

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION**

2015 AUG 28 A 10:08

PLANNED PARENTHOOD SOUTHEAST,
INC.,

Plaintiff,

v.

ROBERT BENTLEY, Governor of Alabama, in
his official capacity; STEPHANIE McGEE
AZAR, Acting Commissioner, Alabama
Medicaid Agency, in her official capacity,

Defendants.

DEBRA P. HACKETT, CLK
U.S. DISTRICT COURT
MIDDLE DISTRICT ALA

CIVIL ACTION 2:15-cv-620

Case No.

COMPLAINT

Plaintiff, by and through its attorneys, brings this Complaint against the above-named Defendants, their employees, agents, delegates, and successors in office, and in support thereof state the following:

PRELIMINARY STATEMENT

1. This civil action is brought pursuant to 42 U.S.C. § 1983 to vindicate rights secured by the federal Medicaid statutes and the First and Fourteenth Amendments to the United States Constitution.
2. Plaintiff Planned Parenthood Southeast, Inc. ("PPSE") provides critically needed family planning services and other preventive health services to women in Mobile and Birmingham through the Medicaid program. As is required by federal law, Medicaid enrollees may seek services from a participating provider of their choice and have those services covered

by Medicaid. Alabama Medicaid does not pay for abortions except in extremely narrow circumstances.

3. On August 6, 2015, without warning and having expressed no prior concerns about the participation of PPSE in providing services to Alabama women through the Medicaid program, Alabama Governor Robert Bentley notified PPSE by letter that it was terminating PPSE's Medicaid provider agreement, effective 15 days after receipt of the letter. While the letter gave no reason for the termination, Governor Bentley that same day released a statement that referred to heavily edited and misleading videos that opponents of Planned Parenthood have recently released. Those tapes relate to the practice of an extremely small number of Planned Parenthood affiliates that allow their patients to donate fetal tissue following an abortion in order to advance medical research. While all Planned Parenthood affiliates comply with all federal and state laws on the disposal of fetal tissue, PPSE does not participate in any fetal tissue donation programs and does not appear in any of the videos.

4. Notably, nothing in Governor Bentley's statement relates to the quality of Medicaid services provided by PPSE.

5. Instead, Governor Bentley stated that he terminated the agreements because: "I respect human life, and I do not want Alabama to be associated with an organization that does not." Defendants' actions are, unfortunately, consistent with the State's long history of targeting abortion providers for unfair treatment. As the Court detailed in *Planned Parenthood Southeast v. Strange*, 33 F. Supp. 3d 1330, 1334 (M.D. 2014) (Thompson, J.), "abortion providers and women seeking abortions in Alabama today live and work in a climate of extreme hostility to the practice of abortion. On a day-to-day basis, a provider or a patient sees this hostility when she opens the newspaper,

drives by a group of protesters at a clinic, or learns that another piece of legislation concerning abortion has been enacted.” In each of the last four years the State has passed a new law restricting abortion. *Id.* In general, there is a climate of hostility toward abortion from elected officials. *Id.* See also *West Ala. Women’s Ctr. v. Williamson*, No. 15-CV-00497-MHT-TFM (M.D. Ala. Aug. 13, 2015) (Thompson, J.), slip op., Doc. 23-1 at 30 (“Abortion providers in Alabama have faced severe harassment and stigma for being associated with abortion in any way”); *id.* at 67-68 (“The history of violence and the continued extreme hostility towards abortion providers has created a shortfall of clinics and doctors in Alabama.”); *id.* at 79 (“These circumstances have resulted in a climate in which any physician associated with abortion in this State is stigmatized, harassed, and even threatened with violence.”).

6. Plaintiff seeks declaratory and injunctive relief to protect PPSE’s patients’ access to – and PPSE’s own ability to provide – these critical medical services. Defendants’ actions violate Section 1396a(a)(23) of Title 42 of the United States Code (“Medicaid freedom of choice provision”) because, by barring PPSE from the Medicaid program, it prevents PPSE’s patients from receiving services from the qualified, willing provider of their choice. Defendants’ actions further impermissibly penalize Plaintiff without adequate justification, in violation of the First and Fourteenth Amendments.

