IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

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. **Case No. 4:15-cv-00566-KGB**

JOHN M. SELIG, DIRECTOR, ARKANSAS DEPARTMENT OF HUMAN SERVICES, in his official capacity **DEFENDANT**

TEMPORARY RESTRAINING ORDER

Before the Court is the motion for temporary restraining order and preliminary injunction filed by plaintiffs Planned Parenthood of Arkansas & Eastern Oklahoma, d/b/a Planned Parenthood of the Heartland ("PPH") and Jane Doe #1, Jane Doe #2, and Jane Doe #3 ("Jane Does") (Dkt. No. 3). Defendant John Selig, Director of the Arkansas Department of Human Services in his official capacity ("ADHS"), was personally notified of this motion and served on or about September 11, 2015.

Based on PPH and the Jane Does' written filings, the Court determined that Federal Rule of Civil Procedure 65(b)(2)(B) was not satisfied so as to permit the Court to consider whether to issue a temporary restraining order without notice. Instead, the Court contacted counsel for the parties on September 11, 2015, and set a hearing on the motion for September 17, 2015 (Dkt. No. 7).

The Court received late the evening of September 15, 2015, a 16-page amended complaint filed by PPH and the Jane Does (Dkt. No. 12). The Court received late the evening of September 16, 2015, a 320-page response by ADHS (Dkt. No. 16). The morning of September

17, 2015, ADHS filed an addendum to the response that included the videos at issue in this litigation (Dkt. No. 19).

The Court held a hearing on the pending motion on September 17, 2015, and the parties appeared through their counsel. The Court concludes that, although it held an adversarial rather than an *ex parte* hearing on the motion, it was not the sort of adversarial hearing that included presentation of evidence beyond the affidavits and exhibits filed with PPH and the Jane Does' motion and ADHS's response so as to allow the basis of the relief requested to be strongly challenged. Therefore, the Court only considers the motion for temporary restraining order at this time. *See, e.g.*, *Piraino v. JL Hein Serv. Inc.*, No. 4:14-CV-00267-KGB (E.D. Ark. May 16, 2014) (citing *McLeodUSA Telecomms. Servs. v. Qwest Corp.*, 361 F. Supp. 2d 912, 918 n.1 (N.D. Iowa 2005)).

I. Background

Based on the parties' filings with the Court, the Court understands the following to be the factual background of this dispute. PPH operates health centers in Little Rock, Arkansas, and Fayetteville, Arkansas, and has done so for over 30 years. These centers provide family planning services to men and women, including contraception and contraceptive counseling, screening for breast and cervical cancer, pregnancy testing and counseling, and early medication abortion. PPH states that, at its Arkansas health centers, PPH offers only early medication abortions, services that Arkansas Medicaid does not cover in virtually all circumstances (Dkt. No. 12, ¶ 17). PPH and the Jane Does also represent that Medicaid payment for abortion is not at issue in this case (Dkt. No. 12, ¶ 17). PPH also operates a pharmacy that serves Arkansas residents which allows patients to have their birth control prescriptions automatically refilled. During the 2015 fiscal year, PPH represents that it provided approximately 1,000 health care visits and filled more

than 1,100 prescriptions, for over 500 women, men, and teens insured through Medicaid in Little Rock and Fayetteville, Arkansas. In 2014, almost 40% of PPH's Little Rock, Arkansas, patients, and 15% of its Fayetteville, Arkansas, patients were insured through Medicaid, according to PPH. Plaintiffs Jane Does are patients of PPH who receive their care through the Medicaid program.

PPH and the Jane Does allege that ADHS, through its director Mr. Selig, notified PPH on August 14, 2015, that ADHS was terminating its Medicaid provider agreements, effective 30 days from the date of the letter (Dkt. No.16-1, at 19). PPH and the Jane Does further allege that this initial notification letter provided no reason for the termination of the agreements; they assert that this initial termination appears to stem from PPH's association with Planned Parenthood and abortion (Dkt. No. 12, ¶ 35). To support their contention that ADHS wrongfully suspended Medicaid payments to PPH, PPH and the Jane Does cite Arkansas Governor Asa Hutchinson's press release from August 14, 2014, the day the termination letter was sent to PPH. In this release, Governor Hutchinson states that he directed ADHS to terminate the agreements because "[i]t is apparent that 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." (Dkt. No. 12, ¶ 35).

