

IN THE U.S. DISTRICT COURT FOR THE  
EASTERN DISTRICT OF ARKANSAS

**FILED**  
U.S. DISTRICT COURT  
EASTERN DISTRICT ARKANSAS

SEP 11 2015

JAMES W. McCORMACK, CLERK  
By: \_\_\_\_\_  
DEP. CLERK

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

Plaintiffs,

v.

JOHN SELIG, Director, Arkansas  
Department of Human Services, in his  
Official Capacity,

Defendant.

No. *4:15cv566-KGB*

This case assigned to District Judge *Baker*  
and to Magistrate Judge *Norris*

**COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF**

Plaintiffs, by and through their attorneys, bring this Complaint against the above-named Defendant and his employees, agents, delegates, and successors in office, in their official capacity, and in support thereof state the following:

**INTRODUCTORY STATEMENT**

1. This civil action is brought pursuant to 42 U.S.C. § 1983 to vindicate rights secured by the federal Medicaid statutes, as well as the U.S. Constitution.
2. Plaintiff Planned Parenthood Arkansas & Eastern Oklahoma, d/b/a Planned Parenthood of the Heartland ("PPH"), provides critically needed family planning and preventive health services to hundreds of women and men in underserved Pulaski County (where PPH's Little Rock health center is located) and Washington County (where PPH's Fayetteville health center is located) through the Medicaid program.

3. As is required by federal law, Medicaid enrollees may seek family planning and other preventive health services from a participating provider of their choice and have those services covered by Medicaid. Plaintiffs Jane Doe #1, Jane Doe #2, and Jane Doe #3 are such women – patients of PPH who are enrolled in Medicaid and who prefer PPH to other Medicaid providers. Arkansas Medicaid does not pay for abortions except in extremely narrow circumstances, and Medicaid reimbursement for abortion is not at issue in this litigation.

4. On August 14, 2015, without giving any warning or expressing any previous concerns about PPH’s participation in the Medicaid program, Defendant John Selig, Director of the Arkansas Department of Human Services (“DHS”), notified PPH that DHS was terminating PPH’s Medicaid provider agreements, effective 30 days after the date of the notice. While the notice gave no reason for the termination, Governor Asa Hutchinson issued a press release the same day, stating he had directed DHS to terminate the agreements and giving as the sole reason that “[i]t is apparent after the recent revelations on the actions of Planned Parenthood that this organization does not represent the values of the people of our state and Arkansas is better served by terminating any and all existing contracts with them.” Press Release, Ark. Governor Asa Hutchinson, Governor Asa Hutchinson Directs DHS to End Contract with Planned Parenthood (Aug. 14, 2015), <http://governor.arkansas.gov/press-releases/detail/governor-asa-hutchinson-directs-dhs-to-end-contract-with-planned-parenthood>. The reference to “recent revelations” appears to relate to heavily edited and misleading videos that have been released by opponents of Planned Parenthood, making claims about other Planned Parenthood providers’ abortion practices in other states. Notably, nothing in Governor Hutchinson’s press release relates to the quality of Medicaid services provided by PPH.

5. Plaintiffs seek declaratory and injunctive relief to protect PPH's patients' access to – and PPH's own ability to provide – these critical medical services. Defendant's actions violate Section 1396a(a)(23) of Title 42 of the United States Code ("Medicaid Freedom of Choice Provision") because, by barring PPH from the Medicaid program, it prevents PPH's patients, including Plaintiffs Jane Doe #1, Jane Doe #2, and Jane Doe #3, from receiving services from the qualified, willing provider of their choice. Defendant's actions further impermissibly penalize Plaintiffs without adequate justification, in violation of the First and Fourteenth Amendments.

6. Unless enjoined, the termination of PPH's Medicaid provider agreements will take effect on September 13, 2015, disqualifying PPH from providing basic and preventive health care services to the women, men, and teens who depend on that care. Defendant's actions will cause significant and irreparable harm to PPH and to its Medicaid patients, including Plaintiffs Jane Doe #1, Jane Doe #2, and Jane Doe #3, who will lose their provider of choice, will find their family planning services interrupted, and will be left with few or no adequate alternative providers.

#### **JURISDICTION AND VENUE**

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

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

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

## THE PARTIES

### **A. Plaintiffs**

10. Plaintiff Planned Parenthood of Arkansas & Eastern Oklahoma, doing business as Planned Parenthood of the Heartland, (“PPH”), is an Arkansas not-for-profit corporation headquartered in Iowa and licensed to do business in Arkansas and is a wholly-owned subsidiary of Planned Parenthood of the Heartland. PPH brings this action on behalf of itself and its Arkansas patients.

