

# **EXHIBIT 1**

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

MAY 30 2003

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

OKLAHOMA CHAPTER OF THE  
AMERICAN ACADEMY OF PEDIATRICS  
(OKAAP), *et al.*,

Plaintiffs,

vs.

MICHAEL FOGARTY, Chief Executive  
Officer of the Oklahoma Health Care  
Authority (OHCA), *et al.*,

Defendants.

Case No. 01-C-187-EA(J)

**ORDER**

Now before the Court is the Plaintiffs' Motion to Certify Class Action (Dkt. # 52). Hearings were held on the issue of class certification on March 14, 2003, and March 17, 2003. The Court has previously denied defendants' motion to dismiss. Oklahoma Chapter of the American Academy of Pediatrics (OKAAP) v. Fogarty, 205 F. Supp. 2d 1265 (N.D. Okla. 2002). Certain details of this controversy as set forth in that order are equally relevant to the issue of class certification; many of those details are repeated below.

**I.**

Federal funding for children's health care is provided pursuant to the Social Security Act "Title XIX", 42 U.S.C. §1396, and the State Children's Health Insurance Program ("S-CHIP"), "Title XXI," 42 U.S.C. §1397aa. Although eligibility and funding under Title XIX and S-CHIP are distinct, Oklahoma provides services to S-CHIP eligible children under its Title XIX program. "Medical Assistance" refers to required Title XIX and Early and Periodic Screening, Diagnosis and Treatment ("EPSDT") services to be provided to eligible Oklahoma children.

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Plaintiff Oklahoma Chapter of the American Academy of Pediatrics ("OKAAP") is a non-profit professional organization of pediatricians and pediatric specialists who are qualified to provide Early and Periodic Screening, Diagnosis and Treatment ("EPSDT") services to eligible Oklahoma children. Plaintiff Community Action Project of Tulsa County, Inc. ("CAPTC") is a non-profit organization located in Tulsa, Oklahoma which operates, among other programs, the Head Start program for Tulsa County. CAPTC is thereby obligated to ensure that all children in its Head Start program receive essential medical, dental, developmental, mental health and rehabilitation services. Most of the children served by CAPTC's Head Start program are financially eligible for Medical Assistance. The individual named plaintiffs are thirteen children and their parents who complain that they have not received timely, equal, or appropriate access to medical services in Oklahoma. They seek class certification for children under the age of 21 who are now, or in the future will be, residing in Oklahoma and who are, or will be, eligible for Medical Assistance.

Defendants are officials of the State of Oklahoma and Oklahoma Health Care Authority ("OHCA"), the designated agency responsible for implementing and administering Oklahoma's Medical Assistance program to eligible children. Plaintiffs bring this class action pursuant to 42 U.S.C. §1983 against defendants to (1) enjoin defendants from "depriving children of timely, complete and continuing health care and services in violation of Title XIX of the Social Security Act, its implementing federal regulations and guidelines, 42 U.S.C. §1396 *et seq.*"; (2) "ensure payments to providers, including pediatricians, pediatric subspecialists, and other specialty care physicians, are sufficient to ensure children receiving Medical Assistance have access to care and services at least to the extent that such care and services are available to other children in the geographic area as required by 42 U.S.C. §1396a(a)(30)(A)"; (3) require "defendants to design, implement, ensure, and enforce

managed care arrangements which deliver in a prompt and continuing fashion, the full array of children's health care services required to be delivered by Title XIX"; and (4) require that defendants "bring children's health care to the children, including: aggressively informing children and their families of Oklahoma's obligation to promptly furnish complete and continuing children's health care; fully utilizing cooperative arrangements with other child-intensive agencies in order to effectively achieve the enrollment and easy reenrollment of all eligible children and also in order to accomplish the actual delivery of necessary health care and services to all enrolled children; and providing scheduling assistance, outstations and case-management." (First Amended Class Action Complaint, Dkt. # 64, at 5-6.)

## II.

To achieve class certification, the moving party must satisfy the provisions of Fed. R. Civ. P. 23(a), which provides:

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). The four prerequisites to a class action are commonly referred to as numerosity, commonality, typicality, and adequacy of representation. See generally, Ortiz v. Fibreboard Corp., 527 U.S. 815, 828 n. 6 (1999).

In addition to satisfying the prerequisites of Rule 23(a), the named plaintiffs must also satisfy the requirements of Rule 23(b), which defines the categories of class actions maintainable. Plaintiffs allege that the second category applies to this action because "the party opposing the class has acted

or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; . . .” Rule 23(b)(2). Plaintiffs have the burden of demonstrating that the requirements of Rule 23 have been satisfied. Reed v. Bowen, 849 F.2d 1307, 1309 (10th Cir. 1988). The Tenth Circuit has stated that “if there is to be an error made, let it be in favor and not against the maintenance of the class action, for it is always subject to modification should later developments during the course of the trial so require.” Esplin v. Hirschi, 402 F.2d 94, 99 (10th Cir. 1968) (citation omitted).

In determining whether a class should be certified, the Court should not delve into the merits of the action. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-78 (1974). However, the Supreme Court has also recognized that consideration of the merits is sometimes necessary to Rule 23 analysis. See General Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 160 (1982); Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 n. 12 (1978). The parties spent the better part of the hearings on March 14 and 17 presenting the merits of the action. Plaintiffs presented the testimony of Tracy Turner (parent of a named plaintiff), three doctors, and defendant Fogarty. Defendants presented the testimony of two individuals who work for the OHCA. While the Court takes the merits of this controversy into consideration, the Court’s focus, for purposes of the motion for class certification, is on whether the plaintiffs have satisfied the requirements of Fed. R. Civ. P. 23.

The Court questioned the parties at the hearing as to whether class certification was necessary, given the Court’s ruling that the organizational plaintiffs in this matter have standing to bring the action. The parties briefed the issue in their respective proposed orders. Defendants’ pleading invited the Court to vacate its prior order on standing. Plaintiffs argue that OKAAP could have brought this action with or without the individual class representatives, but only under 42 U.S.C.

§1396a(a)(3)(A) (the "equal access" provision) because that section concerns provider reimbursement. However, plaintiffs admit that OKAAP does not have standing under 42 U.S.C. § 1396a(a)(8), or under the EPSDT provisions, because these provisions do not address provider reimbursement. Class status is therefore necessary to the survival of plaintiffs' claims under these provisions.

Plaintiffs did not address whether CAPTC's standing obviates the need for class certification of the individual plaintiffs. The Court presumes that the Head Start program operated by CAPTC is provided only for children in Tulsa County, given the name of the organization. Further, there is no evidence to indicate that CAPTC is obligated to ensure that all children who are financially eligible for Medical Assistance receive essential medical, dental, developmental, mental health and rehabilitation services; apparently, it is obligated to ensure only that those in its Head Start program receive such aid. The Court finds that class certification analysis remains necessary for the individual named plaintiffs who seek to represent a putative class of children under the age of 21 who are now, or in the future will be, residing in Oklahoma and who are, or will be, eligible for Medical Assistance.

III.

Before addressing the substantive criteria of Rule 23, the class must be properly defined. The evidence at the class certification hearing demonstrated that at least some portion of Oklahoma children who are eligible for Medical Assistance are receiving Medical Assistance.<sup>1</sup> For example, the state reported that 36.4% of the total children eligible for EPSDT services received an EPSDT screening in fiscal year 2001. Pl. Hrg. Ex. 1. Similarly, a certain percentage (albeit small) of eligible

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<sup>1</sup> The evidence presented at the class certification hearing also indicates that it is not due to lack of good faith or lack of effort by defendants that some children fail to receive Medical Assistance.

children received dental services, preventative dental services, dental treatment and blood lead screens. *Id.* Children receiving appropriate Title XIX and EPSDT services have no claim. Accordingly, the appropriate class definition is: all children under the age of 21 who are now, or in the future will be, residing in Oklahoma and who have been, or will be, denied or deprived of Medical Assistance as required by law.

Plaintiffs argue that they are not required to show that they have been denied health care services in order to achieve class certification. Under 42 U.S.C. § 1396a(a)(30)(A), defendants have a duty to assure that "services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area." Further, they must furnish medical assistance to "all eligible individuals" with "reasonable promptness." 42 U.S.C. § 1396a(a)(8). The Court's definition of the class takes into account the fact that plaintiffs receiving Medical Assistance may not be receiving it with "reasonable promptness" or "to the extent that such care and services are available to the general population in the geographic area." It does not permit class certification for children in Oklahoma who are receiving such assistance. Plaintiff's definition is simply too broad.<sup>2</sup> With the narrower definition in mind, the Court will proceed to address the requirements of Fed. R. Civ. P. 23.

A.

Defendants do not contest the first Rule 23(a) requirement, numerosity. Defendants point out that over 300,000 children receive Medicaid services in Oklahoma. Their own data indicate that, as

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<sup>2</sup> The Court's narrower definition corresponds to the definition of the class as set forth by plaintiffs in the First Amended Class Action Complaint, where plaintiffs requested the following relief: "Determining that this action may be maintained as a class action on behalf of the class of eligible and enrolled children who have been, are being and in the future will be denied timely, complete and continuing children's health care under Title XIX. (Dkt. # 64, at 60.)"

of fiscal year 2001, over 400,000 Oklahoma children fall within the class as defined by plaintiffs. Even with the Court's narrower definition of the class, joinder of all potential members is clearly impracticable. A proposed class that potentially contains thousands of class member is sufficiently numerous to satisfy the numerosity requirement. Hallaba v. Worldcom Network Services Inc., 196 F.R.D. 630, 634 (N.D. Okla. 2000).

B.

The second requirement, commonality, is a source of contention between the parties. Rule 23(a)(2) does not require that plaintiffs establish that all facts or legal issues are common to the class. It requires only a single question of law or fact common to the class. See I.B. ex rel. Hart v. Valdez, 186 F.3d 1280, 1288 (10th Cir. 1999); see also Realmont v. Reeves, 169 F.3d 1280, 1285 (10th Cir. 1999). Plaintiffs contend that the common issues of fact are as follows:

A. Defendants' failure to ensure that payments are sufficient to ensure providers, including pediatricians and specialty providers, are available to provide appropriate screening, diagnosis and treatment for children with Medical Assistance benefits, including, but not limited to, medical (including mental and behavioral health), vision, hearing, dental, and developmental screening and diagnosis at appropriate intervals that meet reasonable standards of medical practice, and the prompt delivery of all needed treatment;

B. Defendants' failure or refusal to develop and implement a coordinated system of care that provides class members with medical, vision, hearing, dental, and developmental screening, diagnosis and treatment, at appropriate intervals that meet reasonable standards of medical care; and

C. Defendants' failure to ensure that families of children enrolled in Medical Assistance are adequately informed of their children's right to receive EPSDT services and of how to obtain such services and that they receive them.

(First Amended Class Action Complaint, Dkt. # 64, ¶ 23.) Plaintiff contend that the common issue of law is as follows: "whether defendants' acts and omissions deprive plaintiffs of EPSDT services in violation of the Medicaid Act." Id. at ¶ 24.