PPH and the Jane Does further assert that Governor Hutchinson's reference to "recent revelations" regarding Planned Parenthood refers to recent videos released about Planned Parenthood, claiming that some Planned Parenthood affiliates allow patients to donate fetal tissue to medical research following abortions (Dkt. No. 12, ¶ 35).

ADHS followed this August 14, 2015, letter with a second termination letter dated September 1, 2015, that ADHS characterizes as a "for cause" letter. PPH and the Jane Does

allege that this second letter states solely that it "is based in part upon the troubling circumstances and activities that have recently come to light regarding the national Planned Parenthood organization, Planned Parenthood of the Heartland, and other affiliated Planned Parenthood entities, all of which are affiliated with [PPH]," and that "there is evidence that [PPH] and/or its affiliates are acting in an unethical manner and engaging in what appears to be wrongful conduct." (Dkt. Nos. 12, ¶ 37; 16-1 at 21-26). The letter also states that PPH is "welcome to submit information or offer comments on the nationally recognized videos that have raised questions on the conduct of Planned Parenthood." (Dkt. Nos. 12, ¶ 37; 16-1 at 21-26).

PPH and the Jane Does represent to this Court that, after the date on which ADHS intends to cut Medicaid funding, the first date that patients insured through Medicaid are scheduled to visit PPH health centers is September 21, 2015 (Dkt. No. 12, ¶¶ 8, 34). Therefore, PPH and the Jane Does allege that, starting on September 21, 2015, 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 services, will lose their provider of choice, will find their family planning services interrupted, and will be left with few or no adequate alternative providers (Dkt. No. 12, ¶ 8, 34). As for PPH, PPH and the Jane Does contend that, "[i]f 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." (Dkt. No. 12, ¶ 43). Further, they allege that "[w]ithout 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." (Dkt. No. 12, ¶ 49). They also allege that, "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." (Dkt. No. 12, ¶ 49).

In this action, PPH and the Jane Does claim that the suspension of Medicaid payments violates certain provisions of the Medicaid statutory and regulatory scheme set out in 42 U.S.C. § 1396 and violates their rights under the First and Fourteenth Amendments to the United States Constitution. They have sued ADHS's director, Mr. Selig, in his official capacity only seeking declaratory and injunctive relief (Dkt. No. 12, at 15). In their instant motion, PPH and the Jane Does ask this Court to enter a temporary restraining order that prevents ADHS from suspending these Medicaid payments.

II. Discussion

When determining whether to grant a motion for a temporary restraining order, this Court considers: (1) the threat of irreparable harm to the movant; (2) the balance between the harm to the movant and the injury that granting an injunction would cause other interested parties; (3) the public interest; and (4) the movant's likelihood of success on the merits. *Kroupa v. Nielsen*, 731 F.3d 813, 818 (8th Cir. 2013) (quoting *Dataphase Sys. Inc. v. CL Sys.*, 640 F.2d 109, 114 (8th Cir.1981)). Preliminary injunctive relief is an extraordinary remedy, and the party seeking such relief bears the burden of establishing the four *Dataphase* factors. *Watkins Inc. v. Lewis*, 346 F.3d 841, 844 (8th Cir. 2003). The focus is on "whether the balance of the equities so favors the movant that justice requires the court to intervene to preserve the *status quo* until the merits are determined." *Id*. "Although no single factor is determinative when balancing the equities," a lack of irreparable harm is sufficient ground for denying a temporary restraining order. *Aswegan*

v. Henry, 981 F.2d 313, 314 (8th Cir. 1992). Thus, "[t]he threshold inquiry is whether the movant has shown the threat of irreparable injury." *Glenwood Bridge, Inc. v. City of Minneapolis*, 940 F.2d 367, 371 (8th Cir. 1991).