11. PPH (or predecessor organizations) have provided high quality reproductive health care in Arkansas for more than thirty years. PPH operates two health centers in Arkansas, one in Little Rock and one in Fayetteville, and participates in the Medicaid program, providing medical services to low-income enrollees in both communities. The family planning and other preventive health services provided by PPH at these and its other health centers include contraception and contraceptive counseling; physical exams; screening for breast cancer; screening and treatment for cervical cancer; testing and treatment for certain sexually transmitted infections (“STIs”); pregnancy testing and counseling; men’s health services; and general health services including smoking cessation and screening for diabetes, high cholesterol, high blood pressure, and anemia.

12. PPH also operates a pharmacy that serves patients in Arkansas. Through this service patients, including patients insured through Medicaid, are able to have their contraception prescriptions automatically refilled and mailed to their homes every month.

13. In fiscal year (FY) 2015, PPH provided more than 1,000 health care visits and filed more than 1,100 prescriptions for over 500 women, men and teens insured through Medicaid in Little Rock and Fayetteville. In FY 2014, the numbers were even higher – more

than 1600 health care visits and 2,600 prescriptions, for over 1,100 women, men and teens insured through Medicaid in Little Rock and Fayetteville.

14. During FY 2015, PPH provided over 100 well woman exams (which include breast exams), nearly 100 pap smears, over 350 visits to screen for STIs, and over 450 visits for long acting reversible contraceptives (“LARCs”) and injectable contraceptives to its Medicaid patients. During FY 2014, PPH provided over 250 well woman exams, 180 pap smears, 600 visits to screen for STIs, and 750 visits for LARCs and injectable contraceptives to its Medicaid patients.

15. PPH also provides abortions at some of its health centers. At its Arkansas health centers, PPH offers only early medication abortions, but Arkansas Medicaid does not cover these services in virtually all circumstances, and Medicaid payment for abortion is not at issue in this case.

16. Plaintiff Jane Doe #1, an Arkansas resident and Medicaid patient, obtains her reproductive health care at PPH’s Little Rock health center and desires to continue to do so.

17. Plaintiff Jane Doe #2, an Arkansas resident and Medicaid patient, obtains her reproductive health care at PPH’s Little Rock health center and desires to continue to do so.

18. Plaintiff Jane Doe #3, an Arkansas resident and Medicaid patient, obtains her reproductive health care at PPH’s Little Rock health center and desires to continue to do so.

19. Plaintiffs Jane Doe #1, Jane Doe #2, and Jane Doe #3 appear pseudonymously because of the private and personal nature of the medical care that they receive at PPH and their desire not to have that information become public in order for them to assert their legal rights.

**B. Defendant**

20. Defendant John Selig is the Director of DHS. DHS is the agency that administers Arkansas's state Medicaid program and has notified PPH that it intends to terminate its provider agreements. Defendant Selig is sued in his official capacity, as are his employees, agents, and successors in office.

**THE MEDICAID PROGRAM**

**A. The Medicaid Statute**

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

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

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

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

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

25. The federal government reimburses the state of Arkansas 90% of expenditures attributable to offering, arranging, and furnishing family planning services and supplies in Medicaid. 42 U.S.C. § 1396b(a)(5).

**B. Implementation of the Medicaid Act**

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

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

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

29. More recently, CMS rejected an Indiana plan that barred state agencies from contracting with or making grants to any entities that perform abortion because it violated the Medicaid freedom of choice provision. Letter from Donald M. Berwick, Adm'r., CMS, to Patricia Casanova, Dir., Ind. Office of Medicaid Policy and Planning (June 1, 2011), [http://www.politico.com/static/PPM169\\_110601\\_indiana\\_letter.html](http://www.politico.com/static/PPM169_110601_indiana_letter.html).

30. Moreover, even though CMS is permitted to waive § 1396a(a)(23) in demonstration projects approved under Social Security Act § 1115, CMS repeatedly rejects state requests to do so for family planning services, including twice in the last year: first in Pennsylvania, *see* Letter from Marilyn Tavenner, Adm'r, CMS, to Beverly Mackereth, Sec'y, Pa. Dep't of Public Welfare (Aug. 28, 2014), <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/pa/pa-healthy-ca.pdf> ("No waiver of freedom of choice is authorized for family planning providers."); and more recently in Iowa, *see* Letter from Manning Pellanda, Dir., CMS Div. of State Demonstrations and Waivers, to Julie Lovelady, Interim Medicaid Dir., Iowa Dep't of Human Servs. (Feb. 2, 2015), <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/ia/ia-marketplace-choice-plan-ca.pdf> ("No waiver of freedom of choice is authorized for family planning providers.").