Plaintiffs' statements of the common issues of fact and law amount to an allegation of systematic failure. The Tenth Circuit "refuse[d] to read an allegation of systematic failures as a moniker for meeting the class action requirements." Hart, 186 F.3d at 1289.<sup>3</sup> In an effort to distinguish Hart, plaintiffs have argued that the alleged specific violations of federal law constitute a discreet legal question common to the class because they "affect" all children of the proposed class. See Pl. Reply Br., Dkt. #81, at 4. The test is not those "affected" by the defendants' acts or omissions; it is those who share a common question of law or fact. See Hart, 186 F.3d at 1288.

At the class certification hearing, the evidence tended to show that defendants were having difficulty recruiting physicians and dentists due to low provider reimbursement rates, and, as a result, the individual plaintiffs were experiencing significant difficulty and delay in obtaining medical and dental care under Oklahoma's Medicaid program. The difficulty and delay are obviously significant in the sense that these twin problems endanger the health and, in some cases, the lives, of those children whom the program is designed to protect. Thus, the common element to the claims of the class are the delay and difficulty in obtaining medical and dental care under Oklahoma's Medicaid program. Whether individual class members are experiencing delay and difficulty in obtaining Medical Assistance, and whether defendants' have thereby failed to fulfill their duties under sections 1396a(a)(8), 1396a(a)(10)(A), 1396a(a)(30)(A), 1396d(a)(4)(B), and 1396d(r), are the common questions of law and fact shared by the plaintiffs. The Court finds that the commonality requirement has been met.

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<sup>3</sup> Other courts have found commonality in similar situations involving Medicaid recipients as plaintiffs. See, e.g., Carr v. Wilson-Coker, 203 F.R.D. 66, 74 (D. Conn. 2001); Risinger v. Concannon, 201 F.R.D. 16, 20 (D. Me. 2001); Daiour B. v. City of New York, No. 00CIV.2044 (JGK), 2001 WL 1173504 (S.D.N.Y. Oct. 3, 2001).

## C.

Defendants further argue that plaintiffs have not proved commonality because not all of the individual plaintiffs qualify as Medicaid recipients. Four of them are not currently covered by Medicaid. Defendants point out that one of the named plaintiffs could not be located by plaintiffs' counsel when defendants wanted to depose her and her mother.<sup>4</sup> Defendants state that several of the named individual plaintiffs have reached the age of majority, and the case is therefore moot. Plaintiffs address these arguments of defendants more appropriately under the third part of the class certification test: typicality.<sup>5</sup>

"In government benefit class actions, the typicality requirement is generally satisfied when the representative plaintiff is subject to the same statute, regulation, or policy as class members." 7 Alba Conte & Herbert Newberg, Newberg on Class Actions § 23:4, at 502 (4th ed. 2002) [hereinafter "Newberg"]. The typicality standard does not require that every member of the class need be in an identical situation as the named plaintiffs. Adamson v. Bowen, 855 F.2d 668, 676 (10th Cir. 1988). However, "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." East Texas Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 403 (1977) (citations omitted).

Plaintiffs contend that "aging out" of the program or otherwise becoming ineligible for Medical Assistance under Oklahoma's Medicaid program is not enough to prevent a plaintiff from representing

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<sup>4</sup> Plaintiffs assert that they have since found the girl and her mother.

<sup>5</sup> "[W]hile the focus of the commonality requirement is on the connection among class as a whole, the focus of the typicality requirement is the connection between named plaintiffs and proposed class members." Risinger, 201 F.R.D. at 22.

the class. Eligibility for the Medicaid program at issue is based primarily on income and age, two variables which, plaintiffs argue, make membership in the putative class inherently transitory. See *Newberg*, § 2:19 at 151 (“Recipients of government benefits may also enter and leave the system on a sporadic basis due to changes in eligibility status.”) If defendants’ argument were to prevail, plaintiffs maintain, no child plaintiff could be a class representative because of the uncertainty of the time the action takes to be resolved and because of economic factors child plaintiffs cannot control. In class actions where the membership is “inherently transitory,” mootness will not necessarily disqualify that plaintiff from serving as a class representative. See *Milona v. Williams*, 691 F.2d 931, 938 (10th Cir. 1982) (plaintiff students’ removal from private school did not preclude them from having standing required for them to be entitled to represent class of students).

The mootness doctrine in class actions<sup>6</sup> derives from Article III of the Constitution, which limits federal “Judicial Power” to “Cases” or “Controversies.” Mootness has two aspects: “when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.” *United States v. Parole Comm’n v. Geraghty*, 445 U.S. 388, 396 (1980) (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)). The issue in this matter is still “live” between defendants and the named representatives continue to have a “personal stake” in the outcome.

<sup>6</sup> Defendants cite to *Bravin v. Mount Sinai Medical Center*, 186 F.R.D. 293, 301 (S.D.N.Y. 1999) (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975)), and *Granato v. Bane*, 74 F.3d 406, 411 (2d Cir. 1996), for the proposition that plaintiffs must show “(1) the challenged action was in its duration too short to be fully litigated prior to its cessation and expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to that same action again.” (Def. Prop. Order, Dkt. # 126), at 5.) *Bravin* was not a class action. It was also vacated in part on reargument, 58 F. Supp.2d 269 (S.D.N.Y. 1999). *Weinstein* explicitly states that the two-part test is applicable only in the *absence* of a class action, 423 U.S. at 149; see *Johansen v. City of Bartlesville, Oklahoma*, 862 F.2d 1423, 1426 (10th Cir. 1988). Although *Granato* was styled as a class action, no motion to certify the class was ever submitted to the court. 74 F.3d at 411.

The Supreme Court has held that mootness of the named plaintiff's individual claim after a class has been duly certified does not render the action moot, Sosna v. Iowa, 419 U.S. 393, 402 n. 11 (1975), but timing of class certification is not crucial. Geraghty, 445 U.S. at 398 (citing Gerstein v. Pugh, 420 U.S. 103, 110 n. 11 (1975)). The Geraghty court explained:

When the claim on the merits is "capable of repetition, yet evading review," the named plaintiff may litigate the class certification issue despite loss of his personal stake in the outcome of the litigation. . . . The "capable of repetition, yet evading review" doctrine to be sure, was developed outside the class-action context. . . . But it has been applied where the named plaintiff does have a personal stake at the outset of the lawsuit, and where the claim may arise again with respect to that plaintiff, the litigation then may continue notwithstanding the named plaintiff's current lack of a personal stake. . . . Since the litigant faces some likelihood of becoming involved in the same controversy in the future, vigorous advocacy can be expected to continue.

Id. (citations omitted).

The claims in this matter are "inherently transitory" and relate back to the to the filing of the complaint for all of the individually named plaintiffs because all of them are under the age of 21.<sup>7</sup> Those plaintiffs may move in and out of state, and in and out of eligibility for Medical Assistance due to the circumstances of their parent or parents. Their claims are classic examples of claims "capable of repetition, yet evading review." They had a personal stake at the outset of the lawsuit, and the claim may arise again with respect to them. Since all of them face some likelihood of becoming involved in the same controversy in the future, the litigation should continue as a class action notwithstanding the current lack of a personal stake by the individual plaintiffs. Defendants' efforts

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<sup>7</sup> The parties agree that coverage for a child under Medicaid extends until that child reaches the age of twenty-one, but that the child must sue in his or her own behalf when he or she turns eighteen. Plaintiffs state that two of the four named plaintiffs who have turned eighteen have signed affidavits indicating their intent to remain as plaintiffs on their own behalf. The Court will dismiss from this lawsuit any of the four from whom no such affidavit is received. See 1 Newberg 3:27, at 438-39 ("courts have realized that the number of class representatives is not significant under the amended [Rule 23].") The four named plaintiffs include Joshua O'Neal, Christy A. Towler, Charles A. Scanlan, and Robert M. Garvin. Towler has submitted the only affidavit to date.

to distinguish these class representatives from each other and from the potential class members are unavailing.

D.

The final requirement of Rule 23(a) is adequacy of representation. It has two elements: (1) adequacy of counsel; and (2) avoiding conflicts of interest between named parties and the class. Hailaba, 196 F.R.D. at 643 n. 6. The defendants do not dispute that plaintiffs' counsel can adequately represent the class. Instead, they argue that there is a conflict between the plaintiffs because, if the relief requested by plaintiffs is granted and payments to medical providers are increased, budgetary constraints might force the state to eliminate from the program certain children who receive services at the option of the state.

As plaintiffs point out, the Court rejected a similar argument made by defendants when they sought to disqualify plaintiffs' counsel for their participation in other lawsuits over the OHCA's allocation of funds among Medicare recipients. In its January 21, 2003 Order, the Court stated that "there may be ways in which to achieve the requisite cost reductions other than to reduce reimbursement rates [or] increase eligibility standards," and "it is not the Court's role to choose among the various options for government spending and to allocate funds accordingly." (Order, Dkt. # 113, at 3.) Once the state elects to participate in the Medicaid program, it must comply with the requirements of Title XIX. Harris v. McRae, 448 U.S. 297, 301 (1980). While a state agency may consider budgetary constraints as a factor in its decisions, such constraints "cannot excuse noncompliance. . . ." See AMISUB v. State of Colorado Dept. of Social Servs., 879 F.2d 789, 800 (10th Cir. 1989). There is no conflict among named plaintiffs and proposed class members where they seek the same remedial relief under the same legal theories. See Dajour B., 2001 WL 1173504 at \*7.

Plaintiffs have satisfied the provisions of Fed. R. Civ. P. 23(a). Further, “[p]otential conflicts relating to relief issues which would arise only if the plaintiffs succeed on common claims of liability on behalf of the class will not bar a finding of adequacy . . . .” 1 Newberg § 3:25, at 423.

IV.

Plaintiffs also satisfy the requirements of Fed. R. Civ. P. 23(b) because “the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; . . . .” Rule 23(b)(2). Plaintiffs allege that defendants’ acts and omissions deprive plaintiffs of EPSDT services in violation of the Medicaid Act, and plaintiffs seek injunctive and declaratory relief such that plaintiffs will receive the medical and dental care required by law for children who are eligible for federally-funded health care. As such, they seek application of a common policy. “That the claims of the individual class members may differ factually should not preclude certification under Rule 23(b)(2) of a claim seeking application of a common policy.” Adamson, 855 F.2d at 676.<sup>8</sup>

V.

For these reasons, the Court finds that the requisites of Rule 23 have been satisfied with respect to the proposed class, and the individual named plaintiffs are proper representatives of the class. However, certification does not establish the fact of any claim set forth in the First Amended Class Action Complaint because the class is certified without respect to substantive proof of the allegations. See Eisen, 417 U.S. at 177-78. If it later appears that a class action is not the most

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<sup>8</sup> The Court does not deem notification necessary because the request for certification is under subpart (b)(2) of Fed. R. Civ. P. 23. 3 Newberg § 8:5. However, if the parties desire notice to some or all members of the class, the parties should advise the Court, no later than ten days from the date of this order, of their request, the reasons for it, and the topics to be addressed by such notice.

efficient form of litigating this controversy, the Court may decertify the class at that time or otherwise divide the class through the creation of sub-classes. See Fed. R. Civ. P. 23(c)(1), 23(c)(4)(B).