7. Unless enjoined, the termination of PPSE’s Medicaid provider agreements will disqualify PPSE from providing critical health care services to Alabama women who depend on PPSE for that care. Defendants’ actions are already causing significant and irreparable harm to PPSE and to its Medicaid patients who will lose their provider of choice, and will find their family planning services interrupted. Plaintiff and its patients have no adequate remedy of law.

JURISDICTION AND VENUE

8. Subject-matter jurisdiction is conferred on this Court by 28 U.S.C. §§ 1331 & 1343.

9. Plaintiff's claims for declaratory and injunctive relief are authorized by 28 U.S.C. §§ 2201 and 2202, by Rules 57 and 65 of the Federal Rules of Civil Procedure, and by the general legal and equitable powers of this Court.

10. Venue in this judicial district is proper under 28 U.S.C. § 1391.

THE PARTIES

A. Plaintiff

11. Plaintiff PPSE is a not-for-profit corporation organized under the laws of Georgia. PPSE brings this action on behalf of itself, its physicians who are Medicaid-enrolled providers, and its Medicaid patients.

12. PPSE provides reproductive health care at two health centers in Alabama, one in Mobile and one in Birmingham, as well as at five in Georgia, and one in Mississippi. PPSE participates in the Alabama Medicaid program, providing medical services to low-income enrollees. The family planning and other preventive health services provided by PPSE at these health centers include physical exams, contraception and contraceptive counseling, screening for breast cancer, screening for cervical cancer, testing and treatment for certain sexually transmitted infections ("STIs"), and pregnancy testing and counseling. Plaintiff also provides abortion at both health centers.

B. Defendants

13. Defendant Robert Bentley is the Governor of Alabama. On August 6, 2015, Governor Bentley notified PPSE that he was directing the termination of PPSE's Medicaid

agreement. The Governor is sued in his official capacity for declaratory and injunctive relief.

14. Defendant Stephanie McGee Azar is the Acting Commissioner of the Alabama Medicaid Agency, the agency that administers the state Medicaid program. The Acting Commissioner is sued in her official capacity for declaratory and injunctive relief.

THE MEDICAID PROGRAM

A. The Medicaid Statute

15. The Medicaid program, established under Title XIX of the Social Security Act of 1935, 42 U.S.C. § 1396 *et seq.*, pays for medical care provided to eligible people based upon their income. A State may elect whether or not to participate; if it chooses to do so, it must comply with the requirements imposed by the Medicaid statute and by the Secretary of the U.S. Department of Health and Human Services (“HHS”) in her administration of Medicaid. *See generally* 42 U.S.C. § 1396a(a)(1)-(83).

16. To receive federal funding, a participating State must develop a “plan for medical assistance” and submit it to the Secretary of HHS for approval. 42 U.S.C. § 1396a(a).

17. Among other requirements, the State plan must provide that: “[A]ny individual eligible for medical assistance . . . may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required . . . who undertakes to provide him such services.” 42 U.S.C. § 1396a(a)(23)(A).

18. Congress has singled out family planning services for special additional protections to ensure freedom of choice of provider, specifically providing that, with respect to these services and with certain limited exceptions not applicable here, “enrollment of an individual eligible for medical assistance in a primary care case-management system . . . , a

medicaid managed care organization, or a similar entity shall not restrict the choice of the qualified person from whom the individual may receive services.” 42 U.S.C. § 1396a(a)(23)(B).

19. The federal government reimburses the state of Alabama 90% of expenditures attributable to family planning services and supplies in the Medical assistance program. 42 U.S.C. § 1396b(a)(5).

B. Implementation of the Medicaid Act

19. For decades, the Centers for Medicare & Medicaid Services (“CMS”), the agency within HHS that administers Medicaid (and its predecessor organization), has repeatedly interpreted the “qualified” language in Section 1396a(a)(23) to prohibit states from denying enrollees access to a provider for reasons unrelated to the ability of that provider to perform Medicaid-covered services or to properly bill for those services, including reasons such as the scope of the medical services that the provider chooses to offer.

20. CMS has explained that “[t]he purpose of the free choice provision is to allow [Medicaid] recipients the same opportunities to choose among available providers of covered health care and services as are normally offered to the general population.” Ctrs. For Medicare & Medicaid Servs, CMS Manuals Publication #45, State Medicaid Manual § 2100.