1. The Threat Of Irreparable Harm

A plaintiff seeking temporary injunctive relief must establish that the claimant is "likely to suffer irreparable harm in the absence of preliminary relief." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). As a general rule, economic loss does not constitute irreparable harm. *See Sampson v. Murray*, 415 U.S. 61, 90 (1974). A threat of irreparable harm exists when a party alleges a harm that may not be compensated by money damages in an action at law. *See Kroupa*, 731 F.3d at 820; *Glenwood Bridge, Inc.*, 940 F.2d at 371-72. Accordingly, "[l]oss of intangible assets such as reputation and goodwill can constitute irreparable injury." *United Healthcare Ins. Co. v. Advance PCS*, 316 F.3d 737, 741 (8th Cir. 2002). Furthermore, a threat of irreparable harm may exist when relief through money damages in an action at law will not fully compensate a claimant's economic loss. *See Glenwood Bridge*, 940 F.2d at 367.

PPH alleges that ADHS's suspension of Medicaid payments threatens irreparable harm to its clinics because it relies on public funding, and a loss of Medicaid funds will impact its operating budgets, likely requiring PPH to reduce staff and/or health center hours. PPH also contends that, if this de-funding occurs and the funding is reinstated at a later time, PPH's patients will remain confused about whether PPH is a Medicaid provider in good standing, potentially causing a loss of patients. An affidavit from PPH's President and Chief Executive Officer, Suzanna de Baca, indicates that "the actions of the [ADHS] will have the effect of disqualifying PPH from providing basic and preventive health care services and medications to

the Arkansas women and men who depend on [PPH] for these services, thereby irreparably harming those patients, as well as PPH . . .” (Dkt. No. 3, Ex. A, ¶ 7).

In part, ADHS counters these claims of irreparable harm with assertions that PPH gets “only about $50,000 in Medicaid reimbursements, which is surely a tiny fraction of its overall revenue,” and thus not a “great” harm to PPH (Dkt. No. 16, at 31). It is unclear to what ADHS refers when it refers to “its overall revenue,” since no cite is provided for this information, and this information does not appear to be included in an affidavit submitted with ADHS’s response.

Further, at the hearing ADHS suggested that PPH might continue to provide the services at issue at no charge to patients, with no certainty about its status as a Medicaid provider in the future. This suggestion strikes the Court as putting a not-for-profit health care provider in the difficult, if not untenable, position of choosing between patient care and fiscal management of the operation. ADHS’s arguments on this point are unpersuasive.

As a practical matter, PPH will lose revenue from Medicaid funding if a temporary restraining order does not issue. PPH would be unable to recover this lost revenue as damages after a judgment on the merits in plaintiffs’ favor because of the Eleventh Amendment’s bar to seeking damages from a state.

Perhaps most importantly, as the Jane Does allege, they will suffer irreparable harm because their relationship with PPH, their chosen family planning provider, will be disrupted, causing reduced access to family planning services in violation of their statutory rights under 42 U.S.C. § 1396a(a)(23). ADHS argues that the Jane Does’ misconstrue their statutory right and that the right under the statute only requires that the Jane Does be allowed their choice of qualified providers free from government interference, not the choice of an unqualified provider. In support of this argument, ADHS cites *O’Bannon v. Town Court Nursing Center*, 447 U.S.

773, 787 (1980). Based upon the Court's review of *O'Bannon*, the facts and circumstances as presented in this case, and the Court's determination on the likelihood of success on the merits of PPH and the Jane Does' claims here, the Court finds this argument unpersuasive.

In support, affidavits from Jane Does #1, #2, and #3 indicate that, because of various family and occupational responsibilities, it is difficult for all three of these women to plan health care visits weeks in advance. Thus, they prefer going to PPH, where they can walk in for an appointment, and the wait times are less than those at a private physician's office. These affidavits also demonstrate that these women could not afford to pay for their normal services out of pocket (*See* Dkt. No. 3, Ex. B, ¶ 9; Ex. C, ¶ 10).

