARTLAND; JANE DOE #1, JANE DOE #2; and JANE DOE #3 **PLAINTIFFS**

v. **Case No. 4:15-cv-00566-KGB**

CINDY GILLESPIE, DIRECTOR, ARKANSAS DEPARTMENT OF HUMAN SERVICES, in her official capacity **DEFENDANT**

PRELIMINARY INJUNCTION ORDER ON BEHALF OF THE PATIENT CLASS

Before the Court is the motion for preliminary injunction on behalf of Patient Class[1] filed by plaintiffs Planned Parenthood of Arkansas & Eastern Oklahoma, d/b/a Planned Parenthood of the Heartland ("PPH") and Jane Doe #1, Jane Doe #2, and Jane Doe #3 ("Jane Does") (Dkt. No. 98). Defendant Cindy Gillespie, who is sued in her official capacity as Director of the Arkansas Department of Human Services ("ADHS"), has responded in opposition to the motion (Dkt. No. 105). PPH and the Jane Does have replied (Dkt. No. 109). ADHS then filed a sur-reply (Dkt. No. 120) and subsequently informally requested permission from the Court to file a supplemental response to her response in opposition to the motion to expand the preliminary injunction to the

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[1] On January 25, 2016, the Court granted a motion to certify a class (referred to in this Order as the "Patient Class") (Dkt. No. 86). The certified class consists of patients who seek to obtain, or desire to obtain, health care services in Arkansas at PPH through the Medicaid program. The Court notes that other cases with claims like those presented here have proceeded without a class being certified, with class-wide injunctive relief being granted based on the general equity powers of the court or the so-called "necessity doctrine." *See, e.g., Planned Parenthood of Kansas and Mid-Missouri v. Mosier*, Case No. 16-2284-JAR-GLR, 2016 WL 3597457 (D. Kan. 2016) (granting preliminary injunction that reinstates provider agreement without ruling on motion for class certification); *Planned Parenthood S.E., Inc. v. Bentley*, 141 F.Supp.2d 1207, 1226-27 (M.D. Ala. 2015) (same); *Planned Parenthood Gulf Coast, Inc. v. Kliebert*, 141 F.Supp.3d 605, 652 (M.D. La. 2015), *aff'd* – F.3d –, 2016 WL 4895921 (5th Cir. 2016) (same).

Patient Class. The Court granted this request, and ADHS filed a supplemental response (Dkt. No. 121). PPH and the Jane Does then filed supplemental memorandums in support of their motion (Dkt. Nos. 122, 124), to which the Court gave ADHS an opportunity to respond. ADHS filed a further reply in opposition to plaintiffs' preliminary injunction motion and a response to the notice of supplemental authority (Dkt. Nos. 125, 126).

PPH and the Jane Does ask this Court, pursuant to Federal Rule of Civil Procedure 65, for a preliminary injunction on behalf of the Patient Class preliminarily enjoining ADHS from terminating the Medicaid provider agreements of PPH. Alternatively, PPH and the Jane Does ask this Court to expand the preliminary injunction to cover the Patient Class pursuant to Federal Rule of Civil Procedure 62(c).

I. Procedural Background

PPH and the Jane Does first filed a motion for temporary restraining order and preliminary injunction on September 11, 2015 (Dkt. No. 3). In this motion, PPH and the Jane Does alleged that, starting on September 21, 2015, absent an injunction, patients insured through the Medicaid program who choose to get family planning and other health care services at PPH would lose access to services, would lose their provider of choice, would find their family planning services interrupted, and would be left with few or no adequate alternative providers (Dkt. No. 12, ¶¶ 8, 34). PPH and the Jane Does also contended that, "[i]f PPH is forced to stop providing care through the Medicaid program, a dire situation will become critical. The remaining providers will be simply unable to absorb PPH's patients, leaving those patients without access to crucial medical services." (Dkt. No. 12, ¶ 43).

Further, they alleged that, "[w]ithout Medicaid reimbursements, PPH may be unable to continue to provide services in the same manner and may be forced to lay off staff members

and/or reduce hours at one or both health centers." (Dkt. No. 12, ¶ 49). They also alleged that, "if PPH's termination from the Medicaid program is allowed to take effect for some period of time and it then is later allowed to become a Medicaid provider again, some patients will remain confused about whether PPH is a Medicaid provider in good standing, and therefore will not return as patients." (Dkt. No. 12, ¶ 49). In their original motion for preliminary injunction PPH and the Jane Does claimed, and in their motion to expand the preliminary injunction PPH and the Jane Does claim, that the suspension of Medicaid payments violates certain provisions of the Medicaid statutory and regulatory scheme set out in 42 U.S.C. § 1396 and violates their rights under the First and Fourteenth Amendments to the United States Constitution.