21. Consistent with this understanding, HHS has a long history of rejecting state plans that seek to limit the type of provider that can provide particular services. *See, e.g.*, 53 Fed. Reg. 8699 (Mar. 16, 1988) (noting rejection of plan that would limit providers to “private nonprofit” organizations); 67 Fed. Reg. 79121 (Dec. 27, 2002) (noting disapproval of a state plan amendment that would have limited “beneficiary choice . . . by imposing standards that are not reasonably related to the qualifications of providers”).

22. More recently, CMS rejected an Indiana plan that barred state agencies from contracting with or making grants to any entities that perform abortion because it violated the Medicaid freedom of choice provision. Letter from Donald M. Berwick, Adm'r., CMS, to Patricia Casanova, Dir., Ind. Office of Medicaid Policy and Planning (June 1, 2011), http://www.politico.com/static/PPM169_110601_indiana_letter.html.

23. Moreover, even though CMS is permitted to waive § 1396a(a)(23) in demonstration projects, like Alabama's Plan First program, approved under Social Security Act § 1115, CMS has repeatedly rejected state requests to do so for family planning services, including twice in the last year: first in Pennsylvania, *see* Letter from Marilyn Tavenner, Adm'r, CMS, to Beverly Mackereth, Sec'y, Pa. Dep't of Public Welfare (Aug. 28, 2014), <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/pa/pa-healthy-ca.pdf> ("No waiver of freedom of choice is authorized for family planning providers."); and more recently in Iowa, *see* Letter from Manning Pellanda, Dir., CMS Div. of State Demonstrations and Waivers, to Julie Lovelady, Interim Medicaid Dir., Iowa Dep't of Human Servs. (Feb. 2, 2015), <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/ia/ia-marketplace-choice-plan-ca.pdf> ("No waiver of freedom of choice is authorized for family planning providers."). Alabama did not even request such a waiver in applying for their program. *See* Letter from Cindy Mann, Director, Ctr. for Medicaid & CHIP Srvs., to Stephanie Azar, Commissioner, Ala. Medicaid Agency (Dec. 29, 2014) <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/al/al-family-planning-ca.pdf>. ("All requirements of the Medicaid program as expressed in law, regulation, and policy statement not expressly identified as not applicable in this letter, shall apply to this demonstration.").

DEFENDANTS' EXCLUSION OF PPSE FROM THE
ALABAMA MEDICAID PROGRAM

24. On August 6, 2015, without prior notice, Alabama Governor Robert Bentley sent a letter to PPSE notifying PPSE that the Alabama Medicaid Agency was terminating PPSE's agreements, effective 15 days after receipt of the letter. A true and correct copy of this letter is attached and incorporated herein as Exhibit 1.

25. Defendants' letter provided no reason for the termination of the agreement.

26. However, Governor Bentley's tweets and statements indicate that he terminated PPSE's agreement because of heavily edited and misleading videos that have been recently released by opponents of Planned Parenthood with regard to other Planned Parenthood's abortion practice in other states. For example, on August 15, 2015, Governor Bentley said, "I will not let Alabama tax payer money fund an organization that talks about on tape gently crushing the heads on an unborn baby and selling their body parts. In Alabama, we're not going to use taxpayer dollars to support an organization like Planned Parenthood that does things like that. We're just not going to do it. I just will never support an organization that talks about gently crushing the heads of an unborn child. Then to do that in order to preserve the organs so that they can sell the organs; I cannot think of anything more barbaric than that."

27. The allegations in the misleading videos that Planned Parenthood abortion providers are violating the law are false, and no governmental investigation related to the videos to date has identified any illegal conduct by Planned Parenthood.

28. In fact, PPSE complies with all federal and state laws regarding the disposal of fetal tissue. *See* Alabama Administrative Code 420-5-1-.03(5)(e). PPSE does not participate in any programs in which patients can donate fetal tissue after abortion. None of its employees are depicted in the misleadingly edited videos. And two investigations of PPSE by Georgia officials,

commenced at the request of Governor Deal after the videos' release, have vindicated PPSE's practices.

