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**

PRELIMINARY INJUNCTION 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). Currently before the Court is a request by PPH and the Jane Does for a preliminary injunction, extending the temporary restraining order this Court previously entered against Defendant John Selig, Director of the Arkansas Department of Human Services in his official capacity ("ADHS") (Dkt. No. 21).

Since entry of the temporary restraining order on September 18, 2015, PPH, the Jane Does, and ADHS have submitted to the Court additional briefing and evidentiary material (Dkt. Nos. 26, 27, 30, 35, 36, 37 38, 39, 40, 41). Included in those submissions are PPH and the Jane Does' motion to strike (Dkt. No. 27), to which ADHS has responded (Dkt. No. 38), and ADHS's motion to strike (Dkt. No. 30), to which PPH and the Jane Does have responded (Dkt. No. 41). The Court denies the motions to strike (Dkt. Nos. 27, 30) and grants the Jane Does a preliminary injunction.

I. Motions To Strike

PPH and the Jane Does have filed a motion to strike (Dkt. No. 27). They move this Court pursuant to Federal Rules of Evidence 402 and 802 to strike Exhibits 2, 3, and 4 from ADHS's response to PPH and the Jane Does' motion for preliminary injunction (Dkt. Nos. 16-3, 16-4, and 16-5) and to strike Exhibit F to, and all references therefore in, the Affidavit of Mark White (Dkt. Nos. 16-1, 19).

ADHS has filed a motion to strike (Dkt. No. 30). ADHS moves pursuant to Federal Rule of Evidence 602 to strike specific portions of Suzanna de Baca's declarations claiming that Ms. de Baca does not have the personal knowledge necessary to testify to the statements cited (Dkt. No. 30, at 1).

PPH and the Jane Does, as well as ADHS, cite this Court to numerous cases for the proposition that, in preliminary relief proceedings, evidentiary requirements are less formal than at trial. PPH and the Jane Does claim that, because a preliminary injunction request "often requires an expeditious hearing and decision," creating problems "in attempting to gather the necessary witnesses," courts may consider reliable hearsay evidence in lieu of testimony from multiple witnesses. *Wounded Knee Legal Def./Offense Comm. v. Fed. Bureau of Investigation*, 507 F.2d 1281, 1286-87 (8th Cir. 1974). ADHS also takes the position that hearsay evidence is frequently admitted and that an objection to hearsay evidence offered at the preliminary injunction hearing goes to its weight, not its admissibility (Dkt. No. 38, at 2). *See, e.g., U.S. v. $8,440,190.00 in U.S. Currency*, 719 F.3d 49, 65 n.17 (1st Cir. 2013) (citing *Mullins v. City of New York*, 626 F.3d 476, 52 (2d Cir. 2010)); *Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 718 (3d Cir. 2004); *Flynt Distrib. Co. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984); *Monterey Bay Military Hous., LLC v. Pinnacle Monterey LLC*, No. 14-cv-03953-BLF, 2015 WL 1548833, at

*11 n.14 (N.D. Cal. Apr. 7, 2015); *Damon's Restaurants, Inc. v. Eileen K., Inc.*, 461 F.Supp.2d 607, 620 (S.D. Ohio 2006); *Heidelberg Harris, Inc. v. Mitsubishi Heavy Industries, Ltd.*, 1996 WL 189398 (N.D. Ill. 1996); *V'Guara, Inc. v. Dec*, 925 F.Supp.2d 1120, 1123 (D. Nev. 2013). The Court will consider all of the challenged evidence at this stage of the proceeding, based upon what the parties agree is the controlling evidentiary standard at this juncture of the litigation. The Court denies the motions to strike at this time (Dkt. Nos. 27, 30).

II. Findings Of Fact

1. PPH operates health centers in Little Rock, Arkansas, and Fayetteville, Arkansas, and has done so for over 30 years.

2. 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.

3. 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).

4. PPH and the Jane Does also represent that Medicaid payment for abortion is not at issue in this case (Dkt. No. 12, ¶ 17).

5. PPH also operates a pharmacy that serves Arkansas residents which allows patients to have their birth control prescriptions automatically refilled.

6. 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.

7. 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.

8. Plaintiffs Jane Does are patients of PPH who receive their care through the Medicaid program.

9. Jane Doe #1 is 26 years old and resides in Little Rock, Arkansas (Dkt. No. 3, at 14, ¶ 1). She has three children, is a member of the National Guard, and is insured through Medicaid (*Id.*, ¶ 2).