Counsel for ADHS has argued to the Court that any assertion of irreparable harm by PPH is, and has been, illusory because, under the Medicaid program, PPH has up to one year after providing services to a patient to seek reimbursement for the cost of that service. In other words, ADHS advanced the argument that PPH could continue to provide services in the same manner with the possibility of reimbursement within one year after providing services and suffer no real financial harm. The one-year reimbursement time limit ends on October 1, 2016.

On September 18, 2015, this Court granted PPH and the Jane Does' motion for temporary restraining order (Dkt. No. 21). The Court temporarily restrained ADHS "for a period of 14 days from the date of entry of this Order from suspending Medicaid payments to PPH for services rendered to Medicaid beneficiaries, including but not limited to the Jane Does." (Dkt. No. 21, at 19). At that stage of the proceedings, the Court conducted a status conference with counsel concerning a briefing schedule and potential hearing. For the reasons set forth in its Order, the Court permitted ADHS to obtain evidentiary material from the Jane Does (Dkt. No. 25). The Court did not regulate the number, scope, or timing of the written questions ADHS submitted to

the Jane Does. The Court instructed counsel from both sides to meet and confer on these matters, and although the Court did later enter an Order clarifying its earlier Order on the permitted discovery, the Court was not asked to resolve or clarify any other issues in regard to the questions submitted to the Jane Does (Dkt. No. 32). Also at that stage of the proceeding, the Court raised with counsel again, and directed counsel to brief, standing issues.

On October 2, 2015, the Court then entered a preliminary injunction more limited in scope – limiting the relief granted to just the Jane Does (Dkt. Nos. 44, 45). The Court subsequently granted PPH and the Jane Does leave to file a second amended complaint (Dkt. No. 63). In their second amended complaint, PPH and the Jane Does added class action allegations (Dkt. No. 64, ¶¶ 50-55). At the same time, PPH and the Jane Does moved this Court to certify a class of patients who seek to obtain, or desire to obtain, health care services in Arkansas at PPH through the Medicaid program (Dkt. No. 50).

On October 6, 2015, ADHS filed a motion for leave to notice four depositions (Dkt. No. 56). The Court conducted a status hearing on the motion. ADHS requested leave to depose Jane Doe #1, Jane Doe #2, and Jane Doe #3 and to conduct a Federal Rule of Civil Procedure 30(b)(6) deposition of a PPH representative before responding to the pending motion for class certification. ADHS claimed that it sought these depositions to test, at least, the typicality and adequacy requirements for class certification (Dkt. No. 55, at 4). ADHS wanted to conduct this discovery prior to the Court ruling on the then-pending motion for class certification. For reasons set out in its Order, the Court denied the motion for leave to notice four depositions and for expedited discovery (Dkt. No. 66).

On January 25, 2016, the Court granted the motion to certify a class (referred to in this Order as the "Patient Class") (Dkt. No. 86). The certified class consists of patients who seek to

obtain, or desire to obtain, health care services in Arkansas at PPH through the Medicaid program. ADHS sought interlocutory review of this Court's class certification Order and denial of the motion for expedited pre-certification discovery decision. *See Planned Parenthood Ark. & E. Okla., d/b/a Planned Parenthood of the Heartland v. Selig*, Case No. 16-8003 (8th Cir. Feb. 5, 2016). The Eighth Circuit Court of Appeals denied ADHS's request for interlocutory review. *Id*.

PPH and the Jane Does then moved for a preliminary injunction extending to the newly-certified Patient Class the same relief already granted the Jane Does (Dkt. No. 98). ADHS subsequently filed a motion seeking expedited discovery before the Court ruled on the motion for preliminary injunction seeking to extend to the newly-certified class the same relief already granted to the Jane Does (Dkt. No. 113). PPH and the Jane Does responded in opposition to the motion for expedited discovery (Dkt. No. 115), and ADHS replied (Dkt. No. 116). The Court then conducted a status conference to discuss the motion for expedited discovery on August 19, 2016, before eventually denying the motion (Dkt. No. 119).

Since the status conference, ADHS has filed a sur-reply (Dkt. No. 120) and subsequently informally requested permission from the Court to file a supplemental response to its response in opposition to the motion to expand the preliminary injunction to the patient class. The Court granted this request, and ADHS filed a supplemental response (Dkt. No. 121). PPH and the Jane Does then filed supplemental memorandums in support of their motion (Dkt. Nos. 122, 124), to which the Court gave ADHS an opportunity to respond. ADHS filed a further reply in opposition to plaintiffs' preliminary injunction motion and a response to notice of supplemental authority (Dkt. Nos. 125, 126).