Accordingly, Plaintiffs' Motion to Certify Class Action (Dkt. # 52) is **GRANTED in part and DENIED in part**. The Court certifies the class as follows: all children under the age of 21 who are now, or in the future will be, residing in Oklahoma and who have been, or will be, denied or deprived of Medical Assistance as required by law.

IT IS SO ORDERED this 30<sup>th</sup> day of May, 2003.

  
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CLAIRE V. BAKAN  
UNITED STATES DISTRICT JUDGE

# **EXHIBIT 2**

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

OKLAHOMA CHAPTER OF THE )  
AMERICAN ACADEMY OF PEDIATRICS )  
(OKAAP);<sup>1</sup> COMMUNITY ACTION )  
PROJECT OF TULSA COUNTY, INC. )  
(CAPTC); KATELYN M. WILBANKS, )  
by her mother and next friend, Tracy )  
Turner; JOSHUA LEE O'NEAL, ERIC )  
HARMAN CAMMISO, MELISSA ANN )  
PADELDFORD, and MATHEW SCOTT )  
PADELDFORD, by their mother and next )  
friend Lisa Padelford; CHRISTY A. )  
TOWLER, KATHERINE P. TOWLER, )  
and JACOB W. TOWLER, by their parents )  
and next friends, Rowena Towler and Kevin )  
Towler; CHARLES A. SCANLAN and )  
ROBERT M. GARVIN, by their parents and )  
next friends, Janice Garvin and Theodore )  
Garvin; JACOB W. HERCULES and )  
EVERETT L. HERCULES, by their parents )  
and next friends, Regina Hercules and Gus )  
Hercules; and STEPHANIE MONCRIEF, )  
by her mother and next friend, Heather )  
Brooke Rogers, )

Plaintiffs, )

v. )

Case No. 01-CV-0187-CVE-SAJ

MICHAEL FOGARTY, Chief Executive )  
Officer of the Oklahoma Health Care )  
Authority (OHCA); LYNN MITCHELL, )  
State Medicaid Director; CHARLES ED )  
McFALL, Chairman of the OHCA Board )  
of Directors; T.J. BRICKNER, JR., )  
Vice-Chair of the OHCA Board of Directors; )  
WAYNE HOFFMAN, Member of the OHCA )  
Board of Directors; JERRY HUMBLE, )  
Member of the OHCA Board of Directors; )

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<sup>1</sup> OKAAP has been dismissed from this lawsuit as a result of the Court's Findings of Fact and Conclusions of Law, issued March 22, 2005. However, OKAAP remains in the caption of this case so as to eliminate confusion.

**RONALD ROUNDS, O.D., Member of the** )  
**OHCA Board of Directors; GEORGE** )  
**MILLER, Member of the OHCA Board of** )  
**Directors; LYLE ROGGOW, Member of the** )  
**OHCA Board of Directors,** )  
 )  
**Defendants.** )

**FINAL JUDGMENT AND PERMANENT INJUNCTION**

On March 22, 2005, the Court entered Findings of Fact and Conclusions of Law after having tried all issues presented before it in this matter. Consistent with the Findings of Fact and Conclusions of Law, the Court now hereby enters its Final Judgment and an Permanent Injunction.

This Court has subject matter jurisdiction under 28 U.S.C. § 1331, which confers on the federal district courts original jurisdiction over all civil suits arising under the Constitution and laws of the United States, and 28 U.S.C. § 1343(a)(3) and (4), which confers on the federal district courts original jurisdiction over all claims asserted under 42 U.S.C. § 1983 to redress any deprivation, under color of state law, of rights, privileges, and immunities guaranteed by the Constitution of the United States and the Acts of Congress. The Court retains jurisdiction of this matter for all purposes. Pursuant to 28 U.S.C. § 2201(a), the Court declares:

(a) in violation of 42 U.S.C. §1396a(a)(30(A), defendants are not assuring that payments are sufficient to enlist enough providers so that care and services are available to Medicaid-eligible children to the extent that such care and services are available to the general population in the geographic areas served by the Oklahoma Health Care Authority (“OHCA”);

(b) defendants are not furnishing medical assistance with reasonable promptness to all eligible individuals, in violation of 42 U.S.C. §1396a(a)(8);

(c) defendants are in substantial compliance with all Early and Periodic, Screening, Diagnosis and Treatment (“EPSDT”) provisions of the Medicaid Act other than the requirement set forth in 42 U.S.C. §1396d(r)(1)(A)(i) that they establish a periodicity schedule for EPSDT screening services “after consultation with recognized medical and dental organizations involved in child health care”;

(d) defendants’ auto-assignment/default enrollment system does not constitute a violation of 42 U.S.C. §1396u-2(a)(4)(D);

(e) defendants’ cross-agency relationship with the Oklahoma Department of Human Services (“DHS”) does not constitute a violation of 42 U.S.C. § 1396a(a)(11)(A); and

(f) defendants, in compliance with federal law, may refuse to pay for experimental treatment desired by certain class members when their decisions are based upon reasonable concern for safety.

Based upon the foregoing, the Court hereby orders and permanently enjoins defendants, their successors, officers, agents, servants, and employees who receive actual notice of the Final Judgment and Permanent Injunction by personal service or otherwise, whether acting directly or through any entity, division, department, or agency, as follows:

1. As an immediate interim measure and in keeping with the OHCA budget requests for numerous years, the OHCA Board of Directors shall institute a fee schedule for fee-for-service physician (including pediatrician) reimbursement for covered, medically necessary physician services provided to minor children under the Oklahoma Medicaid Program at the rate for each Current Procedural Terminology (“CPT”) Code that equals one hundred percent (100%) of the rate paid by Medicare for physician services as soon as possible within the strictures of the Oklahoma Open Meetings Act, 25 Okla. Stat. tit. 25, §301 et seq.; the Oklahoma Administrative Procedures

Act, Okla. Stat., tit. 75, §250 et seq.; the federal Medicaid Act, 42 U.S.C. § 1396 et seq., and other relevant state or federal law, and following all approvals necessary from the United States Centers for Medicare and Medicaid Services.

2. At its next public meeting consistent with public notice requirements of the Oklahoma Open Meetings Act, 25 Okla. Stat. § 301 et seq., and other relevant state or federal law, the OHCA Board of Directors shall authorize OHCA administrative staff to negotiate a contract, in keeping with relevant state laws, with a nationally recognized economic consulting firm to conduct a study to determine the fee-for-service reimbursement rate necessary to assure reasonably prompt access to health care for minor children in the Oklahoma Medicaid Program while also complying with the utilization and efficiency requirements of 42 U.S.C. §1396a(a)(30)(a).

3. The rates to be studied are those for covered, medically-necessary services billed by the following physicians: primary care physicians, pediatricians, neurologists and pediatric neurologists; ear, nose and throat (ENT) specialists/otorhinolaryngologists; orthopedic specialists; child psychiatrists/child psychologists; electrophysiologists; urologists; nephrologists; pediatric cardiologists; allergists/immunologists; pediatric surgeons; dermatologists; dentists and pedodontists.

4. The study shall also include a determination and analysis of physician costs and overhead data in comparison with Medicaid reimbursement rates. It shall also include a determination and analysis of commercial payer rates paid to providers. The contract shall require a final report within six months of the date that the contract is executed by both parties. OHCA shall update this reimbursement and cost study and report as needed for its own use in ensuring compliance with the statute.

5. As soon as possible within the strictures of the Oklahoma Open Meetings Act, 25 Okla. Stat. § 301 et seq., the Oklahoma Administrative Procedures Act, 75 Okla. Stat. §250 et seq., the federal Medicaid Act, 42 U.S.C. §1396 et seq., and other relevant state or federal law, and following all approvals necessary from the United States Centers for Medicare and Medicaid Services, the OHCA Board of Directors shall institute a fee-for-service fee schedule determined by the consulting firm as necessary to assure reasonably prompt access to health care for minor children in the Oklahoma Medicaid Program. The schedule shall be adjusted as needed in accordance with the updated report.

6. In the event that OHCA is unable in good faith to negotiate the contract contemplated by this Final Judgment and Permanent Injunction by August 15, 2005, or if the study contemplated by the contract is not completed within six months of the date the contract is executed by the parties, the OHCA shall adjust all Medicaid rates paid to providers so that the rates for covered, medically necessary physician services provided to minor children under the Oklahoma Medicaid Program are sufficient to ensure equal and reasonably prompt access to health care for such minor children.

7. The OHCA Board of Directors shall use its best efforts to attempt to obtain increased funding from the Oklahoma Legislature for the reimbursement changes mentioned herein; however, a lack of such funding shall not excuse compliance with this Permanent Injunction. This Permanent Injunction shall not prohibit or otherwise prevent OHCA from reducing the population, including children, eligible for Medicaid services to the statutory minimums provided by federal law or some higher number allowed by law on the basis of age, income, or other characteristic permitted by federal law. This Permanent Injunction shall not prohibit or otherwise prevent OHCA from discontinuing any optional Medicaid program, including waiver programs. This Permanent

Injunction shall not prohibit or otherwise prevent OHCA from discontinuing the Oklahoma Medicaid program in its entirety temporarily or permanently.

8. Defendants shall assure that OHCA immediately adopts and implements new periodicity schedules (for periodic comprehensive medical screening examinations, dental screening examinations and vision screening examinations) after consultation with recognized medical and dental organizations involved in child health care, including OKAAP, Oklahoma State Medical Association, and the Oklahoma Dental Association. In this regard, the OHCA Board of Directors shall invite OKAAP, the Oklahoma State Medical Association, the Oklahoma Dental Association and/or other recognized medical and dental organizations involved in child health care to appoint members to an advisory committee that will meet with the OHCA EPSDT Unit (recently renamed Child Health) staff at least annually to consult on a periodicity schedule for EPSDT services. This advisory committee shall meet no later than forty-five days after the date of this Permanent Injunction.

9. The OHCA Board of Directors shall file notice of the following with the Court within seven days of occurrence:

(a) the Board's action approving the rate increase ordered in Paragraph 1 of this Final Judgment and Permanent Injunction, including the agenda for and public minutes of the Board meeting in which such took place;

(b) the Centers for Medicare and Medicaid Services' approval or denial of the rate increase ordered in Paragraph 1, including the actual correspondence;

(c) the Board's action implementing Paragraph 2 of this Final Judgment and Permanent Injunction, including the agenda for and public minutes of the Board meeting in which such took place;

(d) execution of the contract required in Paragraph 2, including a copy of the contract;

(e) the Board's action approving the rate increase ordered in Paragraph 5 or 6 of this Final Judgment and Permanent Injunction, including the agenda for and public minutes of the Board meeting in which such took place;

(f) the Centers for Medicare and Medicaid Services' approval or denial of the rate increase ordered in Paragraph 5 or 6, including the actual correspondence;

(g) invitation to organizations as provided in Paragraph 8 of this Final Judgment and Permanent Injunction, with a copy of each such invitation; and

(h) the meeting of the advisory group provided in Paragraph 8, including the agenda for and public minutes of the meeting.