10. She has been a patient of PPH for about three years. She receives annual exams, testing for sexually transmitted infections, and birth control (*Id.*, ¶ 3). She goes to PPH every 90 days for Depo-Provera injections (*Id.*).

11. She also goes to PPH if she has any symptoms that she is concerned about or questions about her body (*Id.*). She does not have a doctor she uses for general health care; she uses PPH (Dkt. No. 3, at 15, ¶ 5).

12. Jane Doe #1 states that, if she is unable to obtain birth control and other healthcare at PPH, she will have to go back to a provider she likes less and that will have longer wait times. She also believes she might have to stop using Depo-Provera as her birth control method of choice because she worries about the difficulty in scheduling an appointment every 90 days. She does not like that option because she likes her current method of birth control and worries about side effects and effectiveness of other methods (*Id.*, ¶ 7).

13. Jane Doe #2 is 30 years old, resides in Jacksonville, Arkansas, and is a PPH patient (Dkt. No. 3, at 17, ¶ 1). She is insured through Medicaid (*Id.*, ¶ 2)

14. She has a son who is 13, and she works part-time as a cashier (*Id.*).

15. She goes to PPH for annual exams, including breast and pelvic exams, and to receive Depo-Provera injections (*Id.*, ¶3). She has a strong preference for Depo-Provera as her birth control of choice because it is reliable and because, before she used it, she often had migraines and heavy cramping with her period, causing her to miss work and school (*Id.*).

16. Jane Doe #2 states that she wants to remain with PPH as her provider (Dkt. No. 3, at 18, ¶ 6)

17. Jane Doe #3 is 26 years old and lives in Little Rock, Arkansas. She is a patient of PPH (Dkt. No. 3, at 19, ¶1). She is insured through Medicaid (*Id*., ¶2). The Court recognizes that there seem to be billing discrepancies based upon the services that Jane Doe #3 claims she received, and the services that ADHS has in its billing records (Dkt. No. 40). At this stage in the proceeding, the Court finds it prudent to credit the testimony in Jane Doe #3's affidavit.

18. She has a 2 year old son and works for a family business (*Id.*).

19. She relies on PPH for an annual physical, breast exams, and birth control (*Id.*, ¶3). She is using a form of birth control for help with severe cramps and a history of ovarian cysts. She reports that PPH assisted her in finding this solution, which has worked well for her (*Id.*).

20. Jane Doe #3 likes that PPH specializes in reproductive health, she trusts the information and advice she receives, and she likes the atmosphere and treatment she receives. She likes that the office is convenient and that there is never a long wait for her at PPH (Dkt. No. 3, at 20, ¶4).

21. Jane Doe # 3 enrolled in Medicaid specifically to get good access to birth control, due to her life circumstances right now. She also understands the importance of regular exams and wants to continue them. She has only started obtaining regular exams since enrolling in Medicaid because she could not afford these services out of pocket before (*Id.*, ¶¶5−6).

22. Jane Doe #3 reports that PPH is her only medical provider; she does not have a general physician (*Id.*).

23. Jane Doe # 3 wants to continue with PPH as her provider but could not do so if PPH no longer accepts Medicaid. She worries about where she will go or what she will do if she is unable to utilize the services of PPH (*Id.*, ¶7).

24. All three of the Jane Does claim that for a variety of the following reasons, they choose PPH because it is convenient, they are able to obtain appointments quickly, they obtain test results quickly and reliably, they like the atmosphere and staff, they like that they receive the information they need, and they like the services they can receive as a walk-in patient, especially given their time commitments to children, inflexible work schedules, and other responsibilities that make it difficult to schedule appointments at a set time (Dkt. No. 3, at 1−20).

25. Before choosing PPH, Jane Doe #1 and Jane Doe #2 tried to obtain healthcare in other ways. With a private provider, Jane Doe #1 found the wait times long for an appointment and recalls being referred to the emergency room or offered an appointment in three to four weeks when she called concerned about symptoms (Dkt. No. 3, at 15, ¶ 6). With a county health clinic, Jane Doe #1 recalls wait times of three or four weeks and bad experiences with unpleasant, not helpful staff members (*Id.*). Jane Doe #2 recalls long wait times and several weeks from calling to get an appointment. Although she acknowledges other providers take patients on a walk-in basis, the wait times were even longer (Dkt. No. 3, at 18, ¶ 5).