II. Findings Of Fact

The Court makes the following findings of fact, and the Court incorporates by reference as if restated herein word for word all findings of fact from its Order granting the motion for preliminary injunction as to the Jane Does (Dkt. No. 45).

1. The Patient Class certified in this matter consists of patients who seek to obtain, or desire to obtain, health care services in Arkansas at PPH through the Medicaid program.

2. Since this Court issued its Order granting the motion for preliminary injunction as to the Jane Does on October 2, 2015, ADHS has only been required to reimburse PPH for Medicaid services provided to these three patients identified in this litigation as the Jane Does; ADHS has not made such reimbursements to PPH for any other Medicaid patients (Dkt. No. 105, at 5).

3. Mark White, Deputy Director of ADHS, who supervises the Division of Medical Services which administers Arkansas's Medicaid Program, states that "at Governor Asa Hutchinson's directive, DHS Director John Selig gave written notice that DHS would terminate the three (3) PPH provider agreements in 30 days, exercising its rights to do so under the 'voluntary' termination provision (Section III.A) of said agreements." (Dkt. No. 16-1, ¶5).

4. Both prior to October 2, 2015, and between October 2, 2015, and the present, at its two Arkansas health centers, PPH has provided services to patients insured through the Medicaid program without charging patients for Medicaid-eligible services (Dkt. No. 102, ¶ 1).

5. From October 2, 2015, to the present, PPH has not reduced, altered, or discontinued the services available to Medicaid patients in its two Arkansas health centers as a result of PPH not currently being able to seek reimbursement for Medicaid-eligible services provided to Medicaid patients other than the three named Jane Doe Plaintiffs (*Id.*, ¶ 2).

6. From October 2, 2015 to the present, PPH has stated "Medicaid Accepted" on the websites for its Little Rock and Fayetteville, Arkansas, health centers (*Id.*, ¶ 3).

7. The clinic hours, the availability and hours of walk-in services, and staffing at PPH's two Arkansas health centers have not decreased since October 2, 2015, as a result of PPH's current inability to seek reimbursement for Medicaid-eligible services provided to Medicaid patients other than the three named Jane Doe Plaintiffs (*Id.*, ¶ 4).

8. PPH and the Jane Does state that in late February and early March 2016, Holly Ajanel, Center Manager of the Little Rock Health Center at PPH, placed telephone calls to the Little Rock Family Practice Clinic's two locations in Little Rock, Arkansas, and asked about appointment availability for a new Medicaid patient seeking birth control services. Both locations informed Ms. Ajanel that they are not accepting Medicaid patients. The staff member with whom Ms. Ajanel spoke also told her that, while their doctors can perform services such as pap smears, they usually suggest that patients obtain such services from their obstetrician/gynecologist because that is their specialty (Dkt. No. 99, Ex. A, ¶ 1).

9. In the same time period, Ms. Ajanel placed a telephone call to the Genesis Women's Clinic, PA, in Little Rock, Arkansas, and again asked about appointment availability for a new Medicaid patient seeking birth control services. The staff member with whom she spoke represented to her that Medicaid patients must have a referral from a primary care physician in order to obtain these services (*Id.*, ¶ 3).

10. In March 2016, Ms. Ajanel placed telephone calls to the Arkansas Department of Health's Central Unit and North Little Rock, Arkansas, locations and again asked about services for a new Medicaid patient seeking birth control. Both locations told her that they do not provide birth control on a walk-in basis, and they also informed her that a patient would be required to

have a pelvic exam before obtaining hormonal birth control such as birth control pills. Ms. Ajanel also called the Arkansas Department of Health's Southwest Little Rock, Arkansas, unit, was told that they do not offer birth control services, and was referred instead to call the Central Unit (*Id.*, ¶ 4).

11. Ms. Teesha Taylor, Training Manager at PPH, placed a telephone call on March 11, 2016, to Her Health Washington Regional in Fayetteville, Arkansas, and inquired about appointment availability for a new Medicaid patient seeking birth control services. The staff member with whom Ms. Taylor spoke informed her that they were not accepting Medicaid patients who are not pregnant (Dkt. No. 99. Ex. B, ¶ 2).

12. On the same date, Ms. Taylor placed a telephone call to Northwest Arkansas Ob/Gyn Associates in Springdale, Arkansas, also known as Creekside Center for Women, and again inquired about appointment availability for a new Medicaid patient seeking birth control services. The staff member with whom Ms. Taylor spoke informed her that Medicaid patients seeking such services must have a referral from a primary care physician. The staff member also told Ms. Taylor that, to receive hormonal contraception, patients must have a pap smear. The staff member also represented to Ms. Taylor that patients cannot be seen on a walk-in basis, that appointment availability depends on which doctor is requested, but that appointment lead times are usually in the three to four week range (*Id.*, ¶ 3).