ADHS counters this with arguments that the Jane Does cannot show a threat of irreparable injury because of the very large number of family planning providers available in their area that accept Medicaid (Dkt. No. 16-1, at 6, ¶¶ 23 - 25). However, ADHS has provided the Court with no record evidence demonstrating that the alleged other providers are willing to accept additional Medicaid patients in sufficient numbers to account for all patients likely displaced by ADHS's challenged decision, that any one of these other providers provide all of the services offered by PPH at one location, or that any one of these other providers provide the medication abortion services the Court understands PPH to provide. ADHS has not proffered evidence that these alleged other providers are able to render the same services the Jane Does and other Medicaid patients have been receiving from PPH.

ADHS also fails to address the alleged inability to get appointments with other providers, the alleged inability to get timely appointments with other providers, alleged long wait times even when appointments are secured, and overall scheduling issues, except to say that this harm is not great enough to meet their burden of proof on irreparable harm. The Court finds ADHS's

position unpersuasive and without support, especially when family planning and reproductive health care needs are at issue.

The Court finds that the harms alleged do constitute irreparable injuries sufficient for an injunction. *See, e.g., Planned Parenthood of Ind., Inc. v. Comm 'r of Ind. State Dep 't of Health,* 794 F. Supp. 2d 892, 912 (S.D. Ind.) (denial of Medicaid patient's free choice of provider is irreparable harm), *aff'd in part and rev 'd in part on other grounds,* 699 F.3d 962 (7th Cir. 2012); *see also Camacho v. Tex. Workforce Comm 'n,* 326 F. Supp. 2d 794, 802 (W.D. Tex. 2004) (reduced access to health care, as a result of state statute restricting access to Medicaid in violation of federal regulations, constituted irreparable harm). If ADHS is permitted to terminate PPH as a Medicaid provider and to stop reimbursing PPH for the Medicaid services it provides, PPH will be unable to provide health care services to its patients who are Medicaid beneficiaries, including the Jane Does, and PPH will lose revenue from those services. Should the Court fail to issue injunctive relief, the Jane Does will be denied their choice of provider for family planning services. The Court finds that, based on its assessment at this stage of the litigation on the likelihood of success on the merits, denial of that freedom of choice is more likely than not exactly the injury that Congress sought to avoid when it enacted 42 U.S.C. § 1396a(a)(23). A temporary restraining order to preserve the *status quo* properly avoids the risk that the Jane Does will needlessly suffer an irreparable injury while this case is pending.

In addition, Arkansas law is instructive on this issue. The Supreme Court of Arkansas has found in other contexts that harm to a doctor-patient relationship can constitute irreparable harm. *See Baptist Health v. Murphy,* 226 S.W.3d 800 (Ark. 2006); *Cf. Roudachevski v. All–American Care Centers, Inc.*, 648 F.3d 701 (8th Cir. 2011) (holding that an already-disrupted doctor-patient relationship did not constitute irreparable harm).

For these reasons, the Court determines that PPH and the Jane Does have met their burden of demonstrating they likely will suffer irreparable harm in the absence of a temporary injunction.

2. Balance Of Equities And Public Interest

PPH and the Jane Does argue that the aforementioned threats of injury to them outweigh any harm caused to ADHS. In fact, PPH and the Jane Does contend that "the state will suffer no harm at all. Rather, the state will continue to reimburse PPH for providing Medicaid services as it has for years . . . and patients will continue to receive high-quality reproductive health care" (Dkt. No. 4, at 17). PPH and the Jane Does also argue that the public interest weighs in favor of entering a temporary restraining order because of the strong public interest in ensuring continued public access to crucial health services, especially for the many underserved and low-income patients served by PPH (Dkt. No. 4, at 18). In her affidavit, Ms. de Baca states that she does not believe "there are adequate alternative providers to provide healthcare to this many additional women and men . . ." and that "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," while also noting the difficulty that low-income patients would have if forced to travel to clinics that were not as close to them as PPH (Dkt. No. 4, Ex. D, ¶¶ 16-17). Further, Ms. de Baca notes that, "even if a patient can obtain an appointment [at a private ob/gyn], she may be unable to obtain (either at all, or without significant delays) the services she seeks, such as long-acting reversible contraceptives, which are the most effective forms of birth control" (Dkt. No. 4, Ex. D, ¶¶ 16-17).