26. The Arkansas Department of Health's own documents reflect that long wait times and delays in scheduling appointments are commonplace among county health clinics that offer family planning services and other preventative care. (Dkt. Nos. 26-5, 26-6).

27. 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).

28. Mark White, Deputy Director of ADHS, who supervises the Division of Medical Services which administers Arkansas's Medicaid Program, states that "at Governor Asa Hutchinson's directive, DHS Director John Selig gave written notice that DHS would terminate the three (3) PPH provider agreements in 30 days, exercising its rights to do so under the 'voluntary' termination provision (Section III.A) of said agreements." (Dkt. No. 16-1, ¶5).

29. Arkansas Governor Asa Hutchinson issued a press release on August 14, 2014, the day the termination letter was sent to PPH. 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).

30. The August 14, 2015, letter provided directions on how PPH could administratively appeal the termination (Dkt. No. 16-1, ¶6).13. Mr. White states, "[a]fter the letter was issued, the Governor directed DHS to review the videos released by the Center for Medical Progress." (Dkt. No. 16-1, ¶9).

31. Mr. White states that he reviewed the first seven (7) of the eight (8) videos that were available at that time on behalf of DHS and made several observations (Dkt. No. 16-1, ¶ 10).

32. Mr. White states that "[t]he videos appear to demonstrate that Planned Parenthood and/or its affiliates have violated American Medical Association Guidelines, as well as the

federal ban on partial birth abortions (18 U.S.C. § 1531), the Born-Alive Infants Protection Act of 2002 (1 U.S.C. § 8), the federal ban on transferring human fetal tissue for valuable consideration (42 U.S.C. § 289g-2), and other federal and state laws." (Dkt. No. 16-1, ¶ 13).

33. The transfer of fetal tissue is against Arkansas law. See Ark. Code Ann. § 20-17-802.

34. The videos do not depict any representatives of PPH.

35. The videos include no statements from representatives of PPH.

36. The videos do not discuss any conduct by any PPH medical provider.

37. Mr. White states that, on September 1, 2015, he issued a second notice of termination to PPH "acting under the 'for cause' termination provision (Section III.C) of the three (3) provider agreements." (Dkt. No. 16-1, ¶ 16).

38. Mr. White makes clear that, although he believes his authority would permit him to terminate immediately PPH as a provider under the for cause termination provision, ADHS "delayed the effective date to coincide with that of the first letter." (Dkt. No. 16-1, ¶ 16).

39. This second letter states 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).

40. The letter 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).

41. ADHS, through Mr. White, claims that it terminated PPH's provider agreements "based on what is in the public domain" and "determined that termination is in the public interest." (Dkt. No. 16-1, ¶ 18).

42. Sources in the public domain report that completed governmental investigations in response to the videos in Georgia, South Dakota, Indiana, Pennsylvania, and Massachusetts have fully vindicated Planned Parenthood (Dkt. No. 4, at 6 n.7 (citing and collecting media sources)).

43. The second termination letter included instructions on how to appeal the termination (Dkt. No. 16-1, ¶ 19).

44. As of September 16, 2015, PPH had filed no administrative appeal (Dkt. No. 16-1, ¶ 20).

45. PPH complies with all federal and state laws. (de Baca Decl. ¶ 13).

46. The first date after September 14, 2015, that patients insured through Medicaid were scheduled to visit PPH health centers was September 21, 2015 (Dkt. No. 12, ¶¶ 8, 34).

47. 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).

48. PPH and the Jane Does have sued ADHS's director, Mr. Selig, in his official capacity, only seeking declaratory and injunctive relief (Dkt. No. 12, at 15).

III. Conclusions Of Law

When determining whether to grant a motion for preliminary injunction, this Court considers: (1) the threat of irreparable harm to the movant; (2) the movant's likelihood of

success on the merits; (3) the balance between the harm to the movant and the injury that granting an injunction would cause other interested parties; and (4) the public interest. *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).

In this case, application of the *Dataphase* factors depends on this Court's analysis of which plaintiffs, if any, have standing to bring this suit. All parties have addressed this issue. The Court turns to examine this issue first, as the Court's analysis regarding standing implicates inquiries into irreparable harm and likelihood of success on the merits.

