IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

MARY TROUPE, et al.	)	
Plaintiffs,	)	
v.	)	CASE NO. 3:10cv153HTW-LRA
GOVERNOR HALEY BARBOUR, et al.	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM OF AUTHORITIES IN SUPPORT OF MOTION TO LIFT STAY OF DISCOVERY AND PROCEED WITH CASE MANAGEMENT CONFERENCE

On May 27, 2010 the Defendants filed a Motion to Dismiss or for Judgment on the Pleadings with respect to Count I of Plaintiffs' Complaint. In that motion, the Defendants allege that this Court lacks subject matter jurisdiction over the Plaintiffs' claim brought under the Early and Periodic Screening, Diagnostic and Treatment (EPSDT) provisions of the Medicaid Act, 42 U.S.C. §§ 1396a(a)(43), 1396d(r), and argue that the Eleventh Amendment of the United States Constitution bars the Plaintiffs from bringing this claim against Defendants Haley Barbour, Governor of Mississippi, and Robert L. Robinson, Director of the Mississippi Division of Medicaid. Pursuant to Rule 16(b)(3)(B) of the Uniform Local Rules of the United States District Courts for the Northern and Southern Districts of Mississippi, this Court entered an order on May 27, 2010 canceling the Case Management Conference and staying all discovery in this matter not related to the Defendants' jurisdictional and immunity defenses. (Order Staying Discovery, Docket No. 19.)

This Court should lift the Order Staying Discovery Pursuant to Local Rule 16(b)(3)(B) because, although Defendants have characterized their defenses as jurisdictional or immunity defenses, they have actually raised no such defenses. The Defendants have instead challenged the merits of the Plaintiffs' claim by arguing that the definition of "medical assistance" contained in the Medicaid Act, 42 U.S.C. § 1396d(a), should be interpreted so as to mandate only the payment for, rather than the provision of, medically necessary intensive home- and community-based services. (Defs.' Mem., Docket No. 17 at 2-4, 8, 11-13, 16-18, 20-22, 29, 30.) Whether the Plaintiffs have stated a good cause of action under the EPSDT provisions of the Medicaid Act is not a jurisdictional question, nor does it trigger Eleventh Amendment immunity.

Local Rule 16(b)(3) is designed to stay discovery in litigation involving legitimate jurisdictional and immunity defenses. It is unfair and improper to invoke this rule and frustrate timely discovery in situations where jurisdiction and immunity are not truly at issue. Plaintiffs and the proposed class are children living with significant behavioral and emotional disorders who need intensive home- and community-based services, and their right to receive these services should not be delayed simply because the Defendants have mischaracterized their defenses as jurisdictional and immunity defenses. This Court should therefore examine the true basis for Defendants' defenses and lift the Order Staying Discovery on Count I.

Further, the Defendants have not raised a jurisdictional or immunity defense with respect to Count II of the Plaintiffs' Complaint. This Court should therefore lift the Order Staying Discovery and allow the entire matter to proceed, or in the alternative, allow the Plaintiffs to proceed with a Case Management Conference and discovery on Count II of the Complaint.

ARGUMENT

I. DEFENDANTS HAVE CONFUSED JURISDICTION AND IMMUNITY WITH THE MERITS OF THE PLAINTIFFS' CLAIM

Count I of the Plaintiffs' Complaint asserts that the EPSDT provisions of the Medicaid Act require the Defendants to *provide* them with medically necessary intensive home- and community-based services to treat or ameliorate their behavioral and emotional disorders. (Compl., Docket No. 1 at ¶¶ 4, 19, 25-28, 64, 65.) The Defendants counter that Medicaid is simply a payment scheme: "Medicaid does not *provide* services. Medicaid *pays* for medically necessary services rendered." (Docket No. 17 at 2.) The resolution of this disagreement over the Defendants' obligation under the Medicaid Act clearly hinges on the correct interpretation of federal law. The Defendants' attempt to cast this as an issue of subject matter jurisdiction or Eleventh Amendment immunity is therefore improper.

A. Defendants have not raised a valid jurisdictional defense

Federal court subject matter jurisdiction and the essential ingredients of a federal claim for relief are sometimes "confused or conflated concepts." *Arbaugh v. Y&H Corp.,* 546 U.S. 500, 503 (2006). *See also Reed Elsevier, Inc. v. Muchnick,* 130 S. Ct. 1237, 1243-44 (2010) ("Courts . . . have sometimes mischaracterized . . . elements of a cause of action as jurisdictional limitations . . . ."). Importantly, there are no jurisdictional limitations on a court hearing a case in which the defendant challenges the legal basis of the plaintiff's cause of action. The United States Supreme Court has noted that "[i]t is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the court's statutory or constitutional *power* to adjudicate the case." *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 89 (1998) (emphasis in original); *see also Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.,* 535 U.S. 635, 642-43 (2002). The adequacy of a plaintiff's claim "goes to the merits and not to statutory standing," *Steel Co.,* 523 U.S. at 92, and "[i]f satisfaction of an essential element of a claim for relief is at issue . . . the jury is the proper trier of contested facts."

Arbaugh, 546 U.S. at 514. Jurisdiction is not defeated simply because the plaintiffs might not recover under their claim; "[r]ather, the District Court has jurisdiction if 'the right… to recover under their complaint will be sustained if the Constitution and the laws of the United States are given one construction and will be defeated if they are given another.'" *Steel Co.,* 523 U.S. at 89 (quoting *Bell v. Hood,* 327 U.S. 678, 685 (1946)).