10. Counsel for defendants shall provide a copy of this Final Judgment and Permanent Injunction to, and obtain and file with this Court a signed and dated acknowledgment of receipt of same from, each defendant named herein.

11. The Court retains jurisdiction of this matter for a period of one (1) year from this date, or until conclusion of a compliance determination one year from this date. In that regard, **on May 19, 2006 at 9:30 a.m., the parties shall appear before the undersigned for a hearing to determine defendants' compliance with the mandate of this Final Judgment and Permanent Injunction.**

The parties shall be permitted to conduct discovery from February 20, 2006 until April 30, 2006 on

the issue of such compliance. **By May 15, 2006**, the parties shall be permitted to submit separate statements of compliance issues, if any, for the Court to address at the May 19, 2006 hearing.

**IT IS SO ORDERED** this 19th day of May, 2005.

  
\_\_\_\_\_  
CLAIRE V. EAGAN, CHIEF JUDGE  
UNITED STATES DISTRICT COURT

# **EXHIBIT 3**

**FOR THE NORTHERN DISTRICT OF OKLAHOMA**

**OKLAHOMA CHAPTER OF THE )  
AMERICAN ACADEMY OF PEDI- )  
ATRICS (OKAAP), et al., )**

**Plaintiffs, )**

**vs. )**

**No. 01-CV-0187-CVE-SAJ**

**MICHAEL FOGARTY, Chief Execu- )  
tive Officer of the Oklahoma Health )  
Care Authority (OHCA), et al., )**

**Defendants. )**

**FIFTH STATUS REPORT**

Comes now counsel for the Oklahoma Health Care Authority Board of Directors et. al, Defendants, and submits the following report to the Court pursuant to Court Order entered May 19, 2005.

The OHCA held its regularly scheduled Board meeting July 14, 2005. The following items were discussed, voted on and approved: 1) increasing the physician fee schedule to 100% of the Medicare RVU’s 2) increase the anesthesia fee schedule by 5% and 3) increase the reimbursement for physician crossover claims. Additionally, the Board approved the contract amendment between the OHCA and Mercer Consulting.

Attachment 1 is a copy of the minutes of the Board meeting held July 14, 2005.

Respectfully Submitted,

s/Lynn Rambo-Jones  
**LYNN RAMBO-JONES, OBA #4785**  
**Deputy General Counsel**  
**Oklahoma Health Care Authority**  
P.O. Drawer 18497  
4545 N. Lincoln Blvd., Suite 124  
Oklahoma City, OK 73105  
(405) 522-7431, Fax (405) 522-7472

**ATTORNEY FOR DEFENDANTS**

**CERTIFICATE OF SERVICE**

I hereby certify that on July 25, 2005, I electronically transmitted the foregoing document to the Clerk of Court using ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

Robert Blakemore

Louis Bullock

Patricia W. Bullock

I hereby certify that on 25<sup>th</sup> day of July, 2005, I served the foregoing document by mail on the following, who are not registered participants of the ECF system:

Thomas K. Gilhool  
Public Interest Law Center of Philadelphia  
125 South Ninth Street, Suite 700  
Philadelphia, Pennsylvania 19107

s/Lynn Rambo-Jones

MINUTES OF A REGULARLY SCHEDULED BOARD MEETING  
OF THE OKLAHOMA HEALTH CARE AUTHORITY BOARD  
Held at Meridian Technology Center  
Stillwater, Oklahoma  
July 14, 2005  
1:00PM

**DRAFT/BOARD APPROVAL AUGUST 25, 2005**

Manner and Time of Notice of Meeting: A public notice was placed on the front door of the Oklahoma Health Care Authority on July 13, 2005.

Pursuant to a roll call of the members, a quorum was declared to be present, and Chairman McFall called the meeting to order at 1:00pm.

BOARD MEMBERS PRESENT: Chairman McFall, Member Anoatubby, Member Miller, Vice-Chairman Hoffman, Member Roberts, and Member Roggow

ABSENT Member Langenkamp

OTHERS PRESENT: Andrew Tevington  
Joy Leuthard, OSMA  
Lynn White, OHA

**DISCUSSION AND POSSIBLE VOTE ON APPROVAL OF MINUTES OF THE REGULARLY SCHEDULED BOARD MEETING HELD JUNE 9, 2005**

The Board routinely reviews and approves a synopsis of all its meetings. The full-length recordings of the meetings of the Board are retained at the Board Offices and may be reviewed upon written request.

MOTION: Member Roggow moved for approval of the June 9, 2005 minutes as presented.  
Member Roberts seconded.

FOR THE MOTION: Member Roberts, Vice-Chairman Hoffman, Member Roggow, Member Miller, Member Anoatubby, and Chairman McFall

ABSENT Member Langenkamp

**ITEM 8C/CONSIDERATION AND VOTE UPON RATES AND STANDARDS  
COMMITTEE RECOMMENDATION REGARDING RATES FOR PHYSICIAN  
SERVICES**

Anne Garcia

Ms. Garcia stated that this was a proposal to address physician and other practitioner rates paid under the Medicaid fee schedule. In keeping with the OHCA's desire to increase physician rates, to also comply with the intent of House Bill 1088 passed in this last session providing additional funding for physician rates, and also to accommodate the court order, the Rates and Standards Committee met and recommended the following: 1) To increase the Oklahoma Medicaid Physician Fee Schedule to 100% of the Medicare RVU's and conversion factors in effect on June 30, 2005 for Oklahoma for services provided to both children and adults; 2) Increase the anesthesia fee schedule by 5% to accommodate a comparable payment to the Medicare methodology; 3) Increase the reimbursement for physician crossover claims to equal the full amount of the Medicare Co-Insurance and deductible. Also to annually review the RVU's and conversion factors. The estimated budget impact for that is \$25 million and was provided through appropriations and is budgeted in the FY06 Budget Work Program. Ms. Garcia stated that although this is not part of the action item this particular methodology also affects The SoonerCare Plus rates, capitation rates. Those rates have been actuarially certified to accommodate this change in methodology at this point and will be increased on August 1 as well.

Mr. Hoffman asked if these rates are all either due to response to a court decision and or from direction from the legislation? Ms. Garcia replied not everything only 8C, the physician rate could accommodate a court order. Mr. Miller stated that indirectly all the rates would be related to a court order because a court order requires the Department of Human Services to provide these services for Homeward Bound clients. Ms. Garcia noted that some of the services that DDS was recommending increases on the Rates and Standards Committee felt that the Medicaid fee schedule should be used on those rates which are tied back to the court order as well. Mr. Hoffman asked if OHCA is receiving assurances that the other agencies involved are meeting the requirements and standards to maintain these waivers. Ms. Garcia stated that those procedures are in place. There are individuals that liaison with the staff

at DHS that administer those waivers. Ms. Garcia noted that as the Medicaid Agency we have reporting requirements back to the FEDS on complying with the terms and conditions of those waivers.

Mr. Hoffman asked if the counsel feels that in passing all of these increases it keeps OHCA in line with federal and state laws. Mr. Pallotta replied that during the process of passing a rate there is legal representation in the Rates and Standards Committee and we do feel these rates are within the perimeters of the state and federal law.

Mr. Pallotta stated that for the record, Item 8 and 9 under 8A were tabled and are excluded from passage. Those are Physical Therapy and Occupational Therapy Services.

MOTION: Member Miller moved for acceptance of the recommendation of the Rates and Standards Committee which excludes Items 8 and 9 under 8a. Member Roggow seconded.

FOR THE MOTION: Member Roberts, Vice-Chairman Hoffman, Member Roggow, Member Miller, Member Anoatubby, and Chairman McFall

ABSENT Member Langenkamp

**ITEM 12/CONSIDERATION AND VOTE OF CONTRACT AMENDMENT BETWEEN THE OKLAHOMA HEALTH CARE AUTHORITY AND MERCER CONSULTING**

Howard Pallotta, Director of Legal Services

Mr. Pallotta stated that in regard to the Pediatrician's Case, Judge Eagan ordered the OHCA to do a fee study of both primary care and specialty care for children in Oklahoma. Action Item 12 is a request for the Board to allow the OHCA staff to amend the contract with Mercer Consulting in the amount of \$274,000 to complete that study. Mercer Consulting has assured OHCA that they can finish the study within the 6 month time period that Judge Eagan gave us from the date of the contract's execution. Mr. Pallotta asked the Board's authority to amend the Mercer Consulting Contract for that purpose.

Chairman McFall asked how much is Mercer's total contract? Mr. Pallotta replied he did not remember the exact amount.

Chairman McFall noted that this \$274,000 was in addition to the original contract approved last month.

MOTION: Member Hoffman moved for approval as proposed. Member Anoatubby seconded.

FOR THE MOTION: Member Roberts, Vice-Chairman Hoffman, Member Roggow, Member Miller, Member Anoatubby, and Chairman McFall

ABSENT Member Langenkamp

# **EXHIBIT 4**



Not Reported in F.Supp.2d, 2006 WL 1623529 (N.D.Okla.)  
(Cite as: 2006 WL 1623529 (N.D.Okla.))

Only the Westlaw citation is currently available.

United States District Court,  
N.D. Oklahoma.  
OKLAHOMA CHAPTER OF THE AMERICAN  
ACADEMY OF PEDIATRICS (OKAAP), et al.,  
Plaintiffs,

v.

Michael FOGARTY, Chief Executive Officer of the  
Oklahoma Health Care Authority (OHCA), et al.,  
Defendants.

No. 01-CV-0187-CVE-SAJ.

June 6, 2006.

[Louis Werner Bullock](#), [Patricia Whittaker Bullock](#),  
[Robert Murray Blakemore](#), Miller, Keffer & Bullock,  
Tulsa, OK, [Thomas K. Gilhool](#), [James Eiseman](#), Pub-  
lic Interest Law Center of Philadelphia, Philadelphia,  
PA, for Plaintiffs.

Lynn Susan Rambo-Jones, Howard J. Pallotta, Okla-  
homa City, OK, for Defendants.

### OPINION AND ORDER

[CLAIRE V. EAGAN](#), Chief District Judge.

\*1 Now before the Court is Defendants' Motion for Relief from Judgment (Dkt.# 411). On May 26, 2006, the Court held an evidentiary hearing and heard argument to determine the defendants' compliance with the Court's May 19, 2005 Final Judgment and Permanent Injunction. Defendants contend that they have fully complied with the Court's ruling and they request dismissal of the Court's supervision as a result. The basis of their contention (as well as their motion for relief from judgment) is a report submitted by Mercer Government Human Services Consulting ("Mercer") which purports to show that Oklahoma's Medicaid provider reimbursement rates assure reasonably prompt access to health care for minor children in the Oklahoma Medicaid Program.