A. Standing

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. Plaintiffs seek a preliminary injunction based solely on the federal Medicaid statutory claim, not the constitutional claims (Dkt. Nos. 3, 4). 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 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 qualified provider for family planning services.

This Court concludes, as the United States Supreme Court did, that 42 U.S.C. § 1396a(a)(23) "gives recipients the right to choose among a range of qualified providers, without government interference." *O'Bannon v. Town Court Nursing Ctr*., 447 U.S. 773, 785 (1980). Further, the Court agrees that the right entails "an absolute right to be free from government interference with the choice to [receive family planning services from a provider] that continues to be qualified." *Id.* at 785.

1. Jane Does' 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 Cir. 2006).

The Supremacy Clause and a claim for equitable relief, not 42 U.S.C. § 1983, were at issue in *Armstrong.* 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. Further, a provider was the only named plaintiff in *Armstrong*, which is not the case here. The Jane Does are named plaintiffs, 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) based on the facts alleged. The Court's analysis here is intended to summarize that persuasive authority, not supplant the detailed reasoning on these points adopted by those other courts.

The Court determines that the Jane Does are likely to succeed in arguing that this statutory provision satisfies the factors set forth in *Gonzaga University v. Doe*, 536 U.S. 273 (2002), and *Blessing v. Freestone*, 502 U.S. 329, 341 (1997). The Court determines that the Jane Does are likely to prevail when evaluating the first *Blessing* prong that requires examining

whether Congress used "rights-creating" language to create individual rights that were "unambiguously conferred." *Gonzaga*, 536 U.S. at 283-84. Section 1396a(a)(23) is phrased in terms of the individual's right to select among qualified providers and is unmistakably focused on the specific individuals the provision is intended to benefit. This determination is bolstered by language that applies in the family planning context. *See* 42 U.S.C. § 1396a(a)(23)(B).

In addition to the plain text, the structure of the statute in its entirety must be considered to determine whether Congress intended to confer individual rights. *Gonzaga*, 536 U.S. at 286. The Court determines that the Jane Does are likely to succeed in arguing against ADHS's contention that, because this provision is part of a larger funding statute, Congress created a comprehensive enforcement scheme incompatible with individual enforcement under 42 U.S.C. § 1983. *See Wilder v. Virginia Hosp. Ass'n.*, 496 U.S. 498, 521-22 (1990); *Frazar v. Gilbert*, 300 F.3d 530, 539 (5th Cir. 2002), *rev'd sub nom. on other grounds, Frew ex. rel. Frew v. Hawkins*, 540 U.S. 431 (2004); *Comm'r of Ind. State Dep't of Health*, 699 F.3d at 974-75; *Harris*, 442 F.3d at 463. If this Court were to adopt ADHS's argument, it supports a conclusion that would prohibit the enforcement of any provision of the Medicare Act through § 1983. That conclusion is against the great weight of authority derived from the many cases cited in the parties' filings.

The second *Blessing* prong requires the Jane Does to demonstrate that the right conferred is not so "vague" that it would "strain judicial competence" to enforce the right. 520 U.S. at 340. This Court determines that the provision sets forth an explicit right that guarantees individuals eligible for medical assistance the ability to choose from a range of qualified providers without government interference. Here, the issue is whether ADHS by declaring PPH an unqualified provider and terminating its provider agreements in the manner and for the reasons ADHS has

articulated to date and will reveal through discovery in this case violated the Jane Does rights conferred by 42 U.S.C. § 1396a(a)(23). The determination of whether a provider is "qualified to perform the service or services required," under 42 U.S.C. § 1396a(a)(23) "falls comfortably within the judiciary's core interpretive competence. . . [and] is a legal question fully capable of judicial resolution." *Comm'r of Ind. State Dep't of Health*, 699 F.3d at 974. "A court can readily determine whether a state is fulfilling these statutory obligations by looking to sources such as a state's Medicaid plan, agency records and documents, and the testimony of Medicaid recipients and providers." *Ball*, 492 F.3d at 1115.

When pushed by plaintiffs to defend the evidence upon which ADHS claims to have relied to issue its second termination letter, ADHS stated, "[t]his case essentially is an appeal of the administrative termination taken by DHS." (Dkt. No. 38, at 3). The Court is not certain it agrees with that characterization, but ADHS's characterization belies its attempts to argue elsewhere in its filings that such a review does not fall "comfortably within the judiciary's core interpretive competence. . . [and] is a legal question fully capable of judicial resolution." *Comm'r of Ind. State Dep't of Health*, 699 F.3d at 974. For these reasons, the Court determines that the Jane Does are likely to succeed in arguing against the points ADHS raises in its sur-reply regarding whether 42 U.S.C. § 1396a(a)(23) requires the type of judgment-laden standard the *Armstrong* court identified.