#### **HUTCHINSON ADMINISTRATION'S EFFORTS TO EXCLUDE PPH**

31. On August 14, without prior notice, Defendant notified PPH that it was terminating PPH's provider agreements, to be effective in 30 days, on September 13, 2015.

32. Because of previously scheduled staff training and clinician vacation, the first day after September 13 that patients insured through the Medicaid program are scheduled to be seen at one of PPH's Arkansas health centers is September 21, 2015. Therefore, absent an injunction,



patients insured through the Medicaid program who choose to get family planning and other health care services at PPH will lose access to those services on September 21, 2015.

33. Defendant's letter provided no reason for the termination of PPH's agreements. However, that same day, Governor Hutchinson issued a press release stating he had directed DHS to terminate the agreements and giving as the sole reason that "[i]t is apparent after the recent revelations on the actions of Planned Parenthood that this organization does not represent the values of the people of our state and Arkansas is better served by terminating any and all existing contracts with them." Press Release, Ark. Governor Asa Hutchinson. The reference to "recent revelations" appears to relate to heavily edited and misleading videos that have been released by opponents of Planned Parenthood, making claims about the practices of a small number of Planned Parenthood affiliates that allow patients at some health centers to donate fetal tissue following an abortion in order to advance medical research. While all Planned Parenthood affiliates comply with all federal and state laws, PPH does not participate in any fetal tissue donation (in Arkansas or elsewhere), and does not appear in any of the videos.

34. CMS has advised Defendant that his actions to terminate PPH's provider agreements likely violate the Medicaid freedom of choice provision.

#### **THE IMPACT OF DEFENDANT'S ACTIONS ON PPH AND ITS PATIENTS**

35. The need for publicly supported family planning services is great in Arkansas, which regularly ranks among the worst states for reproductive care. In 2010, 55% of pregnancies in Arkansas were unintended. Guttmacher Inst., State Facts About Unintended Pregnancy: Arkansas (2014), <https://www.guttmacher.org/statecenter/unintended-pregnancy/pdf/AR.pdf> (hereafter "State Facts: Arkansas"). The state is tied for the third highest teen pregnancy rate among the 50 states. Kathryn Kost & Stanley Henshaw, Guttmacher Inst.,

U.S. Teenage Pregnancies, Births and Abortions, 2010: National and State Trends by Age, Race and Ethnicity 4 (2014), <http://www.guttmacher.org/pubs/USTPtrends10.pdf>. 72% of Arkansas's unplanned births are publicly funded, which is higher than the national average of 68%. State Facts: Arkansas. Moreover, Arkansas has high rates of STIs: the state ranks second in congenital syphilis, eighth in chlamydia, tenth in primary and secondary syphilis, and eleventh in gonorrhea. Ctrs. for Disease Control and Prevention, Sexually Transmitted Disease Surveillance 2013 79, 91, 105, 122 (2014), <http://www.cdc.gov/std/stats13/surv2013-print.pdf>.

36. In Arkansas in 2010, an estimated 317,720 women needed contraceptive services and supplies. Of these, 62% – 198,090 women – needed publicly supported services. Guttmacher Inst., Contraceptive Needs and Services, 2010: County Data for Arkansas (2014), <http://www.guttmacher.org/pubs/win/counties/pdf/WIN-2010-Arkansas.pdf>. In Pulaski County alone (where PPH's Little Rock health center is located), an estimated 47,700 women needed contraceptive services and supplies in 2010, of which 26,390 (55%) needed publicly supported services. *Id.*

37. If Defendant's actions take effect, many of PPH's Medicaid patients in Little Rock and Fayetteville, who already have few or no alternative options, will find it difficult or impossible to access the reproductive and other health care services they need. Those who are able to find other providers will often have to wait unacceptable periods of time for an appointment. Those who are unable to find an adequate alternative will not receive the medical services they need, which will lead to higher rates of unintended pregnancies, STIs, and undiagnosed cancers.