The Final Judgment and Permanent Injunction required, among other things, that OHCA (1) begin reimbursing physicians at 100% of the rate paid by

Medicare; (2) OHCA negotiate a contract "with a nationally recognized economic consulting firm to conduct a study to determine the fee-for-service reimbursement rates necessary to assure reasonably prompt access to health care for minor children in the Oklahoma Medicaid Program while also complying with the utilization and efficiency requirements of [42 U.S.C. § 1396a\(a\)\(30\)\(a\)](#)"; and (3) "institute a fee-for-service fee schedule determined by the consulting firm as necessary to assure reasonably prompt access to health care for minor children in the Oklahoma Medicaid Program." Dkt. # 288, ¶¶ 1, 2, 5. The order specified that the study "include a determination and analysis of physician costs and overhead data in comparison with Medicaid reimbursement rates ... [and] a determination and analysis of commercial payer rates paid to providers." *Id.*, ¶ 4.

OHCA contracted with Mercer to perform the study, and defendants submitted Mercer's "Allowable Fee Comparison and Survey for Select Provider Specialties" (the "Mercer Report") to this Court on March 3, 2006. Seventh Status Report, Dkt. # 385, Ex. A. Defendants argue that the Mercer Report shows Oklahoma's rates paid at the time of trial compare favorably to rates paid by commercial payers, and thus, the rates paid by the Medicaid program did not deny access to Medicaid children. Mercer essentially concluded that "the fees paid by OHCA seemed to be reasonably sufficient to assure equal access in most specialties" and "the real issue facing OHCA's pediatric specialty access question, in our opinion, is linked more to the general scarcity of physicians in Oklahoma than to Medicaid fee level." *Id.* at 4; *see id.* at 45. Mercer recommended that "maximum reimbursement should be no more than 100 percent of MAF [Medicare Allowable Fees]" and that "reimbursement does not necessarily need to vary by provider specialty." *Id.* at 46-47. Essentially, Mercer's ultimate recommendation is that the defendants either keep Medicaid provider rates at the current level of 100% of Medicare allowable, or reduce Medicaid provider rates to 2004 levels. Defendant Michael Fogarty, Chief Executive Officer of the OHCA, testified at the May 26, 2006 hearing that OHCA has no intention of rolling back the Medicaid reimbursement rates to less than 100% of Medicare.

Not Reported in F.Supp.2d, 2006 WL 1623529 (N.D.Okla.)  
(Cite as: **2006 WL 1623529 (N.D.Okla.)**)

**\*2** The Court finds that the Mercer Study is not valid and does not support a finding that defendants have complied with the Court's Final Judgment and Permanent Injunction or that defendants are entitled to relief from judgment. The Court cannot endorse the report: not only is it contrary to the Court's findings that Oklahoma's 2004 Medicaid provider rates were insufficiently low to comply with [42 U.S.C. § 1396a\(A\)\(30\)\(A\)](#), but also it is based upon unreliable data. As plaintiffs argued, the conclusions of the Mercer Report are facially invalid, as Mercer failed to utilize the correct legal criteria set forth in the Court's Findings of Fact and Conclusions of Law, Dkt. # 272. In particular, Mercer conducted no analysis of whether current rates are sufficient to assure the provision of "reasonably prompt" care.

Mercer's recommendations are based on faulty provider rate analysis whereby Mercer used statistically invalid data to convert Medicaid rates at 72% and 90% into more than 145% of Medicare. The analysis compared payments to physicians under Medicaid, Medicare, and commercial benefit plans and essentially evaluated the cost of service to the plan sponsor, not to the physician providing the service. Mercer also included the uninsured in its calculations and did not consider the level of Medicaid participation by Oklahoma's pediatricians. The individual at Mercer who was in charge of the study admitted at the May 26, 2006 hearing that the physician survey data relied upon by Mercer was not statistically significant.

Relief under [Rule 60\(b\) of the Federal Rules of Civil Procedure](#) "is extraordinary and may only be granted in exceptional circumstances." [Zurich North America v. Matrix Serv., Inc.](#), 426 F.3d 1281, 1289 (10th Cir.2005). Under the rule, "the court may relieve a party or a party' legal representative from a final judgment, order, or proceeding for the following reasons: ... (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); ..." [Fed.R.Civ.P. 60\(b\)\(2\)](#). Defendants claim that the Mercer Report is "newly discovered evidence" warranting relief from the May 19, 2005 Final Judgment and Permanent Injunction.

For newly discovered evidence to provide a basis for a new trial under [Rule 60\(b\)\(2\)](#), the moving party must show "(1) the evidence was newly discovered

since the trial; (2) [the moving party] was diligent in discovering the new evidence; (3) the newly discovered evidence could not be merely cumulative or impeaching; (4) the newly discovered evidence [is] material; and (5) that a new trial[ ] with the newly discovered evidence would probably produce a different result."

[Zurich North America](#), 426 F.3d at 1290 (quoting [Graham v. Wyeth Lab.](#), 906 F.2d 1399, 1416 (10th Cir.1990)).

Plaintiffs contend, and the Court finds, that (1) the evidence offered is not newly discovered, (2) the defendants were not diligent in discovering the evidence, and (3) a new trial with the evidence would probably not produce a different result. The 2004 Medicaid rates were available at the time of trial-Mercer's manipulation of those rates is not "newly discovered evidence." In this regard, the Court is persuaded by the report of plaintiffs' expert, who opined that "[t]he calculations that lead to the conclusion that on balance Medicaid compensates better than commercial insurers ... contradicts every other study of its kind." Pl. Stmt. of Compliance, Dkt. # 418, Ex. D at 7. In any event, plaintiffs argue that the underlying data used by Mercer is and was readily available, and defendants could have hired Mercer or some other entity as an expert on rate reimbursement to perform the analysis before the trial.

**\*3** Finally, the Court notes that there is no need for relief from judgment under the circumstances present here, where defendants increased the Medicaid reimbursement rate to 100% of Medicare, as ordered by the Court, and have expressed no intention to reduce the rate below that level. There is a need for reliable evidence demonstrating the effect of the 100% reimbursement rate since the OHCA instituted the rate increase. Specifically, there is a need for reliable data comparing physician participation in the Medicaid program in 2004 and physician participation as a result of the rate increase. At the hearing, the parties explored the possibility of the Court ordering a second compliance hearing, after a 120-day discovery period, to determine whether the 100% rate assures the "reasonably prompt access" required by statute, or whether the Court should allow the OHCA an opportunity to commission a new study which would be of assistance to the Court in determining whether defendants are in compliance with the Court's man-

Not Reported in F.Supp.2d, 2006 WL 1623529 (N.D.Okla.)  
(Cite as: **2006 WL 1623529 (N.D.Okla.)**)

date. The Court hereby directs defendants to file notice, **no later than June 30, 2006**, as to its preference for one of these two options. The Court will then set a schedule accordingly.

**IT IS THEREFORE ORDERED** that Defendants' Motion for Relief from Judgment (Dkt. # 411) is hereby **denied**.

N.D.Okla.,2006.  
Oklahoma Chapter of the American Academy of Pediatrics (OKAAP) v. Fogarty  
Not Reported in F.Supp.2d, 2006 WL 1623529 (N.D.Okla.)

END OF DOCUMENT

# **EXHIBIT 5**

UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

OKLAHOMA CHAPTER OF THE AMERICAN ACADEMY OF PEDIATRICS (OKAAP); COMMUNITY ACTION PROJECT OF TULSA COUNTY, OKLAHOMA, (CAPTC); TRACY T., as mother and next friend of Katelyn M. Wilbanks; LISA P., as mother and next friend of Joshua Lee O'Neal, Eric Harman Cammisso, Melissa Ann Padelford and Mathew Scott Padelford; ROWENA T., as parent and next friend of Christy A. Towler, Katherine P. Towler and Jacob W. Towler; KEVIN T., as parent and next friend of Christy A. Towler, Katherine P. Towler and Jacob W. Towler; JANICE G., as parent and next friend of Charles A. Scanlan and Robert M. Garvin; THEODORE G., as parent and next friend of Charles A. Scanlan and Robert M. Garvin; REGINA H., as parent and next friend of Jacob W. Hercules and Everett L. Hercules; GUS H., as parent and next friend of Jacob W. Hercules and Everett L. Hercules; HEATHER R., as parent and next friend of Stephanie Moncrief,

Plaintiffs - Appellants -  
Cross-Appellees,

v.

MICHAEL FOGARTY, Chief Executive Officer of the Oklahoma Health Care Authority (OHCA); LYNN MITCHELL, State Medicaid Director; CHARLES ED MCFALL, Chairman of the OHCA Board of Directors; T. J. BRICKNER,

A true copy

Teste

Elisabeth A. Shumaker  
Clerk, U.S. Court of  
Appeals, Tenth Circuit

By 

Deputy Clerk

Nos. 05-5100 & 05-5107  
(D.C. No. 01-CV-0187-CVE-SAJ)  
(Northern District of Oklahoma)

JR., Vice-Chair of the OHCA Board of Directors; WAYNE HOFFMAN, JERRY HENLEE, RONALD ROUNDS, O.D., GEORGE MILLER, LYLE ROGGOW, and JERRY HUMBLE, Members of the OHCA Board of Directors; OKLAHOMA HEALTH CARE AUTHORITY,

Defendants - Appellees -  
Cross-Appellants,

AMERICAN ACADEMY OF PEDIATRICS; AMERICAN MEDICAL ASSOCIATION, and OKLAHOMA STATE MEDICAL ASSOCIATION,

Amici Curiae.

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JUDGMENT

Filed January 3, 2007

---

Before **TACHA**, Chief Circuit Judge, **BRISCOE**, and **HARTZ**, Circuit Judges.

---

This case originated in the District of Northern Oklahoma and was argued by counsel.

The judgment of that court is reversed. The case is remanded to the United States District Court for the District of Northern Oklahoma for further proceedings in accordance with the opinion of this court.

Entered for the Court  
ELISABETH A. SHUMAKER, Clerk

by: *EL*  
Deputy Clerk

# **EXHIBIT 6**

**United States Court of Appeals for the Tenth Circuit**  
**OFFICE OF THE CLERK**

Byron White United States Courthouse  
1823 Stout Street  
Denver, Colorado 80257  
(303)844-3157

Elisabeth A. Shumaker  
Clerk of Court

Douglas E. Cressler  
Chief Deputy Clerk

**RECEIVED**

FEB 15 2007

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

February 13, 2007

Mr. Phil Lombardi  
Clerk  
United States District Court for the N. District of Oklahoma  
333 W. Fourth Street  
Room 411 United States Courthouse  
Tulsa, OK 74103

Re: 05-5100, Oklahoma Chapter v. Fogarty  
Dist/Ag docket: 01-CV-0187-CVE-SAJ,  
05-5107, Oklahoma Chapter v. Fogarty  
Dist/Ag docket: 01-CV-187-CVE

Dear Clerk:

Enclosed are a certified copy of the judgment and a copy of the opinion filed in this case which are issued as the mandate of this court. See Fed. R. App. P. 41(a). Please file it in records of your court or agency.