13. On March 14, 2016, Ms. Taylor placed a telephone call to Mercy Health System of NWA, Inc., in Rogers, Arkansas, and inquired about appointment availability for a new Medicaid patient seeking birth control services. PPH and the Jane Does represent that, from www.mapquest.com, Rogers, Arkansas, is located approximately 24 miles from Fayetteville, Arkansas. The staff member with whom Ms. Taylor spoke told her that Medicaid patients

seeking such services must have a referral from a primary care physician. The staff member also told Ms. Taylor that, to receive hormonal contraception, patients must have a pap smear. Finally, the staff member told Ms. Taylor that the first available appointment would not be for at least seven weeks. Ms. Taylor asked if there were any other health centers within the Mercy System at which she could obtain reproductive healthcare, and the staff member stated that there were not unless she was pregnant (*Id.*, ¶ 4).

III. Conclusions Of Law

PPH and the Jane Does move this Court pursuant to Federal Rule of Civil Procedure 65 for a preliminary injunction on behalf of the Patient Class preliminarily enjoining Ms. Gillespie, her employees, agents, and successors in office "from terminating the Medicaid provider agreements of [PPH]" (Dkt. No. 98, at 1). Plaintiffs alternatively request that the Court modify the injunction previously entered and extend its coverage to the Patient Class pursuant to Federal Rule of Civil Procedure 62(c).

A. Jurisdiction

On October 2, 2015, when the Court entered the order preliminarily enjoining ADHS from suspending Medicaid payments to PPH for services rendered to Medicaid beneficiaries the Jane Does until further order from this Court, ADHS immediately appealed that Order. ADHS represents that the briefing on the appeal is complete, and the case is ready for oral argument (Dkt. No. 105, Ex. F). "An appeal to the circuit court divests the district court as to those issues involved in the appeal." *In re Grand Jury Subpoena Duces Tecum*, 85 F.3d 372, 376 (8th Cir. 1996); *see also Board of Education of St. Louis v. State of Missouri*, 936 F.2d 993, 995 (8th Cir. 1991); *St. Jude Medical, S.C., Inc. v. Biosense Webster, Inc.*, 2015 WL 317362 at *1 (D. Minn. Jan. 26, 2015).

Rule 62(c) is an exception to the general rule that an appeal divests the district court of jurisdiction with regard to the issues involved in the appeal. Rule 62(c) provides that, "[w]hile an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore or grant an injunction on terms for bond or other terms that secure the opposing party's rights." Fed. R. Civ P. 62(c).

PPH and the Jane Does argue that "[i]t is axiomatic that while appeal of a preliminary injunction is pending, the district court retains jurisdiction to continue proceedings in the case before it, including to reach final judgment on the case. As the Eighth Circuit has observed, 'the pendency of an interlocutory appeal from an order granting or denying a preliminary injunction does not wholly divest the District Court of jurisdiction over the entire case' and thus is no impediment to its being tried or otherwise finally resolved. *West Pub. Co. v. Mead Data Cent. Inc.*, 799 F.2d 1219, 1229 (8th Cir. 1986); *see Janousek v. Doyle*, 313 F.2d 916, 920 (8th Cir. 1963) ('filing of the notice of appeal from [interlocutory order denying a preliminary injunction motion] does not… divest the district court of jurisdiction to proceed with the cause with respect to any matter not involved in the appeal.'); *United States v. Queen*, 433 F.3d 1076, 1077 (8th Cir. 2006) ('Although a federal district court and a federal court of appeals should not assert jurisdiction over a case at the same time, a notice of appeal only divests the lower court of jurisdiction over aspects of the case that are the subject of the appeal.'); 11A Fed. Prac. & Proc. Civ. § 2962 (3d ed.) ('An appeal from the grant or denial of a preliminary injunction does not divest the trial court of jurisdiction or prevent it from taking other steps in the litigation while the appeal is pending. According to Rule 62(a) there is no automatic stay of the judgment in an injunction suit pending an interlocutory appeal. . . and the case may proceed to a trial on the merits.'). . . ." (Dkt. No. 109, at 6-7).

Plaintiffs also note that they are asking the Court to issue a new preliminary injunction protecting Patient Class members who were not previously before the Court. The members of the class were not parties to this action when the Court issued its preliminary injunction Order as to the Jane Does (Dkt. No. 45). This Court has examined the arguments proffered by ADHS contending that this Court does not have jurisdiction to decide the instant motion under either Rule 65 or Rule 62(c). After considering the parties' arguments and examining the authorities cited, the Court finds that the Court has the authority to proceed in resolving pending issues in this case to move this case toward final disposition. Thus, this Court finds that it has jurisdiction to analyze the pending motion under Rule 65.