38. Other Medicaid providers in Little Rock and Fayetteville are already stretched to the breaking point, even with PPH providing care. It is very difficult to locate a private ob/gyn who will take a Medicaid patient who is not pregnant, and the ones that will often have wait times of several months. At both community health centers and private ob/gyns, even if a patient can obtain an appointment, she may be unable to obtain (either at all, or without significant delays) the full range of FDA-approved contraceptives, including IUDs and Depo Provera, which are the most effective forms of birth control. Indeed, other Medicaid providers sometimes refer their patients to PPH's health centers for these services. Other clinics are difficult for PPH's low-income patients to travel to.

39. If PPH is forced to stop providing care through the Medicaid program, a dire situation will become critical. The remaining providers will be simply unable to absorb PPH's patients, leaving those patients without access to crucial medical services.

40. Even if other providers were available, patients insured through Medicaid choose PPH based on a number of factors that are generally not available at other providers. With its evidence-based practices and up-to-date technology, PPH is known as a provider of high-quality, compassionate medical care. Many individuals who receive some health care elsewhere choose PPH for their reproductive health care because they are concerned about their privacy and because they fear being judged by other providers.

41. In addition, many low-income patients have unique scheduling constraints because they are juggling inflexible work schedules, childcare obligations, transportation challenges, and lack of childcare resources. To help these patients get access to family planning and other services, PPH offers its full range of services to walk-in patients. This flexibility is especially important for patients receiving Depo-Provera injections (which must be given every

ninety days), or starting a new form of birth control, as well as for patients who are having symptoms that make them concerned. PPH gets walk-in patients every day. In addition, PPH spaces patient appointments so as to minimize wait times. PPH's health centers often have Spanish-speaking staff available for patients, and have translator services in a wide range of languages available to non-English speaking patients at all times.

42. PPH's pharmacy services are similarly set up to minimize logistical burdens so that patients have convenient access to their birth control medications. PPH's pharmacy service gives patients, including Medicaid patients, an easy way to have their prescriptions automatically refilled every month and delivered by mail, so the new prescription is waiting in the mail when the patient needs it.

43. Defendant's actions will deprive all of PPH's Medicaid patients, including Plaintiffs Jane Doe #1, #2, and #3, of access to the high-quality, specialized care that PPH provides.

44. All three individual Plaintiffs rely on PPH as the place they can turn to for critical medical care and for prompt, efficient, and compassionate services. If PPH is eliminated from Medicaid, they will be prevented from receiving services through the Medicaid program from their provider of choice, will have their health care interrupted, and may encounter difficulties finding alternative care.

45. Without Medicaid reimbursements, PPH may be unable to continue to provide services in the same manner and may be forced to lay off staff members and/or reduce hours at one or both health centers. Further, if PPH's termination from the Medicaid program is allowed to take effect for some period of time and it then is later allowed to become a Medicaid provider again, some patients will remain confused about whether PPH is a Medicaid provider in good

standing, and therefore will not return as patients. For these reasons, should PPH be allowed back as a Medicaid provider, it would be very difficult – if not impossible – for PPH to resume its operations as they are today. If PPH reduces hours at its health centers, this will affect not only its Medicaid patients, but all of its patients.

**CLAIMS FOR RELIEF**

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

46. Plaintiffs hereby incorporate Paragraphs 1 through 44 above.

47. Defendant’s action violates Section 1396a(a)(23) of Title 42 of the United States Code by denying PPH’s patients, including the Plaintiffs Jane Doe #1, Jane Doe #2, and Jane Doe #3, the right to choose any willing, qualified healthcare provider in the Medicaid program.

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

48. Plaintiffs hereby incorporate Paragraphs 1 through 44 above.

49. Defendant’s action penalizes Plaintiffs for their constitutionally protected association with Planned Parenthood and/or abortion, without adequate justification.

**CLAIM III – FOURTEENTH AMENDMENT EQUAL PROTECTION**

50. Plaintiffs hereby incorporate Paragraphs 1 through 44 above.

51. Defendant’s action violates Plaintiffs’ rights by singling them out for unfavorable treatment without adequate justification.

**RELIEF REQUESTED**

WHEREFORE, Plaintiffs request that this Court:

52. Issue a declaratory judgment that Defendant’s action violates the Medicaid Act;

53. Issue a declaratory judgment that Defendant’s action violates the First and Fourteenth Amendments;

54. Issue preliminary and permanent injunctive relief, without bond, enjoining Defendant, his agents, employees, appointees, delegates, or successors from excluding PPH as a Medicaid provider;

55. Grant Plaintiffs attorneys' fees, costs and expenses pursuant to 42 U.S.C. § 1988; and

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

Dated: September 11, 2015

/s/ Bettina E. Brownstein  
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*Pro hac vice motion to be filed*