29. Similarly, Governor Bentley's tweets and statements indicate that he terminated PPSE's contract because of his animus against abortion providers. On August 6, 2015, Governor Bentley said the following: "The deplorable practices at Planned Parenthood have been exposed to Americans, and I have terminated any association with the organization in Alabama. As a doctor and Alabama's Governor, the issue of human life, from conception to birth and beyond, is extremely important to me. I respect human life, and I do not want Alabama to be associated with an organization that does not."

30. Defendants' actions are, unfortunately, consistent with the State's long history of targeting abortion providers for unfair treatment. *See Planned Parenthood Southeast v. Strange*, 33 F. Supp. 3d 1330 (M.D. 2014) (Thompson, J.), and *West Ala. Women's Ctr. v. Williamson*, No. 15-CV-00497-MHT-TFM, slip op., Doc. 23-1 (M.D. Ala. Aug. 13, 2015) (Thompson, J.), detailed in ¶ 5, *supra*.

31. Defendants' actions were taken without regard to the quality of the medical care provided by PPSE to Medicaid patients, and in direct retaliation for PPSE's provision of abortion services and its affiliation with Planned Parenthood.

32. CMS has advised Defendants that their actions to terminate PPSE's provider agreements likely violate the Medicaid freedom of choice provision.

IMPACT OF DEFENDANTS' ACTIONS ON PPSE AND ITS PATIENTS

33. The need for publicly supported family planning services is great in Alabama, which regularly ranks among the worst states in the United States for reproductive care. In 2013, 323,490 Alabama women were in need of publicly funded family planning services. Guttmacher

Inst., State Facts About Unintended Pregnancy: Alabama (2014), <https://www.guttmacher.org/statecenter/unintended-pregnancy/pdf/AL.pdf> (hereafter “State Facts: Alabama”). In 2010, 55% of pregnancies in Alabama were unintended. *Id.* The state ranks fifteenth highest among 50 states in teen pregnancy rates. Kathryn Kost & Stanley Henshaw, Guttmacher Inst., U.S. Teenage Pregnancies, Births and Abortions, 2010: National and State Trends by Age, Race and Ethnicity, (2014), <http://www.guttmacher.org/pubs/USTPtrends10.pdf>. Over 60% of Alabama’s unplanned births are publicly funded. State Facts: Alabama.

34. In spite of the great needs, there are simply not enough providers of the critical care PPSE provides. PPSE’s health centers are in areas classified as a “Primary Care Health Professional Shortage Area,” a designation for areas with a population to full-time primary care physician ratio of 3500:1 – or a ratio between 3000-3500:1 in areas with unusually high demand for primary care services – and in which primary care professionals in contiguous areas are practically inaccessible. *See* U.S. Dep’t of Health and Human Servs., *Find Shortage Areas*, Health Resources and Services Administration, <http://datawarehouse.hrsa.gov/GeoAdvisor/ShortageDesignationAdvisor.aspx> (enter each clinic address and click “submit”); U.S. Dep’t of Health and Human Servs., *Guidelines for MUA and MUP Designation*, Health Resources and Services Administration, <http://bhpr.hrsa.gov/shortage/muaps/index.html>; U.S. Dep’t of Health and Human Servs., *Primary medical Care HPSA Designation Overview*, Health Resources and Services Administration, <http://bhpr.hrsa.gov/shortage/hpsas/designationcriteria/primarycarehpsaoverview.html>.

35. Women, including those on Medicaid, choose Planned Parenthood over other health care centers because they trust that Planned Parenthood will offer nonjudgmental, compassionate, and comprehensive care, and that Planned Parenthood will provide them with

information they need to plan their families and protect their health. If PPSE is eliminated from Medicaid, they will be prevented from receiving services from their provider of choice.

36. As a result of Defendants' actions, PPSE is being forced to refer Medicaid patients elsewhere for care or ask them to pay out of pocket for their services. Turning away patients or forcing them to pay for health care they cannot afford fundamentally defeats the core of PPSE's mission: to enable its patients to plan their families and protect their health and well-being. Delays in accessing family planning services can lead to devastating consequences, including undetected diseases and unintended pregnancies, many of which may end in abortion.