Please contact this office if you have questions.

Sincerely,

Elisabeth A. Shumaker  
Clerk, Court of Appeals

By:   
Deputy Clerk

clk:jc

cc:

Louis W. Bullock  
Patricia Whittaker Bullock  
Robert M. Blakemore  
Thomas K. Gilhool  
James Eiseman  
Lynn Rambo Jones  
Howard J. Pallotta  
Jessica L. Ellsworth  
Catherine E. Stetson  
Jonathan S. Franklin

# **EXHIBIT 7**

UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

OKLAHOMA CHAPTER OF THE AMERICAN ACADEMY OF PEDIATRICS (OKAAP); COMMUNITY ACTION PROJECT OF TULSA COUNTY, OKLAHOMA, (CAPTC); TRACY T., as mother and next friend of Katelyn M. Wilbanks; LISA P., as mother and next friend of Joshua Lee O'Neal, Eric Harman Cammiso, Melissa Ann Padelford and Mathew Scott Padelford; ROWENA T., as parent and next friend of Christy A. Towler, Katherine P. Towler and Jacob W. Towler; KEVIN T., as parent and next friend of Christy A. Towler, Katherine P. Towler and Jacob W. Towler; JANICE G., as parent and next friend of Charles A. Scanlan and Robert M. Garvin; THEODORE G., as parent and next friend of Charles A. Scanlan and Robert M. Garvin; REGINA H., as parent and next friend of Jacob W. Hercules and Everett L. Hercules; GUS H., as parent and next friend of Jacob W. Hercules and Everett L. Hercules; HEATHER R., as parent and next friend of Stephanie Moncrief,

Plaintiffs - Appellants -  
Cross-Appellees,

v.

MICHAEL FOGARTY, Chief Executive Officer of the Oklahoma Health Care Authority (OHCA); LYNN MITCHELL, State Medicaid Director; CHARLES ED MCFALL, Chairman of the OHCA Board of Directors; T. J. BRICKNER,

A true copy

Teste

Elisabeth A. Shumaker  
Clerk, U.S. Court of  
Appeals, Tenth Circuit

By 

Deputy Clerk

Nos. 05-5100 & 05-5107  
(D.C. No. 01-CV-0187-CVE-SAJ)  
(Northern District of Oklahoma)

JR., Vice-Chair of the OHCA Board of Directors; WAYNE HOFFMAN, JERRY HENLEE, RONALD ROUNDS, O.D., GEORGE MILLER, LYLE ROGGOW, and JERRY HUMBLE, Members of the OHCA Board of Directors; OKLAHOMA HEALTH CARE AUTHORITY,

Defendants - Appellees -  
Cross-Appellants,

AMERICAN ACADEMY OF PEDIATRICS; AMERICAN MEDICAL ASSOCIATION, and OKLAHOMA STATE MEDICAL ASSOCIATION,

Amici Curiae.

---

JUDGMENT

Filed January 3, 2007

---

Before **TACHA**, Chief Circuit Judge, **BRISCOE**, and **HARTZ**, Circuit Judges.

---

This case originated in the District of Northern Oklahoma and was argued by counsel.

The judgment of that court is reversed. The case is remanded to the United States District Court for the District of Northern Oklahoma for further proceedings in accordance with the opinion of this court.

Entered for the Court  
ELISABETH A. SHUMAKER, Clerk

by: *EL*  
Deputy Clerk

**FILED**  
United States Court of Appeals  
Tenth Circuit

January 3, 2007

**PUBLISH**  
**UNITED STATES COURT OF APPEALS**  
**TENTH CIRCUIT**

Elisabeth A. Shumaker  
Clerk of Court

OKLAHOMA CHAPTER OF THE AMERICAN ACADEMY OF PEDIATRICS (OKAAP); COMMUNITY ACTION PROJECT OF TULSA COUNTY, OKLAHOMA (CAPTC); TRACY T., as mother and next friend of Katelyn M. Wilbanks; LISA P., as mother and next friend of Joshua Lee O'Neal, Eric Harman Cammiso, Melissa Ann Padelford and Mathew Scott Padelford; ROWENA T., as parent and next friend of Christy A. Towler, Katherine P. Towler and Jacob W. Towler; KEVIN T., as parent and next friend of Christy A. Towler, Katherine P. Towler and Jacob W. Towler; JANICE G., as parent and next friend of Charles A. Scanlan and Robert M. Garvin; THEODORE G., as parent and next friend of Charles A. Scanlan and Robert M. Garvin; REGINA H., as parent and next friend of Jacob W. Hercules and Everett L. Hercules; GUS H., as parent and next friend of Jacob W. Hercules and Everett L. Hercules; HEATHER R., as parent and next friend of Stephanie Moncrief,

Plaintiffs-Appellants/Cross-Appellees,

v.

A true copy

Teste

Elisabeth A. Shumaker  
Clerk, U.S. Court of  
Appeals, Tenth Circuit

By MA

Deputy Clerk

Nos. 05-5100 & 05-5107

MICHAEL FOGARTY, Chief Executive Officer of the Oklahoma Health Care Authority (OHCA); LYNN MITCHELL, State Medicaid Director; CHARLES ED McFALL, Chairman of the OHCA Board of Directors; T. J. BRICKNER, JR., Vice-Chair of the OHCA Board of Directors; WAYNE HOFFMAN, JERRY HENLEE, RONALD ROUNDS, O.D., GEORGE MILLER, LYLE ROGGOW and JERRY HUMBLE, Members of the OCHA Board of Directors; OKLAHOMA HEALTH CARE AUTHORITY,

Defendants-Appellees/Cross-Appellants.

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AMERICAN ACADEMY OF PEDIATRICS; AMERICAN MEDICAL ASSOCIATION, and OKLAHOMA STATE MEDICAL ASSOCIATION,

Amici Curiae.

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**APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OKLAHOMA  
(D.C. No. 01-CV-0187-CVE-SAJ)**

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Louis W. Bullock, Miller, Keffer & Bullock, LLC, Tulsa, Oklahoma (Robert M. Blakemore, Miller, Keffer & Bullock, LLC, Tulsa, Oklahoma; Thomas K. Gilhool and James Eiseman, Jr., Public Interest Law Center, Philadelphia, Pennsylvania, with him on the briefs), for Plaintiffs-Appellants/Cross-Appellees.

Howard J. Pallotta, (Lynn Rambo-Jones with him on the briefs) Oklahoma Health Care Authority, Legal Division, Oklahoma City, Oklahoma, for Defendants-Appellees/Cross-Appellants.

Jonathan S. Franklin and Jessica L. Ellsworth, Hogan & Hartson, L.L.P., Washington,

D.C., filed an amicus curiae brief for the American Academy of Pediatrics, the American Medication Association, and the Oklahoma State Medical Association.

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Before **TACHA, BRISCOE, and HARTZ**, Circuit Judges.

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**BRISCOE**, Circuit Judge.

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Plaintiffs, two organizations and thirteen children and their parents representing a class of individuals, filed suit under 42 U.S.C. § 1983 claiming that defendants, officials of the State of Oklahoma and the Oklahoma Health Care Authority, violated various provisions of the Medicaid Act by failing to provide Medicaid-eligible children in the State of Oklahoma with necessary health care services, including early and periodic screening, diagnosis, and treatment services. After conducting a bench trial, the district court found in favor of plaintiffs on some, but not all, of their claims, and issued a permanent injunction requiring defendants to, in pertinent part, conduct a study to determine the provider reimbursement rates necessary to ensure reasonably prompt access to health care for Medicaid-eligible children, and to revise their fee schedule in accordance with that study. Both sides have now appealed, challenging various aspects of the district court’s decision.

We exercise jurisdiction pursuant to 28 U.S.C. § 1291, reverse the judgment of the district court, and remand with directions to enter judgment in favor of defendants. In doing so, we conclude, contrary to the district court, that the defendants did not violate 42 U.S.C. § 1396a(a)(8)’s “reasonable promptness” requirement by allowing system-wide

delays in treatment of Medicaid beneficiaries or by paying providers insufficient rates for services rendered to Medicaid beneficiaries. We further conclude that 42 U.S.C. § 1396a(a)(10) requires a state Medicaid plan to pay for, but not to directly provide, the specific medical services listed in the Medicaid Act. We also conclude, consistent with our recent decision in Mandy R. ex rel. Mr. and Mrs. R. v. Owens, 464 F.3d 1139 (10th Cir. 2006), that 42 U.S.C. § 1396a(a)(30) does not create a private right of action enforceable by plaintiffs. Finally, we decline to consider plaintiffs' assertion of a private right of action pursuant to 42 U.S.C. § 1397a(a)(43) because the arguments now made on appeal by plaintiffs were neither asserted nor addressed below.

I.

Plaintiff Oklahoma Chapter of the American Academy of Pediatrics (OKAAP) is a non-profit professional organization of pediatricians and pediatric specialists. Plaintiff Community Action Project of Tulsa County, Inc. (CAPTC) is a non-profit organization located in Tulsa, Oklahoma. The individually-named plaintiffs are thirteen children and their parents, all of whom have been designated as representatives of the class certified by the district court. Defendants are officials of the State of Oklahoma and the Oklahoma Health Care Authority (OHCA), the designated agency responsible for implementing and administering Oklahoma's Medicaid program.

Plaintiffs filed this action in March 2001, alleging that defendants' policies and procedures denied or deprived eligible children in the State of Oklahoma of the health and medical care to which they were entitled under federal law. In particular, plaintiffs

asserted claims under 42 U.S.C. § 1983 to enforce (a) their alleged right pursuant to 42 U.S.C. §§ 1396a(a)(8), 1396a(10)(A), 1396d(a)(4)(B)(2), and 1336d(r) to receive early and periodic screening, diagnostic, and treatment services (EPSDT), (b) their alleged right pursuant to 42 U.S.C. § 1396a(a)(8) to receive necessary care and services with reasonable promptness, and (c) their alleged right pursuant to 42 U.S.C. § 1396a(a)(30)(A) to have provider reimbursement rates set at a sufficient level to assure Medicaid recipients of equal access to quality health care.

The district court, at plaintiffs' request, defined and certified a plaintiff class of children on May 30, 2003. The district court then conducted a bench trial on plaintiffs' claims in April and May 2004. On March 22, 2005, the district court issued lengthy findings of fact and conclusions of law. In its order, the district court dismissed plaintiff OKAAP for lack of standing. The district court also concluded, in pertinent part, that:

- defendants violated 42 U.S.C. § 1396a(a)(30)(A) by failing to assure that payments were sufficient to enlist enough providers so that care and services were available to Medicaid-eligible children to the extent that such care and services were available to the general population in the geographic areas served by the OHCA; and
- defendants violated 42 U.S.C. § 1396a(a)(8) by failing to furnish medical assistance with reasonable promptness to all Medicaid-eligible individuals.