The third prong of the *Blessing* test requires consideration of whether the statute "unambiguously impose[s] a binding obligation on the States." 420 U.S. at 347. The relevant terms in the freedom of choice provision are "mandatory rather than precatory." *Sabree v. Richman*, 367 F.3d 180, 190 (3d Cir. 2004). As a result, the final Blessing factor "is perhaps the most obviously met by the free choice provisions." *Ball*, 492 F.3d at 1116.

2. PPH's Standing

In its temporary restraining order, the Court did not foreclose the possibility that PPH might succeed in bringing its own private right of action, along with the Jane Does. The Court requested at the status conference that the parties address this issue, as in the Court's view this issue impacts the *Dataphase* analysis.

In its most recent filing, PPH does not seem to assert its own private right of action under 42 U.S.C. § 1983 to enforce rights conferred by 42 U.S.C. § 1396a(a)(23). Therefore, that question is no longer before the Court. Instead, PPH takes the position in its reply that "PPH also has a private right-of-action under the free-choice-of-provider provision on behalf of its patients." (Dkt. No. 26, at 8). PPH cites, in support, the test for third-party standing from *Powers v. Ohio*, 499 U.S. 400, 411 (1991). *See also Kowalski v. Tesmer*, 543 U.S. 125, 136-37 (2004); *Singleton v. Wulff*, 428 U.S. 106, 112-16 (1976) (plurality opinion).

This Court concludes that, because the Jane Does are named plaintiffs here, and the Court determines that the Jane Does have standing, PPH does not have standing in this case to assert a claim based on third-party standing. The Eighth Circuit Court of Appeals limits the use of third-party standing to assert another individual's private right of action to situations where the third-party plaintiff can prove that (1) the third-party plaintiff suffered an injury in fact, (2) the third-party plaintiff "has a 'close' relationship with the person who possesses the right" and (2) "there is a 'hindrance' to the possessor's ability to protect his own interests." *Hodak v. City of St. Peters*, 535 F.3d 899, 904 (8th Cir. 2008); *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin Cnty.*, 115 F.3d 1372, 1378-79 (8th Cir. 1997).

This case is pursued by three Medicaid recipients, the Jane Does. ADHS therefore contends that PPH cannot show that there is a "hindrance" to the ability of Medicaid patients to

protect their own interests. The second factor in the *Powers* test focuses on the ability of third parties to assert their own rights. *See Hodak*, 535 F.3d at 904. The Eighth Circuit has concluded that, even assuming the third-party plaintiff suffers an injury in fact and has a close relationship with the person who possesses the right, "[n]o practical barriers exist if the third party actually asserts his own rights." *Id.* The Court declines to address whether, if the Jane Does were not named plaintiffs here or if it were determined that the Jane Does lack standing, PPH would meet the requirements of third-party standing.

3. Limits On The Scope Of The Rights The Jane Does May Seek To Vindicate

Although this Court recognizes the Jane Does have a private right of action and standing to seek to assert that right, the Jane Does are suing as individuals, not in a representative capacity. There has been no request made to the Court for class certification under Rule 23 of the Federal Rules of Civil Procedure, although the Court acknowledges the time for seeking such certification has not passed. *See* Local Rule 23.1, *Local Rules of the United States District Court for the Eastern and Western Districts of Arkansas.* Given this, the relief the Jane Does may seek and the relief this Court may grant, if any, must be tailored to the individual plaintiffs who brought the lawsuit: Jane Doe #1, Jane Doe #2, and Jane Doe #3. *See, e.g.*, *Monahan v. State of Nebraska*, 491 F. Supp. 1074, 1081 (D. Neb. 1980) (rejecting preliminary injunctive relief to the extent it was "designed to protect those persons whom the plaintiffs wish to represent through a class action suit" in the absence of class certification), *aff'd in part and vacated in part by* 645 F.2d 592 (8th Cir. 1999); s*ee also St. Louis Efforts for Aids v. Huff*, 782 F.3d 1016, 1021-23 (8th Cir. 2015) (affirming a preliminary injunction for only those named plaintiffs who satisfied the *Dataphase* factors and noting the importance of narrowly tailoring preliminary relief).

