

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

J.B., L.P., L.M., L.S., by and through their next friends,)	
)	
Plaintiffs,)	
)	
v.)	CASE NO. 3:10cv153HTW-MTP
)	
GOVERNOR PHIL BRYANT, et al.)	
)	
Defendants.)	
)	

**NOTICE OF TERMINATION OF SETTLEMENT NEGOTIATIONS BETWEEN
PLAINTIFFS AND THE UNITED STATES AND DEFENDANTS
AND REQUEST FOR RULINGS AND A SCHEDULING CONFERENCE**

The settlement negotiations between the United States and the State of Mississippi, and between the Plaintiffs and the Defendants, have terminated. Accordingly, Plaintiffs request that the Court:

1. Render a decision on Defendants’ Motion to Dismiss (ECF No. 15) and Plaintiffs’ Motion to Lift Stay of Discovery (ECF No. 29).
2. In connection with Plaintiffs’ Motion to Lift Stay of Discovery (ECF No. 29), take notice of Magistrate Judge Parker’s statement in his Report and Recommendation (ECF No. 55) that Defendants’ purported jurisdictional defense to Count I, the EPSDT claim, “is not an attack on Plaintiffs’ standing, but, rather, on the merits of their claim – akin to a motion under Rules 12(b)(6) or 12(c).” Report and Recommendation at 3, (ECF No. 55).
3. Schedule a case management conference with respect to Count II, Plaintiffs’ Americans with Disabilities Act claim.

Procedural History

Plaintiffs, by and through their next friends, filed this action on March 10, 2010 against Defendants Phil Bryant, Governor of Mississippi; David J. Dzielak, Executive Director of the Mississippi Division of Medicaid; Diana Mikula, Director of the Mississippi Department of Mental Health, and the Mississippi Board of Mental Health alleging violations of Title II of the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12131-12134, as interpreted by *Olmstead v. L.C.*, 527 U.S. 581 (1999); and the Early and Periodic Screening, Diagnostic and Treatment (“EPSDT”) provisions of the Medicaid portion of the Social Security Act, 42 U.S.C. § 1396 *et seq.* (ECF No. 1).

Defendants Bryant and Dzielak filed a Motion to Dismiss Plaintiffs’ EPSDT claim on May 27, 2010 (ECF No. 15), and Magistrate Judge Anderson entered an order that same day staying discovery in the case. (ECF No. 19). After completing briefing on the State’s Motion to Dismiss, the parties agreed to enter into formal mediation on August 10, 2010. The parties engaged in mediation for close to one year, but were unable to reach a mutually-agreeable settlement.

On July 15, 2011, Plaintiffs notified this Court that the parties had been unable to reach a settlement agreement and requested that this Court schedule oral argument to hear all of the outstanding motions in this case. Notice on Mediation, (ECF No. 42). This Court heard oral arguments on several pending motions, including Defendants’ Motion to Dismiss (ECF No. 15) and Plaintiffs’ Motion to Lift Stay of Discovery (ECF No. 29) on August 19, 2011 and October 19, 2011. Magistrate Judge Parker issued a Report and Recommendation (ECF No. 55) on August 23, 2013 recommending that the Court grant Defendants’ Motion to Dismiss Count I and grant Plaintiffs’ Motion to Lift Stay of Discovery. Plaintiffs timely objected to Magistrate Judge

Parker's recommendation to dismiss Count I of the Complaint. *See* Partial Objection to the Report and Recommendation (ECF No. 56).

On December 22, 2011, the United States Department of Justice ("DOJ") completed an investigation into Mississippi's mental health system and issued a letter detailing its findings that Mississippi is violating the ADA and the EPSDT provisions of the Medicaid Act by failing to provide children with mental illness with appropriate community-based mental health services, resulting in unnecessary institutionalization. *See* Plaintiffs' Notice at 1-2 (ECF No. 48). DOJ specifically noted that "hundreds of those who are unnecessarily institutionalized in Mississippi in violation of the ADA are children with disabilities." *Id.* (quoting ECT No. 48-1, Letter from T. Perez, Assistant Attorney General, DOJ, to Governor Haley R. Barbour (Dec. 22, 2011)).