Further, other courts presiding in cases with claims like those presented here have proceeded without a class being certified, with class-wide injunctive relief being granted based on the general equity powers of the court or the so-called "necessity doctrine." *See, e.g., Planned Parenthood of Kansas and Mid-Missouri v. Mosier*, Case No. 16-2284-JAR-GLR, 2016 WL 3597457 (D. Kan. 2016) (granting preliminary injunction that reinstates provider agreement without ruling on motion for class certification); *Planned Parenthood S.E., Inc. v. Bentley*, 141 F.Supp.2d 1207, 1226-27 (M.D. Ala. 2015) (same); *Planned Parenthood Gulf Coast, Inc. v. Kliebert*, 141 F.Supp.3d 605, 652 (M.D. La. 2015), *aff'd* – F.3d –, 2016 WL 4895921 (5th Cir. 2016) (same). This Court finds it appropriate to proceed in analyzing the pending motion and considering what relief the Patient Class should be afforded at this stage.

B. The *Dataphase* Factors

The Court incorporates by reference as if restated herein word for word its analysis of the *Dataphase* factors in its Order granting the motion for preliminary injunction as to the Jane Does (Dkt. No. 45, at 17-31). *See Kroupa v. Nielsen*, 731 F.3d 813, 818 (8th Cir. 2013) (quoting

Dataphase Sys. Inc. v. CL Sys., 640 F.2d 109, 114 (8th Cir. 1981)). The analysis of the factors as to the Jane Does in the previous Order applies equally to the analysis of these same factors for the Patient Class. The Court will specifically address in this Order the irreparable harm factor, as this is one of the arguments posited by ADHS in its opposition to the issuance of a preliminary injunction to the Patient Class.

1. The Threat Of Irreparable Harm

A plaintiff seeking temporary injunctive relief must establish that the claimant is "likely to suffer irreparable harm in the absence of preliminary relief." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). A threat of irreparable harm exists when a party alleges a harm that may not be compensated by money damages in an action at law. *See Kroupa*, 731 F.3d at 820; *Glenwood Bridge, Inc. v. City of Minneapolis,* 940 F.2d 367, 371-72 (8th Cir. 1991). Courts in the Eighth Circuit will not issue an injunction in the absence of evidence of class-wide irreparable harm. *See, e.g., Agnotti v. Rexam Inc*., 2006 WL 3043130 at *13 (D. Minn. 2006).

As this Court has observed, Arkansas law is instructive although admittedly not controlling on this issue. The Supreme Court of Arkansas has found in other contexts that harm to a doctor-patient relationship can constitute irreparable harm. *See Baptist Health v. Murphy*, 226 S.W.3d 800 (Ark. 2006); *Cf. Roudachevski v. All–American Care Centers, Inc.*, 648 F.3d 701 (8th Cir. 2011) (holding that an already-disrupted doctor-patient relationship did not constitute irreparable harm).

Here, PPH and the Jane Does allege that the Patient Class will suffer irreparable harm absent the requested injunction because the class members' relationship with PPH, their chosen family planning provider, will be disrupted, causing reduced access to family planning services in violation of their statutory rights under 42 U.S.C. § 1396a(a)(23). ADHS again argues, as it

did in opposition to the first motion for preliminary injunction in this matter, that alternative providers are available. As the Court found in its Order granting the motion for preliminary injunction, the right does not protect the class members' right to a substitute or similar provider. As this Court has concluded, the right entails "an absolute right to be free from government interference with the choice to [receive family planning services from a provider] that continues to be qualified." *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 785 (1980). Here, the Patient Class consists of patients who seek to obtain, or desire to obtain, health care services in Arkansas at PPH through the Medicaid program (Dkt. No. 86).

In addition to disrupting the class members' relationship with their chosen provider of family planning services and other preventive healthcare, this loss would reduce the Patient Class's access to such services by depriving its members of access to PPH's flexible and convenient scheduling. The Court has already recognized in its motion certifying the class that these harms would affect the class as a whole (Dkt. No. 86, at 16). Based on the record before the Court, the Court confirms that these harms would affect the Patient Class as a whole.