In the Eighth Circuit and in a number of other circuits, "in the absence of class certification, the preliminary injunction may properly cover only the named plaintiffs." *See Zepeda v. US I.N.S.*, 753 U.S. 719, 727-28 (9th Cir. 1983) ("[An] injunction must be limited to apply only to the individual plaintiffs unless the district judge certifies a class of plaintiffs."); *Hollon v. Mathis Independent School District*, 491 F.2d 92, 93 (5th Cir. 1974) ("In this case, which is not a class action, the injunction against the School District from enforcing its regulation against anyone other than Hollon reaches further than is necessary . . . ."); *Berger v. Heclker*, 771 F.2d 1556, 1567 (2d Cir. 1980) (recognizing constraints of a preliminary injunction include only covering the named plaintiffs in absence of class certification).

B. The *Dataphase* Factors

Having determined that the Jane Does have a private right of action, the Court turns to examine the *Dataphase* factors as applied to that right of action. The right the Court recognizes is that 42 U.S.C. § 1396a(a)(23) "gives recipients the right to choose among a range of qualified providers, without government interference." *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 785 (1980). Further, the Court agrees that the right entails "an absolute right to be free from government interference with the choice to [receive family planning services from a provider] that continues to be qualified." *Id.* at 785.

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). 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. v. City of Minneapolis*, 940 F.2d 367, 371-72 (8th Cir. 1991).

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.

As this Court has observed, Arkansas law is instructive although admittedly not controlling 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).

Here, the Jane Does allege that 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 against irreparable harm in the first instance by asserting that the Jane Does misconstrue their statutory right. ADHS contends 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). Framing the argument this way misstates the nature of the dispute.

Here, the dispute is whether the government, either through the Governor or through ADHS's actions, impermissibly interfered with the Jane Does' choice of a qualified provider when it terminated PPH as a provider in the manner and for the reasons it articulates. If this right

found in 42 U.S.C. § 1396a(a)(23) and conferred on Medicaid recipients is to have meaning, and if it is to have the meaning ascribed to it by the Court in *O'Bannon*, ADHS cannot be permitted to declare a provider unqualified and then to use that declaration to put out of reach any future challenges to its conduct by Medicaid recipients.

This Court has struggled with ascertaining what significance, if any, the fact that PPH has not availed itself of the administrative appeals process has on this dispute. At this stage of the proceeding, the Court settles on this. The effect ADHS wants to give that fact dovetails with its attempt to misstate the nature of the dispute. ADHS advocates that, because PPH has not appealed ADHS's determination that PPH is no longer a qualified provider in Arkansas, the Jane Does have no ability to vindicate their rights under 42 U.S.C. § 1396a(a)(23) (Dkt. No. 39, at 17).

If the Court gives this fact the significance ADHS seeks, the Court questions why Congress would confer a right on Medicaid beneficiaries when that right seemingly has to be enforced by the provider through the administrative appeals process as ADHS's argument suggests. This Court also questions how, if at all, the current procedural posture of the case differs from the hypothetical case in which PPH pursues the administrative appeal and loses. An argument can be made, given the undisputed facts regarding the sequence of events surrounding the issuance of the termination letters here, that such would have been the result. ADHS seems to want to make the Jane Does wait for that result, or the contrary result which seems remote, before attempting to vindicate their rights. As ADHS points out, however, the Jane Does sue under 42 U.S.C. § 1983, and there is no exhaustion requirement under 42 U.S.C. § 1983. Even if there were, all parties agree that the Jane Does do not have access to the administrative appeals

process; they cannot vindicate their rights under 42 U.S.C. § 1396a(a)(23) in that forum. This fact is not in dispute.

For these reasons, at this stage of the litigation, the Court declines to find that PPH's decision not to appeal ADHS's determination forecloses the Jane Does' ability to vindicate their rights under 42 U.S.C. § 1396a(a)(23) through this lawsuit. The Court will not examine irreparable harm through the lens ADHS suggests.