DOJ also concluded, among other things, that:

- 1) "Many Medicaid-eligible children enter psychiatric facilities in Mississippi because they are not receiving medically necessary services that the State is required to provide. Children in Mississippi who have mental health, emotional and behavioral needs typically require services such as intensive case management, mobile crisis services, behavioral support, and family education services to avoid unnecessary institutionalization. Mississippi fails to provide these medically necessary treatment services prior to their institutionalization, and instead, these children cycle through local hospitals, State hospitals, and PRTFs [psychiatric residential treatment facilities], including the Specialized Treatment Facility ("STF")." *Id.*
- 2) "Staff at STF acknowledged that a large number of the children they serve could succeed in their own homes and communities if they received the supports offered to a limited number of children through the MYPAC program. The State itself has found that

MYPAC is equally or more effective than institutional placement. Despite this recognition, the State does not divert all children from segregated congregate placements and offer them effective home-based supports required by EPSDT. . . . The State has an obligation to identify the need for services and provide treatment that will ameliorate children's disabilities and cannot wait to offer flexible support until after someone has received the most segregated treatment." *Id.* at 2-3.

- 3) "[C]hildren in Mississippi's institutional settings could be served in the community if flexible, intensive home-based supports were available, and . . . children with similar needs are currently served through the MYPAC program. However, the Division of Medicaid and the DMH staff do not provide the supports mandated under EPSDT to help families prevent unnecessary institutionalization. In fact, few providers are aware that EPSDT services are not limited to those services that already exist in the State Plan." *Id.* at 3.

In August 2014, Plaintiffs' counsel were notified that Defendants and DOJ had reached an agreement to engage in a discussion to settle the DOJ's December 22, 2011 findings. Defendants then sent Plaintiffs' counsel a letter in February 2015 inviting Plaintiffs to join DOJ in settlement discussions. The parties, including DOJ, exchanged several drafts of settlement proposals up through October 2015 but were unable to reach an agreement.

Because the parties have reached an impasse, Plaintiffs and DOJ have terminated settlement negotiations with Defendants.

Need for Resolution of Outstanding Motions

Several motions remain pending before this Court, and Plaintiffs submit that the resolution of these motions and the initiation of discovery are necessary before the parties can

revisit settlement negotiations. Magistrate Judge Parker issued a Report and Recommendation on Defendants' Motion to Dismiss on August 23, 2013, and Plaintiffs filed a timely partial objection to the Report and Recommendation. (ECF No. 56). Defendants' Motion to Dismiss is therefore before the Court and ripe for review; Plaintiffs request that the Court render a decision on Defendants' Motion to Dismiss (ECF No. 15) and Plaintiffs' Motion to Lift Stay of Discovery (ECF No. 29).

In addition, Plaintiffs request that this Court take notice of Magistrate Judge Parker's statement in his Report and Recommendation (ECF No. 55) that Defendants' purported jurisdictional defense to Count I, the EPSDT claim, "is not an attack on Plaintiffs' standing, but, rather, on the merits of their claim – akin to a motion under Rules 12(b)(6) or 12(c). Report and Recommendation at 3, (ECF No. 55). Because Defendants have not raised a valid jurisdictional defense to Count I, Defendants should not have the benefit of a Local Rule 16(b)(3) discovery stay with respect to either the EPSDT or the ADA claim. *See also* Pls' Mem. in Support. of Mot. to Lift Stay at 2-6 (ECF No. 30).

Moreover, Plaintiffs request a case management conference on Count II, the ADA claim. As noted in Plaintiffs' Motion to Lift Stay of Discovery (ECF No. 29), Defendants have requested dismissal of the EPSDT claim only (and only on behalf of Defendants Bryant and Dzielak). Defendants have not raised *any* defense, jurisdictional or otherwise, to Plaintiffs' ADA claim. *See* Pls.' Mem. in Support of Mot. to Lift Stay at 6 (ECF No. 30). Accordingly, Defendants are not entitled to a discovery stay under Local Rule 16(b)(3) with respect to the ADA claim. *Id.* This Court should schedule a case management conference so that Plaintiffs may proceed with taking discovery on Count II of their Complaint.

Respectfully submitted, this 17th day of December, 2015.

/s/ Jody E. Owens, II

Jody E. Owens, II, MSB No. 102333
Brooke McCarthy, MS Bar No. 104930
Southern Poverty Law Center
111 E. Capitol Street, Suite 280
Jackson, Mississippi 39201
601-948-8882 (phone)
601-948-8885 (fax)

Ira Burnim, D.C. Bar No. 406145
The Bazelon Center for Mental Health Law
1101 5th Street NW, Suite 1212
Washington, D.C. 20005
202-467-5730 (phone)
202-223-0409 (fax)
Admitted pro hac vice

CERTIFICATE OF SERVICE

I, Jody E. Owens, II, hereby certify that a true and correct copy of the foregoing document was filed electronically. Notice of this filing will be sent by electronic mail to all parties by the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

SO CERTIFIED, this 17th day of December, 2015.

s/Jody E. Owens, II
Jody E. Owens, II, MS Bar # 102333