ADHS argues that Planned Parenthood's alleged conduct is "not reflective of the values of Arkansas or Arkansans." (*See* Dkt. No. 16, at 33). It claims that Arkansas should, within the

bounds of the Medicaid program, be able to pursue its public policy objectives by excluding this network from Arkansas's Medicaid program.

The Court must examine its case in the context of the relative injuries to the parties and to the public. *Dataphase*, 640 F.2d at 114. After balancing these relative injuries and the equities argued by the parties, the Court finds that because any suspension of Medicaid payments would result in threatened irreparable harm to PPH and the Jane Does, as well as other Medicaid patients who may have nowhere else to go for family-planning services, and because the quality of PPH's care rendered to Arkansas patients does not appear to be questioned by ADHS or other officials at this time, the resulting harm to PPH and the Janes Does, who are PPH's patients, is greater than the potential harm to ADHS's pursuit of public policy objectives. At this stage of the proceedings, the Court finds that the threat of irreparable harm to PPH and Jane Does, and the public interest, outweighs the immediate interests and potential injuries to ADHS.

3. Likelihood Of Success On The Merits

The Eighth Circuit has emphasized that courts are to apply the *Dataphase* factors flexibly and that no one factor is controlling. *See Aswegan*, 981 F.2d at 314. Furthermore, other courts have noted that in assessing the likelihood of success on the merits, this factor may be "somewhat relaxed" if the "three harm factors" tip in a claimant's favor. *Peak Med. Oklahoma No. 5, Inc. v. Sebelius*, No. 10-CV-597-TCK-PJC, 2010 WL 4809319, at *2 (N.D. Okla. Nov. 18, 2010) (quoting *F.T.C. v. Mainstream Marketing Services, Inc.*, 345 F.3d 850, 852 (10th Cir. 2003)). Thus, "[u]nder such circumstances, 'probability of success is demonstrated when the [movant] has raised questions going to the merits so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation.'" *Id.*

Plaintiffs bring this civil action pursuant to 42 U.S.C. § 1983 based on rights allegedly secured by federal Medicaid statutes and the United States Constitution. Specifically, plaintiffs

allege violations of federal Medicaid statute 42 U.S.C. § 1396a(a)(23)(A), which states 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." Plaintiffs contend that this "free choice provision" is violated because PPH is qualified and willing to undertake such family planning services. In addition to this contention, plaintiffs also note that Congress has distinguished family planning services by giving this type of service even greater protections to ensure freedom of choice.

Plaintiffs cite 42 U.S.C. § 1396a(a)(23)(B), which states in pertinent part that, "[a] State plan for medical assistance must" "provide that. . . an 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 under section 1396d(a)(4)(C) of this title. . . ." This provision then lists enumerated exceptions, none of which the parties contend apply here. Further, PPH and the Jane Does contend that, by referencing 42 § 1396d(a)(4)(C), this provision carves out and insulates family planning services from limits that may otherwise apply under approved state Medicaid plans, assuring covered patients an unfettered choice of provider for family planning services.

A. Private Right Of Action

As an initial matter, the Court addresses ADHS's contention that 42 U.S.C. § 1396a(a)(23) does not provide a private right of action for PPH or even the Jane Does. This Court determines that, despite ADHS's arguments otherwise, *Armstrong v. Exceptional Child Center*, __ U.S. __, 135 S. Ct. 1378 (2015), does not overrule, or even significantly undermine,

the precedent that informed the reasoning of the Sixth, Seventh, and Ninth Circuits in recognizing a private right of action under 42 U.S.C. § 1396a(a)(23). *See Planned Parenthood Ariz., Inc. v. Betlach*, 899 F. Supp. 2d 868 (D. Ariz. 2012), *appeal dismissed as moot,* 727 F.3d 960, 962 (9th Cir. 2013), *cert. denied,* 134 S. Ct. 1283 (2014); *Planned Parenthood of Ind., Inc. v. Comm 'r of Ind. State Dep 't of Health*, 699 F.3d 962 (7th Cir. 2012), *cert. denied,* 133 S. Ct. 2736 (2013); *Harris v. Olszewski*, 442 F.3d 456 (6th 2006).

