UNITED STATES DISTRICT COURT

DISTRICT OF CALIFORNIA

WESTERN DIVISION

INDEPENDENT LIVING CENTER OF SOUTHERN CALIFORNIA, et al., Petitioners vs. SANDRA SHEWRY, Director of Department of Health Services of the State of California, et al., Respondents	Case No. CV 08-3315 CAS (MANx) ORDER DENYING PETITIONERS' MOTION FOR A PRELIMINARY INJUNCTION

I. INTRODUCTION

On April 22, 2008, petitioners filed a verified petition for writ of mandamus in the Los Angeles County Superior Court, seeking mandamus and injunctive relief against the California Department of Health Care Services ("the Department"), Sandra Shewry, Director of the Department ("the Director"), and Does 1 through 50.[1] The

[1] Petitioners are the Independent Living Center of Southern California, Inc.; Gray Panthers of Sacramento; the Gray Panthers of San Francisco; Gerald Shapiro, Pham.D., d/b/a Uptown Pharmacy and Gift Shoppe; Sharon Steen, d/b/a Central Pharmacy; Mark Beckwith; Margaret Dowling; Tran Pharmacy, Inc., d/b/a Tran Pharmacy; and Jason Young.

Department is a California agency charged with the administration of California's Medicaid program, Medi-Cal. Petitioners are health care advocates and Medi-Cal providers and recipients.

On February 16, 2008, the California Legislature enacted Assembly Bill X3 5 ("AB 5") in special session. First Amended Petition ¶ 20. Section 14 of AB 5 adds Cal. Welf. & Inst. Code § 14105.19, which reduces by ten percent payments under the Medi-Cal fee-for-service program for physicians, dentists, pharmacies, adult day health care centers, clinics, health systems, and other providers for services provided on or after July 1, 2008. Cal. Welf. & Inst. § 14105.19(b)(1); First Amended Petition ¶ 22. California Welfare & Institutions Code § 14105.19 also reduces payments to managed care plans by the actuarial equivalent of the ten percent payment reduction. Cal. Welf. & Inst. § 14105.19(b)(3); First Amended Petition ¶ 22. Section 15 of AB 5 adds Cal. Welf. & Inst. Code § 14166.245, which reduces payments to acute care hospitals not under contract with the Department for inpatient services provided on or after July 1, 2008. Cal. Welf. & Inst. § 14166.245(c); First Amended Petition ¶ 23.[2] These rate and payment reductions are referred to herein as the "ten percent rate reduction."

Petitioners allege that the ten percent rate reduction violates Title XIX of the Social Security Act, 42 U.S.C. §§ 1396 et seq. ("the Medicaid Act"), and therefore, may not be implemented. Petitioners seek declaratory relief and injunctive relief to restrain the implementation of the ten percent rate reduction.

On May 19, 2008, respondents removed this action to this Court, based on federal

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[2] The Department is authorized to contract with individual hospitals for the exclusive right to treat Medi-Cal patients. Cal. Welf. & Inst. § 14081; Cedars-Sinai Med. Ctr. v. Shewry, 137 Cal. App. 4th 964, 969-70 (2006). Contracting hospitals are reimbursed by the Department at the negotiated contract rate, and once the Department has contracted with enough hospitals to meet the needs of Medi-Cal beneficiaries in a geographic area, it awards no further contracts in that area. Cedars-Sinai, 137 Cal. App. 4th at 970. Noncontract hospitals are only reimbursed for treating Medi-Cal patients under certain circumstances, including where emergency care or services are provided. Id.

question jurisdiction. On May 28, 2008, petitioners filed the operative first amended petition against the Department and the Director. On June 1, 2008, petitioners voluntarily dismissed the Department as a respondent in this case without prejudice.

On May 30, 2008, petitioners filed the instant motion for preliminary injunction. Respondents filed their opposition thereto on June 12, 2008.[3] On June 16, 2008, petitioners filed a reply. A hearing was held on June 23, 2008, and the Court took this matter under submission. After carefully considering the parties' arguments, the Court denies petitioners' motion for the reasons set forth below.