PPH and the Jane Does have also supplementally provided notice to the Court that, on September 14, 2016, a panel of the United States Court of Appeals for the Fifth Circuit unanimously affirmed a preliminary injunction enjoining Louisiana from terminating a Planned Parenthood affiliate from Medicaid following the release of the videos at issue here. *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 2016 WL 4895921 (5th Cir. Sept. 14, 2016). The Fifth Circuit agreed with the Louisiana district court that the individual plaintiffs "will almost certainly suffer irreparable harm" without a preliminary injunction because they "would otherwise be denied both access to a much needed medical provider and the legal right to the qualified provider of their choice." *Id.* at *16. Specifically, the Fifth Circuit found that it was

"beside the point" that the individual plaintiffs could find health services elsewhere because they "would be denied the provider of their choice guaranteed under 42 U.S.C. § 1396a(a)(23)." *Id.*

Even if this Court were to assume that the violation of the choice-of-provider right is not enough to constitute the threat of irreparable harm, although this Court believes it is, PPH and the Jane Does have placed into the record affidavits of Holly Ajanel, the Center Manager of the Little Rock Health Center at PPH, and Teesha Taylor, the Training Manager at PPH (Dkt. No. 99, Exs. A, B). Both Ms. Ajanel and Ms. Taylor state under oath that they contacted other providers in Pulaski County and Washington County, Arkansas, some of whom stated they could not provide specific services offered by PPH, they were not accepting Medicaid patients, and enumerated various other hurdles a Medicaid patient would face in obtaining family planning and reproductive services from their clinics (*Id.*). As a result, it is the finding of this Court for all of these reasons that plaintiffs have met their burden to demonstrate the threat of irreparable harm to the Patient Class, if the motion for preliminary injunction is not granted.

2. PPH's Coverage of Medicaid Patient Costs

ADHS contends that the Patient Class does not face the threat of irreparable harm by the termination of PPH from the Medicaid program because PPH has temporarily covered the cost of these services while plaintiffs have gone through the steps needed to try to obtain a broader preliminary injunction that would protect the ability of all of PPH's Medicaid patients to receive services from PPH through the Medicaid program (Dkt. No. 105, at 5-9). PPH and the Jane Does assert that this argument fails because PPH—a non-profit medical provider committed to providing family planning services and other preventive care to the women and men of Arkansas—cannot continue providing services without payment indefinitely. Rather, PPH puts forth record evidence that it decided to take on this burden to protect its patients while plaintiffs' motion for class certification and subsequent motion for a preliminary injunction on behalf of the

newly-certified Patient Class were pending (Dkt. No. 109, Ex. A, de Baca Decl. ¶ 6). Suzanna de Baca, President and Chief Executive Officer of PPH, represents that, if the Court denies the instant preliminary injunction motion, PPH will no longer provide services to its Medicaid patients without payment; these patients will be forced to either pay out of pocket for these services or attempt to obtain services from another Medicaid provider (*Id*., ¶ 8).

ADHS claims that this Court should not find Ms. de Baca's statements credible because she allegedly misrepresented PPH's ability or willingness to provide services to Medicaid patients in the absence of a preliminary injunction in her prior declaration and in PPH's briefing. Specifically, ADHS claims that Ms. de Baca stated that, if the Court did not grant injunctive relief, patients would be denied access to Medicaid services at PPH, their provider of choice (Dkt. No. 105, at 2-5). That situation has not come to pass yet, based on the record evidence.

In response, PPH and the Jane Does contend that ADHS's "accusations ignore the procedural history of this case. When the statements [ADHS] complains of were made, PPH did not contemplate a scenario where this Court ruled in plaintiffs' favor on all four preliminary injunction factors but determined that in the absence of class certification it could not grant a preliminary injunction that covered all of PPH's patients." (Dkt. No. 109, at 4). PPH and the Jane Does also state "that Ms. de Baca's statements were made before [ADHS]'s repeated representations that if initial relief was not granted but this Court subsequently granted injunctive relief, PPH would be entitled to seek reimbursement for services provided to Arkansas Medicaid patients for a year from the date of service (even though no injunction was in place at the time of the service)." (Dkt. No. 109, at 4) (citing Dkt. No. 26-1, at 17-18, 52; Dkt. No. 21, at 19)).

Ms. de Baca's declaration states that, if not for this Court's Order ruling in plaintiffs' favor on most issues but holding additional procedural steps were needed before the Court could

consider granting a preliminary injunction on behalf of PPH's patients other than the individual Jane Doe plaintiffs, combined with the State's representation that PPH would have the opportunity to seek reimbursement for services provided during the period that no injunction was in place, PPH would have done exactly what it stated—given Medicaid patients the option to seek services elsewhere or pay out of pocket at PPH (Dkt. No. 109, Ex. A, ¶ 6). PPH and the Jane Does state in their motion for preliminary injunction as to the Patient Class that, should the Court deny the instant preliminary injunction motion, that is precisely what PPH will do (*Id.*, ¶ 8). The Court credits Ms. de Baca's statements in her most recent affidavit and does not question the business practices and policies of PPH in deciding to cover the costs of Medicaid procedures despite the funding cut. Ms. de Baca has explained the decision to cover these costs in the interim and the actions taken by PPH, and ADHS has not persuaded this Court of the contrary. The Court will continue to take at face value the sworn statements of Ms. de Baca regarding what PPH will do if a preliminary injunction as to the Patient Class does not issue.