The Supremacy Clause, not 42 U.S.C. § 1983, was at issue in *Armstrong*, and the case involved 42 U.S.C. § 1396a(a)(30)(A) of the Medicaid Act which includes meaningfully different language from the statutory language at issue here. *See Armstrong*, 135 S.Ct. at 1385 ("The provision for the Secretary's enforcement by withholding funds might not, by itself, preclude the availability of equitable relief. . . . But it does so when combined with the judicially unadministrable nature of § 30(A)'s text."). Further, a provider was the only named plaintiff in *Armstrong*, which is not the case here. The Jane Does are named plaintiffs here, along with PPH.

As to other arguments raised by ADHS to defeat the private right of action under 42 U.S.C. § 1983, to the extent those arguments are addressed by the Sixth, Seventh, and Ninth Circuits, the Court finds the reasoning in these prior cases persuasive and determines that, at a minimum, the Jane Does likely will succeed in bringing a private right of action under 42 U.S.C. § 1396a(a)(23)(B) based on the facts alleged. At this point, the Court also does not foreclose the possibility that PPH might succeed in bringing a private right of action, as well.

B. The Merits Of The 42 U.S.C. § 1983 Claim

In support of their assertion that ADHS's efforts to exclude PPH from Medicaid violate federal law guaranteeing a Medicaid patient's right to receive care from the provider of her

choice, PPH and the Jane Does rely on recent Seventh and Ninth Circuit case law and the discussions by those courts of the merits of such a claim. The Seventh Circuit held that excluding "Planned Parenthood from Medicaid for a reason unrelated to its fitness to provide medical services[] violate[s] its patients statutory right to obtain medical care from the qualified provider of their choice." *Planned Parenthood of Ind.*, 699 F.3d 962. Similarly, the Ninth Circuit case dealt with an Arizona law that "bar[red] patients eligible for the state's Medicaid program from obtaining covered family planning services through health care providers who perform[ed] abortions in cases other than medical necessity, rape, or incest." *Betlach*, 899 F. Supp. 2d at 874. Although these cases addressed legislative enactments and the instant case involves a decision made by the Governor and communicated through ADHS or a decision made by ADHS, depending on which termination letter is examined, those facts do not sufficiently distinguish the instant case from the aforementioned cases, and the holdings of those cases weigh in favor of the plaintiffs' likely success on the merits here. The Court determines that PPH and the Jane Does have carried their burden, at least at this stage of the proceeding, on demonstrating a likelihood of success on the merits of their 42 U.S.C. § 1983 claim. Because the Court makes this determination, the Court does not address PPH and the Jane Does' other claims under the First and Fourteenth Amendments. Further, in making this determination, the Court has considered at least preliminarily the counterarguments raised by ADHS.

C. ADHS's Arguments

(i) Initial Contract-Based Decision

ADHS recognizes that one of the key issues in this litigation will be whether ADHS's termination decision was proper under federal law (Dkt. No. 16, at 20). As an initial matter, and in support of the first termination letter sent to PPH, ADHS argues that its termination of PPH's

provider agreement is allowed, based upon provisions in the agreements itself, 42 U.S.C. § 1396a(p), 42 U.S.C. § 1320a-7, and Ark. Admin. Code § 016.06.35-151.000(B) (Dkt. No. 16, at 2, 20). Specifically, ADHS argues that Section III.A of the agreement provides that, "[t]his contract may be voluntarily terminated by either party by giving thirty (30) days written notice to the other party." (Dkt. No. 16, Aff. 1).