At the conclusion of its order, the district court directed the parties to meet and confer with the magistrate judge "in order to reach an agreed proposed injunctive order to be submitted" to the court "consistent with [its] Findings of Fact and Conclusions of Law." Aplt. App. at 396.

On May 19, 2005, after the parties submitted the agreed proposed injunctive order, the district court issued a Final Judgment and Permanent Injunction. Therein, the district court reiterated its legal conclusions and, based upon the two alleged violations outlined above, directed defendants to:

- “institute a fee schedule for fee-for-service physician . . . reimbursement for covered, medically necessary physician services provided to minor children” under the Medicaid program “at the rate for each Current Procedural Terminology . . . Code that equals one hundred percent (100%) of the rate paid by Medicare for physician services as soon as possible within the strictures of” state and federal law;
- “authorize OHCA administrative staff to negotiate a contract . . . with a nationally recognized economic consulting firm to conduct a study to determine the fee-for-service reimbursement rate necessary to assure reasonably prompt access to health care for minor children in the Oklahoma Medicaid Program while also complying with the utilization and efficiency requirements of 42 U.S.C. § 1396a(a)(30)(a)”;
- “institute a fee-for-service schedule determined by the consulting firm as necessary to assure reasonably prompt access to health care for minor children in the Oklahoma Medicaid program”;
- “[i]n the event that OHCA is unable in good faith to negotiate the contract contemplated by the Final Judgment and Permanent Injunction by August 15, 2005, or if the study contemplated by [the district court] is not completed within six months of the date the contract is executed by the parties, the OHCA shall adjust all Medicaid rates paid to providers so that the rates for covered, medically necessary physician services provided to minor children under the Oklahoma Medicaid Program are sufficient to ensure equal and reasonably prompt access to health care for such minor children”;
- “use [their] best efforts to attempt to obtain increased funding from the Oklahoma Legislature for the reimbursement changes mentioned herein; however, a lack of such funding shall not excuse compliance with this Permanent Injunction”; and

- “assure that OHCA immediately adopts and implements new periodicity schedules (for periodic comprehensive medical screening examinations, dental screening examinations and vision screening examinations) after consulting with recognized medical and dental organizations involved in child health care, including OKAAP, Oklahoma State Medical Association, and the Oklahoma Dental Association. In this regard, the OHCA Board of Directors shall invite OKAAP, the Oklahoma State Medical Association, the Oklahoma Dental Association and/or other recognized medical and dental organizations involved in child health care to appoint members to an advisory committee that will meet with the OHCA EPSDT Unit (recently renamed Child Health) staff at least annually to consult on a periodicity schedule for EPSDT services. This advisory committee shall meet no later than forty-five days after the date of this Permanent Injunction.”

Aplt. App. at 422-425.

On June 14, 2005, plaintiffs filed a notice of appeal from the district court’s Final Judgment and Permanent Injunction, and from the district court’s April 20, 2005 Order denying plaintiffs’ motion to alter or amend judgment. On June 27, 2005, defendants filed a notice of cross appeal from the district court’s Final Judgment and Permanent Injunction, as well as the district court’s Findings of Fact and Conclusions of Law.

## II.

### *A. Plaintiffs’ claims under 42 U.S.C. § 1983*

*1) 42 U.S.C. §§ 1396a(a)(8) and (a)(10)(A), 1396d(a)(4)(B) and (r)*

Plaintiffs challenge the district court’s ruling on the merits of their claims under § 1983 for alleged violations of 42 U.S.C. §§ 1396a(a)(8), 1396a(a)(10)(A), 1396d(a)(4)(B), and 1396d(r).<sup>1</sup> In particular, plaintiffs contend the district court erred in

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<sup>1</sup> “We . . . assume without deciding that § 1983 gives the plaintiffs a right of action to enforce” these provisions. Mandy R., 464 F.3d at 1143.

applying a “substantial compliance” standard in determining whether defendants met what plaintiffs allege, and the district court agreed, were defendants’ obligations under these statutes to furnish comprehensive medical screening examinations, preventive dental services and necessary medical treatment to members of the class of individual plaintiffs. Because this issue hinges on the interpretation of these federal statutes, we apply a de novo standard of review. Shivwits Band of Paiute Indians v. Utah, 428 F.3d 966, 978 (10th Cir. 2005).

Sections 1396a(a)(8) and (a)(10)(A) of Title 42 provide, in pertinent part, as follows:

(a) A State plan for medical assistance must –

\* \* \*

(8) provide . . . that such [medical] assistance shall be furnished with reasonable promptness to all eligible individuals;

\* \* \*

(10) provide –

(A) for making medical assistance available, including at least the care and services listed in paragraphs (1) through (5), (17) and (21) of section 1396d(a) of this title, to . . . all individuals . . . who are receiving aid or assistance under any [approved State Medicaid] plan . . . .

42 U.S.C. § 1396a(a)(8), (10)(A).

In turn, sections 1396d(a)(4)(B) and (r) provide as follows:

For purposes of this subchapter --

**(a) Medical assistance**

The term “medical assistance” means payment of part or all of the cost of the following care and services . . . for individuals . . .

(4) . . . (B) early and periodic screening, diagnostic, and treatment services (as defined in subsection (r) of this section) for individuals

who are eligible under the plan and are under the age of 21 . . . .

\* \* \*

**(r) Early and periodic screening, diagnostic, and treatment services**

The term “early and periodic screening, diagnostic, and treatment services” means the following items and services:

**(1) Screening services—**

**(A) are provided—**

(i) at intervals which meet reasonable standards of medical and dental practice, as determined by the State after consultation with recognized medical and dental organizations involved in child health care and, with respect to immunizations under subparagraph (B)(iii), in accordance with the schedule referred to in section 1396s(c)(2)(B)(i) of this title for pediatric vaccines, and

(ii) at such other intervals, indicated as medically necessary, to determine the existence of certain physical or mental illnesses or conditions; and

**(B) which shall at a minimum include—**

(i) a comprehensive health and developmental history (including assessment of both physical and mental health development),

(ii) a comprehensive unclothed physical exam,

(iii) appropriate immunizations (according to the schedule referred to in section 1396s(c)(2)(B)(i) of this title for pediatric vaccines) according to age and health history,

(iv) laboratory tests (including lead blood level assessment appropriate for age and risk factors), and

(v) health education (including anticipatory guidance).

**(2) Vision services—**

**(A) which are provided—**

(i) at intervals which meet reasonable standards of medical practice, as determined by the State after consultation with recognized medical organizations involved in child health care, and

(ii) at such other intervals, indicated as medically necessary, to determine the existence of a suspected illness or condition; and

**(B) which shall at a minimum include diagnosis and treatment**

for defects in vision, including eyeglasses.

(3) Dental services—

(A) which are provided—

- (i) at intervals which meet reasonable standards of dental practice, as determined by the State after consultation with recognized dental organizations involved in child health care, and
- (ii) at such other intervals, indicated as medically necessary, to determine the existence of a suspected illness or condition; and

(B) which shall at a minimum include relief of pain and infections, restoration of teeth, and maintenance of dental health.

(4) Hearing services—

(A) which are provided—

- (i) at intervals which meet reasonable standards of medical practice, as determined by the State after consultation with recognized medical organizations involved in child health care, and
- (ii) at such other intervals, indicated as medically necessary, to determine the existence of a suspected illness or condition; and

(B) which shall at a minimum include diagnosis and treatment for defects in hearing, including hearing aids.

(5) Such other necessary health care, diagnostic services, treatment, and other measures described in subsection (a) of this section to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, whether or not such services are covered under the State plan.

Nothing in this subchapter shall be construed as limiting providers of early and periodic screening, diagnostic, and treatment services to providers who are qualified to provide all of the items and services described in the previous sentence or as preventing a provider that is qualified under the plan to furnish one or more (but not all) of such items or services from being qualified to provide such items and services as part of early and periodic screening, diagnostic, and treatment services. The Secretary shall, not later than July 1, 1990, and every 12 months thereafter, develop and set annual participation goals for each State for participation of individuals who are covered under the State plan under this subchapter in early and periodic screening, diagnostic, and treatment services.

42 U.S.C. § 1396d(a)(4)(B), (r).

Purporting to apply § 1396a(a)(8)'s "reasonable promptness" requirement, the district court held as follows:

32. Plaintiffs have offered substantial evidence that the delays in treatment for children with specific conditions are medically inappropriate. Importantly, plaintiffs have shown that system-wide delays in treatment exist and have presented convincing evidence that those delays are not reasonable. In violation of 42 U.S.C. § 1396a(a)(8), defendants are not ensuring that medical assistance is furnished with reasonable promptness to all eligible individuals.

33. The Court is aware of Bruggeman v. Blagojevich, 324 F.3d 906, 910 (7th Cir. 2003), in which the court held that Illinois officials' failure to adopt a plan for expanding the number of intermediate care facilities for the developmentally disabled in another part of the state did not violate 42 U.S.C. § 1396a(a)(8). In so holding, the court remarked:

the statutory reference to "assistance" appears to have reference to *financial* assistance rather than to actual medical services, though the distinction was missed in Bryson v. Shumway, 308 F.3d 79, 81 (1st Cir. 2002), and Doe v. Chiles, 136 F.3d 709, 714, 717 (11th Cir. 1998). Medicaid is a payment scheme, not a scheme for state-provided medical assistance, as through state-owned hospitals. The regulations that implement the provision indicate that what is required is a prompt determination of eligibility and prompt provision of funds to eligible individuals to enable them to obtain the covered medical services that they need, see 42 C.F.R. §§ 435.91(a), .930(a)-(b); a requirement of prompt treatment would amount to a direct regulation of medical services.

Id. at 910. The Court finds that this distinction, while accurate, does not preclude a finding in this case that defendants have violated § 1396a(a)(8). Without financial assistance (provider reimbursement) sufficient to attract an adequate number of providers, reasonably prompt assistance is effectively denied.

Aplt. App. at 378.

We reject the district court's conclusions. In our recent decision in Mandy R., we agreed with the Seventh Circuit's decision in Bruggeman that the term "medical assistance," as employed in § 1396a(a)(8), refers "to financial assistance rather than to actual medical services." 464 F.3d at 1143 (quoting Bruggeman, 324 F.3d at 910). In turn, we interpreted § 1396a(a)(8) as "requir[ing] any state participating in Medicaid to pay promptly . . . for medical services when the state is presented with the bill." Id. As noted by defendants, this interpretation is clearly contrary to the plaintiffs' assertion, and the district court's apparent conclusion, that § 1396a(a)(8) makes a state Medicaid program directly responsible for ensuring that the medical services enumerated in the Medicaid Act (i.e., those that are reimbursable) are actually provided to Medicare beneficiaries in a reasonably prompt manner.