ADHS also takes issue with the sliding scale of potential charges discussed by Ms. de Baca in her affidavit, claiming that it is too speculative, and takes issue with the ownership of Planned Parenthood of Arkansas and Eastern Oklahoma ("PPAEO") being transferred from PPH to Planned Parenthood of Greater Plains ("PPGP"). PPH and the Jane Does represent that this ownership transfer is not scheduled to take place until October 20, 2016 (Dkt. No. 122, at 1). ADHS suggests that the upcoming transition is a reason to deny the pending motion for preliminary injunction on behalf of the Patient Class, on the theory that once PPGP assumes control of PPAEO, it may be willing to continue providing unpaid services to its Medicaid patients even if this Court denies the motion, thus, according to ADHS, preventing any irreparable injury to the members of the Patient Class (Dkt. No. 121, ¶¶ 1-2).

Specifically, ADHS argues that, "[i]f Planned Parenthood of the Heartland and de Baca are not going to be the ones to make those decisions—since the plaintiffs contend there is a real and significant distinction between all Planned Parenthood affiliates—then de Baca's declaration is even more meaningless and speculative than it was before this revelation. Certainly, the particulars of the sliding scale de Baca mentioned, and whether some, most, or all patients would receive services without charge in the absence of an injunction (which they have been for nearly twelve months) cannot be answered by the only declaration presented by Planned Parenthood—that of Planned Parenthood of the Heartland CEO." (*Id.*, ¶ 3).

However, PPH and the Jane Does have put into the record a declaration from Laura McQuade, Chief Executive Officer of PPGP, which states that PPGP—like PPH—is not willing or able to continue providing unpaid services to its PPAEO Medicaid patients indefinitely. Rather, if the Patient Class's preliminary injunction motion is still pending at the time of PPAEO's transition to PPGP and is subsequently denied, PPAEO will no longer provide these services without payment and will instead give patients insured through Medicaid the option to try to obtain services at another Medicaid provider or to pay for services at PPAEO (Dkt. No. 122, Ex. A, Decl. of Laura McQuade, ¶¶ 5, 7, 8).

PPH and the Jane Does argue that "PPAEO's upcoming transition to operation by PPGP does not change the fact that, if the pending preliminary injunction motion is denied, members of the Patient Class will be unable to access services at PPAEO without payment—as the Medicaid program entitles them to do—and thereby will suffer irreparable injury. Indeed, if anything, the Patient Class will now be left in a more precarious position than it was previously because of Defendant's recent attempt to reverse her prior position regarding reimbursement of the services PPAEO has been providing without payment to Medicaid patients during the past year." (Dkt.

No. 122, at 2). The Court agrees. The Court rejects ADHS's argument that a future change in ownership that has yet to occur should affect the Court's analysis at this time, especially considering the affidavit from Ms. McQuade, the Chief Executive Officer of PPGP, stating that she plans to handle the Medicaid funding cut exactly like PPH.

C. Scope Of The Injunction

ADHS argues that, "[e]ven if the Court concludes that an expanded injunction is justified, it must limit the scope of the injunction to reimbursement for future services (services provided after the date on which the expanded injunction is issued) provided by PPH to patients." (Dkt. No. 120, at 7). ADHS also notes that, "[i]n its reply, PPH argued that, at the temporary restraining order hearing in September 2015, [A]DHS suggested there was no need for a temporary restraining order because PPH could submit receipts up to one year after the services were provided. . . . In addition to being irrelevant for purposes of the proper analysis of the scope of a preliminary injunction, this is a mischaracterization of [A]DHS's position." (*Id.*, at 8 n.1).

ADHS now contends that its "suggestion was merely that the Court did not need to issue a temporary restraining order because it could address the question of PPH's right to reimbursements in 'two weeks' at the preliminary injunction stage . . . The two intervening weeks between the TRO and PI stage is far different than the nearly twelve months we are talking about now." (*Id.*). ADHS further argues that, "more importantly, [A]DHS's statement was about what would happen if PPH prevailed on its argument that it had a right to be in the Medicaid program. . . But PPH did not prevail on the initial PI, and cannot prevail on the expanded PI, because the Court has ruled that PPH does not have standing to pursue the claim on which the PI is based. This Court simply cannot conclude that PPH has a right to be in the

Medicaid program. Accordingly, [A]DHS's previous statement concerning reimbursements if the Court determined PPH has a right to be in the Medicaid program is inapplicable." (*Id.*).