II. BACKGROUND

The Medicaid Act authorizes the federal government to distribute funds to participating states for the purpose of providing medical assistance to low income persons who are aged, blind, disabled, or members of families with dependent children. Medicaid is a cooperative federal program: the federal government provides federal funding to the states so that states may provide medical care to their needy citizens. State participation is voluntary; however, once a state chooses to participate by accepting federal funds, it must comply with requirements imposed by the Medicaid Act.

Because California has elected to participate in the Medicaid program, it must administer its state Medicaid program, known as Medi-Cal, in compliance with a state plan that has been pre-approved by the Secretary of the U.S. Department of Health and Human Services ("the Secretary"), and which complies with the requirements set forth in 42 U.S.C. § 1396a(a)(1)-(70). In accordance with these requirements, California must also provide methods and procedures for the payment of care and services that are consistent with efficiency, economy, and quality of care, and that ensure their availability to the Medicaid population to the same extent as they are available to the

[3] By order dated June 19, 2008, the Court granted respondents' ex parte application to allow for the late filing of their instant opposition.

general population in the geographic area. 42 U.S.C. § 1396a(30)(A) ("§ (30)(A)").

Further, under California law, the Department must administer Medi-Cal in accordance with the state plan; applicable state law, as specified in the Welfare and Institutions Code; and Medi-Cal regulations. Cal. Code Regs. tit. 22, § 50004(b).

Petitioners now move to preliminary enjoin the implementation of the ten percent rate reduction. The request for a preliminary injunction is predicated only on petitioners' first and second claims for relief.[4] In their first and second claims, petitioners allege the ten percent rate reduction violates 42 U.S.C. § 1396a(30)(A), which requires that a state plan must:

> provide such methods and procedures relating to the utilization of, and payment for, care and services available under the plan . . . as may be necessary . . . to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and 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.

Petitioners allege that the Department and the Legislature improperly failed to consider efficiency, economy, and quality of care as required by § 30(A) in enacting the ten percent reduction, and that as a result of AB 5, there will not be a sufficient number of

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[4] The first amended petition asserts four claims for relief. Petitioners' first claim is asserted by each of the petitioners except petitioner Jason Young. Petitioners' second claim is brought by petitioners Young and the Tran Pharmacy, Inc., d/b/a Tran Pharmacy. Petitioners third and fourth claims allege that §§ 14 and 15 of AB 5 are unenforceable because they are preempted by and violate the Americans with Disabilities Act (the "ADA"), 42 U.S.C. §§ 12181 et seq. However, because petitioners' motion for preliminary injunction is predicated only on the first and second claims, and only on their Supremacy Clause theory raised in their motion papers, those are the only claims and argument that the Court addresses herein.

providers to provide equal access to healthcare as mandated by § 30(A).

III. LEGAL STANDARD

A preliminary injunction is appropriate when the moving party shows either (1) a combination of probable success on the merits and the possibility of irreparable harm, or (2) the existence of serious questions going to the merits and that the balance of hardships tips sharply in the moving party's favor. See Rodeo Collection, Ltd. v. West Seventh, 812 F.2d 1215, 1217 (9th Cir. 1987). These are not two distinct tests, but rather "the opposite ends of a single 'continuum in which the required showing of harm varies inversely with the required showing of meritoriousness.'" Id. A "serious question" is one on which the movant "has a fair chance of success on the merits." Sierra On-Line, Inc. v. Phoenix Software, Inc., 739 F.2d 1415, 1421 (9th Cir. 1984).

IV. DISCUSSION

The "quality of care" provision of § (30)(A) provides that

> [a] State plan for medical assistance must . . . provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan . . . as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care.

42 U.S.C. § 1396a(30)(A). The "equal access" provision of § 30(A) provides that

> [a] State plan for medical assistance must . . . provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan . . . as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are . . . sufficient to enlist enough providers so that care and 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.

Id.