The Court turns then to examine the allegations of irreparable harm advanced by the Jane Does in relation to the right at issue. As an initial matter, the Court takes the Jane Does' affidavits and responses to ADHS's written questions at face value; the Court credits their testimony in the form submitted. The Court gives very little weight to ADHS's attempts to diminish the provider-patient relationships the Jane Does testify they have with PPH as their family planning provider. Further, that the Jane Does see their family planning provider one time per year to obtain a method of birth control, when pregnancy or complications are not at issue; that a staff member, not the physician, administers the shot of a birth control medication; and that a patient might see more than one family planning doctor or different family planning doctors does not convince this Court that the Jane Does' relationship with PPH as their family planning provider deserves less protection or recognition than other patient-physician relationships. Mark White's supplemental affidavit which is submitted under seal for this Court's consideration suggests Jane Does seek or have sought through the years treatment from various providers.

In support of their claims of irreparable harm, 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, obtain an appointment quickly, and the wait times are less than those at a private physician's office or public health clinics. (*See* Dkt. No. 3, at 14-20). These affidavits also demonstrate that these women could not afford to pay for their normal services out of pocket (*Id.*). The Court still finds unpersuasive ADHS's position that, alleged long wait times even when appointments are secured, and overall scheduling issues, is not harm great enough to meet the Jane Does' burden of proof on irreparable harm, especially when family planning and reproductive health care needs are at issue.

ADHS's position that alternative providers are available again shifts the examination of the right. The right does not protect the Jane Does' right to a substitute or similar provider. As this Court has concluded, the right entails "an absolute right to be free from government interference with the choice to [receive family planning services from a provider] that continues to be qualified." *O'Bannon*, 447 U.S. at 785. Here, all three Jane Does state they wish to continue with PPH as their family planning provider of choice (Dkt. No. 3, at 14-20).

The Court finds that, for all of these reasons and based on the Court's findings of fact in this case, the harms alleged by the Jane Does do constitute irreparable harm 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). 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) and that the Jane Does will suffer irreparable harm if a preliminary injunction is not entered by the Court to preserve the *status quo* while this case is pending.

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

2. Likelihood Of Success On The Merits

This Court's analysis of the likelihood of success on the merits has changed little since the Court's entry of the temporary restraining order, but the Court has modified it slightly based on the parties' recent filings. 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, 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. This Court finds those cases, and the reasoning of those courts, persuasive.

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 at 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 Jane Does' likely success on the merits here. The Court determines that the Jane Does have carried their burden on demonstrating a likelihood of success on the merits of their 42 U.S.C. § 1983 claim so as to warrant the entry of a preliminary injunction.

In reaching this conclusion, the Court has examined the arguments ADHS advances for its determination and the Jane Does' countervailing arguments. Though participating states must comply with all requirements of Title XIX, including the freedom of choice provision, states retain some autonomy and flexibility in devising Medicaid plans. Specifically, a state may establish "reasonable standards relating to the qualifications of providers. . . ." 42 C.F.R. § 431.51(c)(2). A state may also exclude health care providers under certain circumstances: "[i]n addition to any other authority, a State may exclude an individual or entity. . . for any reason for which the Secretary could exclude the individual or entity from participation." 42 U.S.C. § 1396a(p)(1). The central conflict between the parties in this case is whether Arkansas can terminate PPH as a qualified Medicaid provider for the reasons it articulates in this litigation without violating the freedom of choice provision. 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 submitted with its initial response 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. The Jane Does' claimed federal statutory right to the family planning provider of their choice is now the claim before the Court at this stage, 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).

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. For the reasons its states in this Order, the Court does not strike the videos but gives them little weight. ADHS's argument about what the statements in the videos demonstrate, even if taken as true and assumed to be in context, which PPH and the Jane Does contest, may overstate this proof. Further, PPH and the Jane Does contest that any "determination" as required by 42 U.S.C. § 1320a-7(b)(6)(B) was made by ADHS here.

ADHS also argues 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"). If there is ambiguity in this term, the Jane Does argue the agency's interpretation should be afforded deference and that it would not support ADHS's conduct (Dkt. No. 26, 26-2). At this stage, the Court has not determined that there is an ambiguity so as to resort to giving deference to the agency. The Court simply notes this argument exists.

The record before the Court includes Ms. de Baca's affidavit (Dkt. No. 3, at 4 −12). 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, at 4, ¶ 13). The Court acknowledges that ADHS moves this

Court to strike this statement from Ms. de Baca's affidavit, but the Court denies the motion. The Court finds persuasive the reasoning provided by plaintiffs in response to the motion to strike as to how Ms. de Baca acquired the knowledge upon which she basis this statement. Further, there can be no meaningful challenge to Ms. de Baca's statements as to PPH's activities; it is undisputed that she serves as the president and chief executive officer of PPH (Dkt. No. 3, at 4, ¶ 1). At this stage of the proceeding, the Court considers these statements. It gives great weight to Ms. de Baca's statements about PPH and lesser weight to the remaining portions of the statement.