According to Defendants' reading of the Medicaid Act, a plaintiff may only possess standing and a ripe claim under the EPSDT provisions of the Medicaid Act if s/he submits a specific request to the Mississippi Division of Medicaid for payment for intensive home- and community-based services, and is then denied payment for such services. (Docket No. 17 at 7-8) ("[N]one of the Plaintiffs allege that they have applied to Medicaid for, or been denied by Medicaid, the particular EPSDT services to which they claim they are entitled. More importantly, Plaintiffs have made no allegations that they have applied for and been denied *payment* by Medicaid for any medically necessary services."). According to the Defendants, failure to satisfy these elements deprives the Plaintiffs of standing and deprives this Court of subject matter jurisdiction over Plaintiffs' claim. (Docket No. 17 at 13.) ("Plaintiffs do not adequately allege that they have sought the services they want, that they have applied to Medicaid for payment, and that Medicaid has refused to pay for medically necessary services. . . . [T]he allegations in the Complaint are insufficient to confer standing on the named Plaintiffs; and said claims are not ripe for judicial consideration."). But these arguments go to the merits of Plaintiffs' claim, not to the Court's jurisdiction to adjudicate that claim. This is clearly a case in which "the right to recover under . . . [Plaintiffs'] complaint will be sustained if the . . . laws of the United States are given one construction and will be defeated if they are given another." *Bell,* 327 U.S. at 685. The Plaintiffs' Complaint assumes an interpretation of the statutory

definition of "medical assistance" that obligates the Defendants to *provide* medically necessary home- and community-based services. Under this theory, Plaintiffs' rights under the EPSDT provisions of the Medicaid Act are violated when the Defendants fail to provide these services. The dispute between the parties does not raise a question of jurisdiction, but rather a question of whether the Plaintiffs have stated a good cause of action under the Medicaid Act.

B. Defendants have not properly invoked Eleventh Amendment Immunity

Under the *Ex parte Young* doctrine, the Eleventh Amendment does not bar an action against state officers in a federal forum where the plaintiff seeks prospective relief for the violation of a federal right. *See Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261, 276-77 (1997). To determine whether the *Ex parte Young* exception applies to a plaintiff's claim, "a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Verizon Md.,* 535 U.S. at 645 (2002) (quoting *Coeur d'Alene,* 521 U.S. at 296). An inquiry into the applicability of *Ex Parte Young* "does not include an analysis of the merits of the claim." *Verizon Md.,* 535 U.S. at 646 (holding that the Fourth Circuit incorrectly granted defendant Eleventh Amendment immunity in a case where the defendant's conduct was "probably *not* inconsistent with federal law after all" because such an inquiry ran to the merits of the plaintiff's claim.) *See also McCarthy v. Hawkins,* 381 F.3d 407, 416 (5th Cir. 2004) ("[A]nalyzing the applicability of the *Ex parte Young* exception should generally be a simple matter, which excludes questions regarding the validity of the plaintiff's cause of action.").

Defendants premise their immunity defense on the argument that "there exists no ongoing violation of federal rights perpetrated by Medicaid" because "Medicaid does not *provide* services. Medicaid *pays* for medically necessary services rendered." (Docket No. 17 at 17.) *Ex*

parte Young does not apply, according to Defendants, because "Plaintiffs seek to compel Medicaid to act beyond its clear obligations . . . ." *Id.* However, the *Ex parte Young* analysis is meant to be "straightforward," *Coeur d'Alene,* 521 U.S. at 296, and an "*allegation* of an on-going violation of federal law . . . is ordinarily sufficient." *Id.* at 281 (emphasis added). Whether or not the definition of "medical assistance" confers a right to receive actual services, rather than just payment for services, is a merits-based inquiry that has no place in an *Ex parte Young* analysis. The Defendants have mistakenly conflated immunity with the validity of the Plaintiffs' claim; they have not properly raised an Eleventh Amendment immunity defense.

II. THE COURT SHOULD ALLOW THE PLAINTIFFS TO PROCEED WITH DISCOVERY AND A CASE MANAGEMENT CONFERENCE ON COUNT II OF THE COMPLAINT

Even if the Court agrees with Defendants' characterization of their defenses as jurisdictional and immunity defenses, the Court should allow the Plaintiffs to proceed with Count II of their Complaint, which avers that all Defendants – Governor Haley Barbour, the Mississippi Division of Medicaid, the Mississippi Board of Mental Health, and the Mississippi Department of Mental Health – have violated Plaintiffs' rights under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132, and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794. The Defendants filed their Motion to Dismiss on behalf of only two of these Defendants and the Defendants have asserted alleged jurisdictional and immunity defenses with respect to Count I only. This does not entitle any of the Defendants, particularly the Department of Mental Health and Board of Mental Health, to a stay on discovery for Count II of the Complaint. Allowing Defendants' opposition to Count I to stay the entire case unfairly prejudices the Plaintiffs' right to seek timely relief for the violation of the ADA and the Rehabilitation Act that is set forth in Count II.

CONCLUSION

The Defendants have mischaracterized their challenge to the merits of the Plaintiffs' claim as raising jurisdictional and immunity defenses. Accordingly, they are not entitled to a stay on discovery under Local Rule 16(b)(3)(B). Moreover, the Defendants have not raised a jurisdictional or immunity defense with respect to Count II of the Complaint. Therefore, even if the Court finds that Defendants have raised jurisdictional or immunity defenses with respect to Count I, the Court should allow the Plaintiffs to proceed with discovery on Count II of the Complaint.

Respectfully submitted, this the 16th day of July, 2010,

s/ Vanessa Carroll, MBN 102736
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CERTIFICATE OF SERVICE

I, Vanessa Carroll, Attorney for the Plaintiffs, hereby certify that on this date I electronically filed the foregoing with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

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THIS the 16th day of July, 2010,

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