In Sanchez v. Johnson, 416 F.3d 1051 (9th Cir. 2005), the Ninth Circuit held that § 30(A) does not confer individual rights that are enforceable under 42 U.S.C. § 1983. Id. at 1060. There, plaintiffs, consisting of a class of developmentally disabled individuals and several organizations, brought suit against California officials charged with the administration of programs for persons with developmental disabilities. Id. at 1053-54. The plaintiffs asserted claims under 42 U.S.C. § 1983, alleging that the defendants violated § 30(A) by failing to fund adequately community-based programs for persons with developmental disabilities. Id. at 1055. The district court found that in light of the Supreme Court's decision in Gonzaga University v. Doe, 536 U.S. 273 (2002), the Medicaid Act did not confer individual rights that were enforceable by recipients of Medicaid funding or providers of Medicaid services, under 42 U.S.C. § 1983.[5] Id. The district court therefore granted judgment on the pleadings in favor of the defendants. Id.

On appeal, the Ninth Circuit affirmed. The court reasoned that § 30(A) did not "focus[] on the rights of a specific class of beneficiaries." Id. at 1059. The court found that instead, "§ 30(A) is concerned with overall methodology rather than conferring individually enforceable rights on individual Medicaid recipients." Id. at 1059-60. Because a plaintiff seeking to prosecute a claim under 42 U.S.C. § 1983 must "assert the violation of an individually enforceable *right* conferred specifically upon him, not merely a violation of federal law," and because § 30(A) does not manifest a congressional intent to confer individual rights, the court found that the Medicaid Act did not give rise to rights enforceable under 42 U.S.C. § 1983. Id. at 1062 (emphasis in

[5] In Gonzaga, the Supreme Court clarified the standard for determining whether a federal statute creates rights enforceable under 42 U.S.C. § 1983.

original).[6]

It is true, as petitioners argue, that in Sanchez the Ninth Circuit was presented with the question of whether individuals may invoke 42 U.S.C. § 1983 to sue for an alleged violation of § 30(A). However, in order to decide that issue the Ninth Circuit was first required to determine whether § 30(A) gives rise to any federally created individual rights: in evaluating "whether a statutory violation may be enforced through § 1983 . . . [a court] must first determine whether Congress *intended to create a federal right*. Gonzaga, 536 U.S. at 283 (emphasis in original). Thus, in deciding that the Sanchez plaintiffs could not enforce § 30(A) under 42 U.S.C. § 1983, the Ninth Circuit necessarily concluded that § 30(A) does not create any individual federal rights.

Because after Sanchez, petitioners do not have any claims for relief under 42 U.S.C. § 1983 by which to seek redress for violations of § 30(A), petitioners seek to avail themselves of a claim for relief allegedly arising directly under the Supremacy Clause, Article VI, § 2, of the United States Constitution. However, the Supremacy Clause, of its own force, does not create any rights enforceable under 42 U.S.C. § 1983. See Golden State Transit Corp. v. L.A., 493 U.S. 103, 108 (1989) ("'[The Supremacy] clause is not a source of any federal rights'; it [']secures federal rights by according them priority whenever they come in conflict with state law.'") (quoting Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 613 (1979)).

In an attempt to avoid the effect of Sanchez, petitioners rely on cases following

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[6] The Court notes that there is a circuit split concerning whether plaintiffs can sue for alleged violations by state officials of § 30(A) under 42 U.S.C. § 1983. Specifically, the Fifth, Sixth, Ninth, and Tenth Circuit Courts of Appeal have found that Medicaid beneficiaries cannot sue for alleged violations of § 30(A) under 42 U.S.C. § 1983. On the other hand, the Eighth Circuit has concluded that § 30(A) creates individual rights that can be the subject of suit under 42 U.S.C. § 1983. There is currently pending a petition for certiorari to the Supreme Court from the judgment in the Fifth Circuit case, Equal Access for El Paso, Inc. v. Hawkins, 509 F.3d 697 (5th Cir. 2007), cert. pending (U.S. Supreme Ct. No. 07-1160) (filed March 10, 2008).