Aside from Ms. de Baca's statements there remains no contrary evidence in the record about PPH 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. ADHS seems to acknowledge this when it recognizes that "the vast majority of PPH's patients in Arkansas are not abortion patients; they are patients seeking run-of-the-mill and uncontroversial decisions like wellness exams, pelvic exams, and birth control. Indeed, there is no indication that the Jane Doe plaintiffs in this case are abortion patients." (Dkt. No. 39, at 12). Moreover, 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 Jane Does have supplemented their response as to the merits of this dispute about ADHS's ability to terminate the provider agreements of PPH if in fact PPH engaged in no alleged conduct (Dkt. No. 26, at 13−16). Based on a review of the authorities cited by both parties, the Court still finds that, at this stage, the Jane Does are likely to prevail on the merits of this argument.

The Court acknowledges that the Jane Does move this Court to exclude the videos and transcripts that ADHS cites because, as the Jane Does contend, they are irrelevant and unreliable. The Jane Does request that this Court strike them from the record and not consider them in making a determination on the Jane Does' motion for preliminary injunction. This Court denies the motion to strike (Dkt. No. 27, at 2).

The Jane Does first argue that the videos and transcripts are not relevant to whether ADHS's termination of PPH's Medicaid provider agreements likely violates the Medicaid freedom-of-choice provision, 42 U.S.C. § 1396a(a)(23), which is the basis for the pending request for injunctive relief. ADHS argues "[t]hese videos establish a basis for the administrative termination, establish background and context for the agency's decision and, significantly, demonstrate Planned Parenthood's corporate knowledge and intent." (Dkt. No. 38, at 4). Although the Court agrees with PPH and the Jane Does in that the videos do not show anything at all about PPH, its employees, or its practices, the Court declines at this stage of the litigation to strike the videos under Rule 402, given the purpose for which ADHS cites them and given the evidentiary standards the parties agree apply to the Court's current inquiry.

At this stage of the proceeding, however, the videos are inadmissible hearsay. This is the second basis for PPH and the Jane Does' request that the Court strike the videos under Rule 802. Authentication of videos as evidence is not a difficult requirement to meet in most instances. Here, the individual who could submit an affidavit to this Court or appear before this Court to authenticate the videos has not done so; the Court has not heard from the individual who created the videos or edited the footage. Instead, the Court is presented with conflicting reports on the extent of the editing and misrepresentations, if any, in the content and context of the videos and transcripts (Dkt. No. 38-A). Further, ADHS cites as the only basis for the admission of this hearsay evidence the residual clause of Rule 807's hearsay exceptions (Dkt. No. 38, at 6). Given the evidentiary standards the parties agree the Court should apply at this stage, the Court declines to strike the videos.

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

3. Balance Of Equities And Public Interest

The Jane Does argue that the aforementioned threats of injury to them outweigh any harm caused to ADHS. In fact, 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). 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 the Jane Does 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 the Janes Does, who are PPH's patients, is greater than the potential harm to ADHS's pursuit of its stated public policy objectives. At this stage of the proceedings, the Court finds that the threat of irreparable harm to the Jane Does, and the public interest, outweighs the immediate interests and potential injuries to ADHS.

III. Security

Under Federal Rule of Civil Procedure 65(c), a district court may issue a preliminary injunction "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 enters a preliminary injunction nor has it presented any evidence that it will be financially harmed if it were wrongfully enjoined. Further, as this Court stated when it entered the temporary restraining order, this Court does not perceive how ADHS could be harmed by reimbursing PPH for services provided to the Jane Doe Medicaid patients, considering 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 the Jane Does.

IV. Conclusion

For the foregoing reasons, the Court determines that the Jane Does have met their burden for the issuance of a preliminary injunction. Therefore, the Court grants the Jane Does' motion for preliminary injunction. The Court enjoins ADHS from suspending Medicaid payments to PPH for services rendered to Medicaid beneficiaries the Jane Does until further order from this Court.

SO ORDERED this 2nd day of October, 2015, at 3:00 p.m.

Kristine G. Baker
United States District Judge