CLAIMS FOR RELIEF

CLAIM I – MEDICAID ACT (TITLE XIX OF SOCIAL SECURITY ACT)

37. Plaintiff hereby incorporates Paragraphs 1 through 36 above.

38. Defendants' action violate Section 1396a(a)(23) of Title 42 of the United States Code by denying PPSE's patients the right to choose any willing, qualified healthcare provider in the Medicaid program.

CLAIM II – FIRST AND FOURTEENTH AMENDMENTS – PENALIZING CONSTITUTIONALLY PROTECTED ACTIVITY

39. Plaintiff hereby incorporates Paragraphs 1 through 36 above.

40. Defendants' actions impermissibly penalize Plaintiff and its patients for its constitutionally protected association with Planned Parenthood and/or abortion, without adequate justification.

CLAIM III – FOURTEENTH AMENDMENT EQUAL PROTECTION

41. Plaintiff hereby incorporates Paragraphs 1 through 36 above.

42. Defendants' action violates Plaintiff's rights by singling it out for unfavorable treatment without adequate justification.

RELIEF REQUESTED

WHEREFORE, Plaintiff requests that this Court:

A. Issue a declaratory judgment that the Defendants' action violates the Medicaid Act;

B. Issue a declaratory judgment that Defendants' action violates the First and Fourteenth Amendments;

C. Issue preliminary followed by permanent injunctive relief, without bond, enjoining Defendants, their agents, employees, appointees, delegates, or successors from terminating PPSE's Medicaid provider agreement;

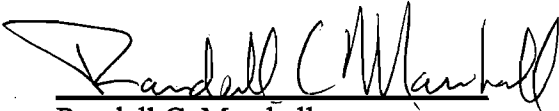
D. Grant Plaintiff's attorneys' fees, costs and expenses pursuant to 42 U.S.C. § 1988; and

E. Grant such further relief as this Court deems just and proper.

Dated: August 28, 2015.

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Attorneys for the Plaintiff

**Pro hac vice* motion to be filed

PLAINTIFF'S EXHIBIT 1

OFFICE OF THE GOVERNOR

ROBERT BENTLEY
GOVERNOR



STATE CAPITOL
MONTGOMERY, ALABAMA 36130

(334) 242-7100
FAX: (334) 242-3282

STATE OF ALABAMA

August 6, 2015

Via Federal Express Delivery

Ms. Staci Fox

CEO

Planned Parenthood Southeast, Inc.

75 Piedmont Avenue NE Suite 800

Atlanta, Georgia 30303-2507

Dear Ms. Fox:

Pursuant to the Alabama Medicaid Agency Provider Agreement under section IV. Term, Amendment, and Termination, the Agency is exercising its ability to terminate the existing agreement(s) with Planned Parenthood Southeast, Inc. with fifteen (15) days written notice. The termination of the provider agreement(s) with Planned Parenthood Southeast, Inc. will be effective fifteen (15) days after receipt of this letter.

If you are dissatisfied or disagree with the Agency's decision, you or your representative may ask for a fair hearing. A letter asking for a fair hearing must be received by the Agency within sixty (60) days from the date of this notice. The letter should be mailed to:

Alabama Medicaid Agency

P.O. Box 5624

Montgomery, Alabama 36103-5624

ATTN: Hearings Coordinator

Sincerely,

A handwritten signature in black ink that reads "Robert Bentley". The signature is fluid and cursive, with a long, sweeping line extending from the bottom of the name.

Robert Bentley
Governor

cc: Stephanie McGee Azar, Acting Commissioner, Alabama Medicaid Agency

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*Pro hac vice motion to be filed

Court Name: U S DISTRICT COURT - AL/M
Division: 2
Receipt Number: 4602038114
Cashier ID: awilliam
Transaction Date: 08/28/2015
Payer Name: ACLU OF ALABAMA FOUNDATION

CIVIL FILING FEE
For: ACLU OF ALABAMA FOUNDATION
Amount: \$400.00

CHECK
Check/Money Order Num: 9288
Amt Tendered: \$400.00

Total Due: \$400.00
Total Tendered: \$400.00
Change Amt: \$0.00

2:15-cv-00620

Planned Parenthood Southeast, Inc.
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