Shaw v. Delta Air Lines, 463 U.S. 85 (1983), to argue that AB 5 is preempted by the Medicaid Act, and therefore invalid under the Supremacy Clause, such that they are entitled to relief based on an implied right of action under the Supremacy Clause. In opposition, respondents argue that the Supremacy Clause does not confer any rights on petitioners. Respondents assert that petitioners therefore lack standing to maintain this suit.

In Shaw, the United States Supreme Court stated that

> [i]t is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights. A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U. S. C. § 1331 to resolve.

Shaw, 463 U.S. at 96 n.14; see e.g., Verizon Md., Inc. v. Pub. Serv. Comm'n of Md., 535 U.S. 635, 641-43 (2002) (stating that the district court has federal question jurisdiction under 28. U.S.C. § 1331 in a suit where the plaintiff claimed that the Federal Communications Commission's order was preempted by federal law); Lawrence County v. Lead-Deadwood School Dist., 469 U.S. 256, 259 n.6 (1985) (stating that the Eighth Circuit erroneously concluded that a district court lacked subject matter jurisdiction where the affected plaintiff school district alleged that a South Dakota statute conflicted with federal law and was therefore invalid under the Supremacy Clause); see also Hydrostorage, Inc. v. Northern Cal. Boilermakers Local Joint Apprenticeship Comm., 891 F.2d 719 (9th Cir. 1989).

Shaw preemption claims have been permitted in three circumstances. First,

where the plaintiff claims that a state law requires him to act in violation of federal law.[7] Second, such claims have been allowed where the plaintiff contends that his conduct will be restricted by a state law that is preempted by federal law.[8] Third, courts have entertained Shaw preemption claims where state law interferes with federally created

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[7] See e.g., Lawrence County v. Lead-Deadwood School Dist. No. 40-1, 469 U.S. 256, 258, 260-61 (1985) (after Lawrence County refused to distribute federal funds to the school district in accordance with a state statute, arguing that federal law gave it the discretion to spend the federal funds for any governmental purpose it chose, the school district filed suit seeking to compel Lawrence County to distribute the federal funds); Burgio & Campofelice, Inc. v. N.Y. State Dep't of Labor, 107 F.3d 1000, 1005-07 (2d Cir. 1997) (suit by a public works contractor to enjoin the New York Department of Labor from enforcing a state wage law, alleging the state law was preempted by ERISA); Verizon Md., Inc. v. Public Serv. Comm'n of Md., 535 U.S. 635, 641-42 (2002) (Verizon sued the Maryland Public Service Commission alleging that the Federal Communications Commission's order requiring Verizon to make payments under a negotiated interconnection agreement violated the Telecommunications Act of 1996); Qwest Corp. v. City of Santa Fe, 380 F.3d 1258, 1264 (10th Cir. 2004) (suit by telecommunications provider challenging local ordinance that imposed several requirements on telecommunications providers before they could access city-owned rights-of-way).

[8] See e.g., City of L.A. v. County of Kern, 509 F. Supp. 2d 865, 889 (C.D. Cal. 2007) (where the plaintiffs challenged a local ordinance on that grounds that it was preempted by state law, the court analogized the law of preemption under the California Constitution to that under the Supremacy Clause, and held that the plaintiffs had standing to bring suit because their "conduct would be restricted by a local ordinance they challenge[d] as preempted, even if the plaintiffs d[id] not assert rights protected by the preempting statute itself"); Planned Parenthood of Cent. Tex. v. Sanchez, 280 F. Supp. 2d 590, 596, 599-602 (W.D. Tex. 2003) (family planning and abortion services provider challenged state statute that precluded payment of Medicaid funds to organizations providing abortions services); St. Thomas--St. John Hotel & Tourism Ass'n, Inc. v. Gov't of U.S. Virgin Islands, 218 F.3d 232, 240-42 (3d Cir. 2000) (challenge to territorial law providing that an employee discharged for any reason other than for cause as set forth in nine enumerated reasons will be considered to have been wrongfully discharged).

rights.[9]

Here, AB 5 neither compels nor restricts petitioners' own conduct. In order to state a claim, petitioners must therefore show that AB 5 interferes with some individual federal right that arises under § 30(A). However, for the reasons stated *supra*, § (30)(A) does not give rise to a federally created right.[10]

Because petitioners do not have any federal rights under § 30(A), their probability of success on the claims at issue here is low, if not wholly lacking.[11]

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[9] See e.g., League of Women Voters v. Blackwell, 340 F. Supp. 2d 823, 827-28 (N.D. Ohio 2004) (challenge to Ohio Secretary of State's directive prescribing procedures for obtaining identification from first-time voters).