This Court raised at the hearing an issue as to what, if anything, ADHS reviewed prior to issuing the initial contract-based decision. ADHS submits an affidavit from Mark White, the Deputy Director of ADHS, that seems to suggest only after this letter was issued did Governor Hutchinson direct ADHS employees to review the videos upon which ADHS relies in this lawsuit (Dkt. No. 16-1, at 2, ¶ 9).

Further, legal arguments of this type, citing 42 U.S.C. § 1396a(p) and 42 U.S.C. § 1320a-7 of the Medicaid Act, were addressed by the Seventh and Ninth Circuits. These courts rejected claims by the states in those cases that the cited provisions provide any sort of expanded, unchecked state authority for terminating provider contracts for reasons unrelated to the purposes of the Medicaid Act. 42 U.S.C. § 1396a(p)(1) provides specifically that:

> In addition to any other authority, a State may exclude any individual or entity for purposes of participating under the State plan under this subchapter for any reason for which the Secretary could exclude the individual or entity from participation in a program under subchapter XVIII of this chapter under section 1320a-7, 1320a-7a, or 1395cc(b)(2) of this title.

42 U.S.C. § 1396a(p)(1). The cross-referenced sections of the Medicaid Act cited within this provision pertain to mandatory or permissive exclusions of providers for various forms of malfeasance such as fraud, drug crimes, and failure to disclose necessary information to regulators. *See* 42 U.S.C. §§ 1320a-7, 1320a-7a, 1395cc(b)(2). To the extent ADHS intends to rely on these provisions, or comparable state provisions, to argue a plenary power of the states to

exclude Medicaid providers as the states see fit, this Court is mindful that other courts have soundly rejected such arguments. *See Planned Parenthood of Indiana*, 699 F..3d at 979. Specifically, the Seventh Circuit determined that the phrase "'[i]n addition to any other authority' signals only that what follows is a non-exclusive list of specific grounds upon which states may bar providers from participating in Medicaid. It does not imply that the states have an unlimited authority to exclude providers for any reason whatsoever." *Id.*

Further, as to this contractual issue, the Jane Does are not parties to the agreements cited. A focus of this lawsuit is the Jane Does' claimed federal statutory right to the family planning provider of their choice, and the Jane Does claim that language of the Medicaid Act conferring this right is mandatory language for any state plan for medical assistance. 42 U.S.C. § 1396a(a)(23)(B).

Given these considerations at this stage of the proceeding, this Court still concludes that PPH and the Jane Does likely will succeed on the merits of their 42 U.S.C. § 1983 claims.

(ii) Second For-Cause Decision

ADHS also sent the second for-cause termination letter. ADHS raises Section III.C of the provider agreements, which states that a provider may be terminated for a number of reasons, including, but not limited to: "(1) the sanction of a provider; (2) other reasons set out in the appropriate Arkansas Medicaid Provider Manual; or (3) failure to conform to the terms or requirements of this contract." (Dkt. No. 16, Aff. 1). ADHS claims that its second letter, terminating PPH "for cause," is justified under Section III.C of the provider agreements because of ". . . evidence that [PPH] and/or its affiliates are acting in an unethical manner and engaging in what appears to be wrongful conduct." (Dkt. No. 16, Aff. 1). In justifying this, ADHS asserts that "Planned Parenthood affiliates have likely engaged in questionable transactions involving

fetal parts and tissue" and that Arkansas law prohibits the donation of fetal tissue, citing Ark. Code Ann. § 20-17-802(c) (Dkt. No. 16, at 22).

ADHS also contends that Planned Parenthood affiliates have "apparently altered abortion procedures with an eye toward consummating the fetal-tissue transactions," which it believes is in violation of American Medical Association standards (Dkt. No. 16, at 23-25). ADHS argues that all of the aforementioned alleged conduct justifies ADHS's determination that Planned Parenthood has acted in an unethical manner, so as to remove itself from the category of qualified providers.