The district court also erred, given our holding in Mandy R., in concluding that defendants violated § 1396a(a)(8)'s "reasonable promptness" requirement by paying providers insufficient rates for services rendered to Medicaid beneficiaries. Although the district court apparently concluded, and perhaps correctly so, that low rates of reimbursement reduce the number of providers available to Medicaid beneficiaries, and in turn increase the time Medicaid beneficiaries must wait to receive medical services from available providers, this conclusion does not mean that defendants failed (or will fail in the future) to be reasonably prompt in paying for services actually rendered by available providers, as required by § 1396a(a)(8). Indeed, if the district court's theory were correct, it would broaden § 1396a(a)(8) far beyond its intended scope, and would require federal

courts to engage in what the Third Circuit has described as the “onerous” task of “evaluating whether a state’s Medicaid reimbursement rates are ‘reasonable and adequate.’” Chiles, 136 F.3d at 717. Thus, we agree with defendants that the district court erred when it directed defendants to conduct a study of rates, costs and services, and then to use the study to correct what the district court concluded were too-low rates of reimbursement. Likewise, we agree with defendants that the district court erred in requiring rates to be set at a level that would ensure a two-thirds “level of participation” among physicians in the State of Oklahoma.

To be sure, plaintiffs’ claims in this case differ slightly from those in Mandy R. in that, in addition to § 1396a(a)(8), they also rely on the provisions of § 1396a(a)(10)(A). Although Mandy R. did not address the meaning of § 1396a(a)(10)(A), the fact that plaintiffs have included that as a basis for their claims does nothing to change the outcome. As noted above, subsection (a)(10)(A) simply requires a state Medicaid plan to provide “medical assistance,” as that phrase is uniquely defined in the Medicaid Act, for specific medical services listed in the Medicaid Act, including EPSDT services. In other words, subsection (a)(10)(A) requires a state Medicaid plan to pay for all such medical services, not, as plaintiffs suggest, to directly provide them.

Finally, plaintiffs’ “substantial compliance” arguments are clearly wrong because they hinge on the mistaken view that the above-quoted provisions of the Medicaid Act “clearly and unambiguously require states to furnish EPSDT services to all eligible individuals under the age of 21.” Aplt. Br. at 31. As we have discussed, the term

“medical assistance,” as used throughout the Medicaid Act, refers to the payment of all or part of the cost of the care and services specifically described in the act. That is, as noted in Mandy R., the Medicaid Act requires participating states to provide beneficiaries financial assistance rather than actual medical services. Thus, not only do the statutes cited by plaintiffs not obligate defendants to ensure that EPSDT services are “fully” delivered to the plaintiff class, those statutes impose no obligation whatsoever on defendants to deliver any medical services. Rather, as we concluded in Mandy R., defendants’ obligation under these statutes is to pay promptly for the medical services outlined in the Medicaid Act, including EPSDT services.

*2) 42 U.S.C. § 1396a(a)(30)(A)*

Both plaintiffs and defendants assert challenges to the district court’s final judgment granting injunctive relief based upon defendants’ alleged violation of 42 U.S.C. § 1396a(a)(30)(A). We find it unnecessary to address any of these arguments in detail, however, because we recently held in Mandy R. that § 1396a(a)(30)(A) does not give rise to an enforceable private right on behalf of Medicaid beneficiaries and providers that can be pursued under § 1983. 464 F.3d at 1148. Thus, we simply conclude that the district court erred in holding that defendants violated § 1396a(a)(30)(A), and in turn granting injunctive relief in favor of defendants based upon that purported violation.

*3) 42 U.S.C. § 1396a(a)(43)*

In a supplemental brief filed after the issuance of Mandy R., plaintiffs argue for the first time on appeal that 42 U.S.C. § 1396a(a)(43) “create[s] enforceable rights” in favor

of Medicaid recipients, “including the right to receive actual [EPSDT] services.” *Aplt. Supp. Br.* at 6. Plaintiffs further argue that “[i]f, as the trial court found here, children are not *receiving* the care and services they are entitled to, then the State has failed to comply with” § 1396a(a)(43). *Id.* at 8 (*italics in original*).

We conclude these arguments are not properly before us. “Absent authorization from this court, a party is generally precluded from raising issues in a supplemental brief that were not addressed in the opening brief.” United States v. Lawrence, 405 F.3d 888, 908 n.15 (10th Cir. 2005). Moreover, we are not persuaded, after reviewing the record on appeal, that the new arguments asserted by plaintiffs were adequately raised or decided below. See United Steelworkers of Am. v. Or. Steel Mills, Inc., 322 F.3d 1222, 1228 (10th Cir. 2003) (noting that arguments not raised below will not be considered for the first time on appeal unless they are purely matters of law whose proper resolution is certain); United States v. Easter, 981 F.2d 1549, 1556 n.5 (10th Cir. 1992) (refusing to address issue not decided below because it was “a fact-dependant challenge and [there was] an insufficient record” on appeal). While § 1396a(a)(43) was cited in the first amended complaint and also referenced in the pretrial order, there is no indication in the record on appeal that the district court was asked to determine, or in fact did determine, (a) whether § 1396a(a)(43) creates an enforceable private right on behalf of Medicaid beneficiaries that can be pursued under § 1983, and (b) whether defendants violated the specific provisions of § 1396a(a)(43) that plaintiffs now assert require the provision of actual health care services.

***B. Dismissal of plaintiff OKAAP for lack of standing***

Plaintiff OKAAP, a non-profit professional organization of pediatricians and pediatric sub-specialists, contends the district court erred in dismissing it from the suit for lack of standing. Our conclusions on the parties' other issues, which necessitate reversal of the district court's judgment, have rendered this issue moot.

The judgment of the district court is REVERSED, and the case REMANDED to the district court with directions to enter judgment in favor of defendants on all claims.

**United States Court of Appeals for the Tenth Circuit**  
**OFFICE OF THE CLERK**

Byron White United States Courthouse  
1823 Stout Street  
Denver, Colorado 80257  
(303)844-3157

Elisabeth A. Shumaker  
Clerk of Court

Douglas E. Cressler  
Chief Deputy Clerk

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FEB 15 2007

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

February 13, 2007

Mr. Phil Lombardi  
Clerk  
United States District Court for the N. District of Oklahoma  
333 W. Fourth Street  
Room 411 United States Courthouse  
Tulsa, OK 74103

Re: 05-5100, Oklahoma Chapter v. Fogarty  
Dist/Ag docket: 01-CV-0187-CVE-SAJ,  
05-5107, Oklahoma Chapter v. Fogarty  
Dist/Ag docket: 01-CV-187-CVE

Dear Clerk:

Enclosed are a certified copy of the judgment and a copy of the opinion filed in this case which are issued as the mandate of this court. See Fed. R. App. P. 41(a). Please file it in records of your court or agency.

Please contact this office if you have questions.

Sincerely,

Elisabeth A. Shumaker  
Clerk, Court of Appeals

By:   
Deputy Clerk

clk:jc

cc:

Louis W. Bullock  
Patricia Whittaker Bullock  
Robert M. Blakemore  
Thomas K. Gilhool  
James Eiseman  
Lynn Rambo Jones  
Howard J. Pallotta  
Jessica L. Ellsworth  
Catherine E. Stetson  
Jonathan S. Franklin

# **EXHIBIT 8**

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

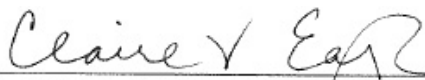
OKLAHOMA CHAPTER OF THE )  
AMERICAN ACADEMY OF PEDIATRICS )  
(OKAAP), *et al.*, )  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
MICHAEL FOGARTY, Chief Executive )  
Officer of the Oklahoma Health Care )  
Authority (OHCA), *et al.*, )  
 )  
Defendants. )

Case No. 01-CV-0187-CVE-SAJ

JUDGMENT

This matter comes on for consideration following the Tenth Circuit’s decision reversing this Court’s entry of judgment in favor of plaintiffs and against defendants. Dkt # 446. The Tenth Circuit remanded the case with instructions to enter judgment for defendants on all claims. In accordance with the Tenth Circuit’s decision, the Court’s Finding of Fact and Conclusions of Law (Dkt. # 272) and Final Judgment and Permanent Injunction (Dkt. # 288) are **vacated**, and judgment is hereby entered in favor of defendants and against plaintiffs on all claims.

**IT IS SO ORDERED** this 16th day of February, 2007.

  
\_\_\_\_\_  
CLAIRE V. EAGAN, CHIEF JUDGE  
UNITED STATES DISTRICT COURT

# **EXHIBIT 9**

## News Release

January 14, 2010

OHCA Contact: Jo Kilgore, Public Information Manager, (405) 522-7474.

### Health Care Authority Board OKs Provider Rate Reductions

OKLAHOMA CITY – The Oklahoma Health Care Authority board approved reductions of 3.25 percent to rates paid to SoonerCare providers for health care services. The cuts which were required to accommodate the agency's reduced allocation of general revenue for December 2009 and January 2010 will go into effect April 1.

The agency's budget reduction amounts to about \$5 million in state dollars. However, each dollar the state spends in the Medicaid program is matched by \$3 from the federal government. A cut of \$5 million state dollars creates a total cut of \$20 million when matching federal funds are taken away.

In December, the board cut about \$17 million in state funds from the agency's budget which equaled a total reduction of \$69.6 million when the federal matching funds were included. The cuts involved reducing administrative costs, changes to durable medical equipment (DME) and prescription benefits, and changes in payments to providers for certain services.

"This is frustrating to say the least," said Mike Fogarty, OHCA's chief executive officer. "Our board and agency has been on a mission with state leaders for the past seven years to bring provider rates up to a responsible level. Three years ago, we reached that goal and we do not want to lose momentum."

Fogarty noted that access may become an issue if provider rates are reduced as fewer providers are willing to see SoonerCare patients.

"Our program is designed to be counter-cyclical. When the economy falters and people lose their jobs and benefits or have their pay reduced, then more people qualify for our programs. We provide a safety net to help people, particularly kids, get needed health care," he added. "Until this point, we have done all we can to protect provider rates in order to maintain access to our growing membership. However, we knew if the cuts continued that provider rates would have to be reduced."

According to recently released enrollment data, the OHCA is experiencing an enrollment surge in its two health care programs, SoonerCare and Insure Oklahoma. For the first time in history, point in time enrollment in the two programs is more than 700,000 Oklahomans, or 20 percent of the state's population.

The agency has spent the past couple of months meeting with providers and advocates to try to determine the best ways to reduce the agency's budget. The across-the-board provider rate cuts were the last possible option to reduce the millions required to meet the state-mandated balanced budget provision.

A copy of the board's agenda is available at OHCA's Web site at <http://www.okhca.org/board-meetings>.

**#30#**

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Oklahoma's Medicaid Agency