[10] Petitioners reliance on Orthopaedic Hospital v. Belshe, 103 F.3d 1491 (9th Cir. 1997), decided before Sanchez, is misplaced. There, the plaintiff-providers filed suit under 42 U.S.C. § 1983, claiming that the Director violated § 30(A) by setting reimbursement rates for hospital providers of outpatient services without considering hospital costs. Orthopaedic Hosp., 103 F.3d at 1492. In that case, however, there was no discussion of whether plaintiffs had any federally created individual rights. However, because Sanchez has decided that no individual right to sue is conferred by § 30(A), it appears that the holding of Orthopaedic Hospital is not controlling on that issue.

The cases addressed by petitioners at the hearing held herein are similarly unavailing. In Ball v. Rodgers, 492 F.3d 1094 (9th Cir. 2007), the court, noting that after Sanchez, § 30(A) cannot be enforced under 42 U.S.C. § 1983, analyzed different provisions of the Medicaid Act, which it determined, unlike § 30(A), gave rise to individual rights. In Day v. Apoliona, 496 F.3d 1027 (9th Cir. 2007), the Ninth Circuit applied the factors set forth in Blessing v. Freestone, 520 U.S. 329 (1997), and Gonzaga University v. Doe, 536 U.S. 273 (2002), to conclude that beneficiaries of a trust had individual rights that could be enforced under 42 U.S.C. § 1983. Arc of Wash. State Inc. v. Braddock, 427 F.3d 615 (9th Cir. 2005), involved a challenge under the ADA.

[11] Petitioners' reliance on Burgio & Campofelice, Inc. v. New York State DOL, 107 F.3d 1000 (2d Cir. 1997) is also misplaced. In Burgio & Campofelice, Inc., the plaintiff argued that the allegedly preempted state statute improperly caused the withholding of money that it was due under a public works contract. Burgio & Campofelice, Inc., 107

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See Golden State Transit Corp. v. L.A., 493 U.S. *supra* at 108 (1989) ("'[The Supremacy] clause is not a source of any federal rights'; it ['']secures federal rights by according them priority whenever they come in conflict with state law.'") (quoting Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 613 (1979)).

In light of the Court's finding that petitioners have no likelihood of succeeding on the merits, the Court, while acutely cognizant of the potential adverse consequences of the ten percent rate reduction, declines to address petitioners' arguments that they have shown irreparable harm. See Global Horizons, Inc. v. United States DOL, 510 F.3d 1054, 1058 (9th Cir. 2007) ("Once a court determines a complete lack of probability of success or serious questions going to the merits, its analysis may end, and no further findings are necessary.").

V. CONCLUSION

In accordance with the foregoing, the Court hereby DENIES petitioners' motion for preliminary injunction.

IT IS SO ORDERED.

Dated: June 25, 2008

Christina A. Snyder

CHRISTINA A. SNYDER
UNITED STATES DISTRICT JUDGE

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[11](...continued)
F.3d at 1005-06. In Pharm. Research & Mfrs. of Am. v. Concannon, 249 F.3d 66 (1st Cir. 2001), the First Circuit concluded that the plaintiff had standing to assert a claim under the Supremacy Clause reasoning that "[w]here a party has established a concrete injury in fact, and otherwise has standing to challenge the lawfulness of the statute, it is entitled to assert those concomitant rights of third parties that would be diluted or adversely affected should [its] constitutional challenge fail and the statute[] remain in force." Id. at 74 (internal quotations omitted; alterations in original). Here, § 30(A) does not give petitioners any right to Medi-Cal funds.