ADHS contends that § 1396a(23) does not define the term "qualified" and that 42 C.F.R. § 431.51(c)(2) permits states to "establish reasonable standards relating to the qualifications of providers." The term "qualified" is at issue in 42 U.S.C. § 1396a(a)(23)(A), in the context of providers being "qualified to perform . . . the service or services required." The Seventh Circuit has held that the term "qualified" as used in the Medicaid Act "unambiguously relate[s] to a provider's fitness to perform the medical service the patient requires." *Comm 'r of Ind. State Dep 't of Health,* 699 F.3d at 978; *see also Betlach,* 727 F.3d at 969 ("We therefore read that term, as it appears in § 1396a(a)(23), as conveying its ordinary meaning, which is: 'having an officially recognized qualification to practice as a member of a particular profession; fit, competent.'"); *see also Qualified,* Black's Law Dictionary (10th ed. 2014) (defining qualified as "capable or competent").

The record before the Court includes Ms. De Baca's affidavit (Dkt. No. 3, Ex. A). Ms. De Baca states, "While all Planned Parenthood affiliates comply with federal and state law on the disposal of fetal tissue, PPH does not participate in any fetal tissue donation, and does not appear in any of the videos." (Dkt. No. 3, Ex. A, ¶ 13). There is no contrary evidence in the

record at this stage. For example, there is no evidence that PPH performs surgical abortions in Arkansas from which fetal tissue could be obtained. There is no evidence that PPH performs medication abortions in Arkansas from which fetal tissue can be obtained and donated for any purpose. There also is no evidence that PPH has been cited, reprimanded, or cautioned by ADHS in the past about its qualifications as a provider of the services it offers.

This is consistent with what ADHS argues in support of its determination to terminate PPH as a provider. ADHS does not specifically mention, or provide evidence in the record, that PPH itself has participated in any of this conduct cited by ADHS as a basis for its termination decision, but instead ADHS relies on its contention that Planned Parenthood Federation of America and its affiliates function as a unified whole, and thus, the acts of one affiliate may be attributed to all other affiliates. In support of this, ADHS cites among other matters personal jurisdiction, tort liability, and joint employer cases, arguing that "Planned Parenthood Federation 'codetermines' essential policies with its affiliates, and so its affiliates can be deemed to follow those policies in a uniform fashion." (Dkt. No. 16, at 29-31).

The Court has reviewed the affidavits before it and the legal theories advanced by both sides including this particular legal theory advanced by ADHS. The Court still concludes that PPH and the Jane Does likely will succeed on the merits of their 42 U.S.C. § 1983 claims.

III. Security

Under Federal Rule of Civil Procedure 65(c), a district court may grant a temporary restraining order "only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). In these proceedings, ADHS has neither requested security in the event this Court grants a temporary restraining order nor has it presented any evidence that it

will be financially harmed if it were wrongfully enjoined. Further, this Court does not perceive how ADHS could be harmed by reimbursing PPH for services provided to Medicaid patients, considering that ADHS has indicated that PPH if reinstated as a Medicaid provider would have 365-days from the date service is rendered to seek reimbursement for care provided and that ADHS likely will have to pay the same amount for benefits of these patients regardless of who the patients' Medicaid provider happens to be. For these reasons, the Court declines to require security from PPH or the Jane Does.

IV. Conclusion

For the foregoing reasons, the Court determines that PPH and the Jane Does have met their initial burden for a temporary restraining order to maintain the *status quo*. Therefore, the Court grants PPH and the Jane Does' motion for temporary restraining order. The Court temporarily restrains ADHS for a period of 14 days from the date of entry of this Order from suspending Medicaid payments to PPH for services rendered to Medicaid beneficiaries, including but not limited to the Jane Does. Pursuant to Federal Rule of Civil Procedure 65(b)(2), this temporary restraining order shall not exceed 14 days from the date of entry of this order and shall expire by its own terms on Friday, October 2, 2015, at 4:55 p.m. unless the Court, for good cause shown, extends it.

SO ORDERED this 18th day of September, 2015, at 4:55 p.m.

Kristine G. Baker
United States District Judge