The record on this point regarding representations made about reimbursements speaks for itself (*See, e.g.*, Dkt. No. 26-1, at 48-50 ("Q: What I'm hearing I think from the State is services could still be provided and be billed for 365 days after the service is provided if they are reinstated as a provider. Is that correct? A: That's correct, Your honor . . . They, of course, can keep the receipts. And if the Court reinstates them after a preliminary injunction hearing or after the merits, they can do that for up to 365 days."); Dkt. No. 39, at 19 ("Nor is the alleged harm imminent. Medicaid reimbursements can be filed up to 365 days after the services are provided . . . This case may well be over by then, and if not the Court could revisit the question of an injunction at that point.")). The Court does not construe this anticipated request by PPH for reimbursement as being a dispute presented to this Court for resolution at this stage. However, based upon the record in this case, the Court declines ADHS's request to limit the injunctive relief awarded to the Patient Class for future services only or to services provided after the date on which the expanded injunction is issued.

ADHS further argues regarding the scope of the injunction that, "[i]f the Court requires [A]DHS to reimburse PPH for Medicaid-eligible services provided to Arkansas Medicaid patients pending trial, [A]DHS respectfully asks that the Court make clear that its injunction is limited to the specific conduct in question in this litigation. That is, the Court should make clear that any such injunction does not enjoin [A]DHS from, in the future, terminating PPH from the Medicaid program for acts or omissions (other than the conduct at issue in the videos) that fail to meet PPH's obligations under federal or state Medicaid laws or otherwise require or allow [A]DHS to remove PPH from the Medicaid program." (Dkt. No. 105, at 16).

While the parties are engaged in this litigation, the Court is not inclined to narrow the injunction in the manner ADHS requests. Instead, the injunction this Court issued as to the Jane Does and that it is being asked to issue as to the members of the Patient Class provides sufficient leeway for the parties to petition the Court to alter or amend the terms of the injunction, should the facts of the case warrant.

The Court finds that, for all of these reasons and based on the Court's findings of fact in this case, the harms alleged by PPH and the Jane Does on behalf of the Patient Class constitute irreparable harm sufficient for an injunction. *See, e.g., Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health,* 794 F. Supp. 2d 892, 912 (S.D. Ind.) (denial of Medicaid patient's free choice of provider is irreparable harm), *aff'd in part and rev'd in part on other grounds,* 699 F.3d 962 (7th Cir. 2012); *see also Camacho v. Tex. Workforce Comm'n,* 326 F. Supp. 2d 794, 802 (W.D. Tex. 2004) (reduced access to health care, as a result of a state statute restricting access to Medicaid in violation of federal regulations, constituted irreparable harm).

Should the Court fail to issue injunctive relief, members of the Patient Class will be denied their choice of provider for family planning services. The Court finds that, based on its assessment at this stage of the litigation on the likelihood of success on the merits, denial of that freedom of choice is more likely than not exactly the injury that Congress sought to avoid when it enacted 42 U.S.C. § 1396a(a)(23) and that the members of the Patient Class will suffer irreparable harm if a preliminary injunction is not entered by the Court to preserve the *status quo* while this case is pending. PPH and the Jane Does have met their burden of demonstrating that members of the Patient Class will suffer irreparable harm in the absence of the requested preliminary injunction.

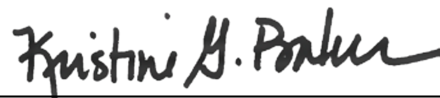
IV. Security

Under Federal Rule of Civil Procedure 65(c), a district court may issue a preliminary injunction "only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). As this Court stated when it entered the temporary restraining order and preliminary injunction order on behalf of the Jane Does, this Court does not perceive how ADHS could be harmed by reimbursing PPH for services provided to the Jane Doe Medicaid patients and the Patient Class members, considering that ADHS likely would and will have to pay the same amount for benefits of these patients regardless of who the patients' Medicaid provider happens to be. For these reasons, the Court declines to require security from the Jane Does or members of the Patient Class.

V. Conclusion

For the foregoing reasons, the Court determines that PPH and the Jane Does have met their burden on behalf of the Patient Class for the issuance of a preliminary injunction as to the Patient Class members. Therefore, the Court grants the motion for preliminary injunction on behalf of the Patient Class (Dkt. No. 98). The Court enjoins ADHS from suspending Medicaid payments to PPH for services rendered to Medicaid beneficiaries who are members of the Patient Class until further order from this Court.

So ordered this 29th day of September, 2016, at 3:00 p.m. CST.



Kristine G. Baker
United States District Judge