

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO**

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| Rio Grande Community Health Center, Inc., <i>et al.</i> , |) | |
| |) | |
| <i>Plaintiffs,</i> |) | |
| |) | |
| v. |) | Civil No. 03-1640 (JAG) |
| |) | |
| Johnny Rullan, Secretary, Department of Health, |) | |
| |) | |
| <i>Defendant.</i> |) | |
| _____ |) | |

**PLAINTIFFS’ REPLY TO DEFENDANT’S OPPOSITION TO
MOTION FOR PRELIMINARY INJUNCTION AND
SUMMARY JUDGMENT**

I. INTRODUCTION

Plaintiffs’ Reply to Defendant’s Opposition to Plaintiffs’ Motion for Preliminary Injunction and Summary Judgment (the “Opposition”) is made simple because the Opposition does not even attempt to controvert plaintiffs’ contentions that the Commonwealth has not yet begun to implement the Federally qualified health center (“FQHC”) payment plan that it was legally required to implement more than three (3) years ago. Such an attempt, in any event, would have been in vain, since the Declarations supporting plaintiffs’ Motion conclusively demonstrate defendant’s failure to comply with binding federal law. The Opposition suggests that the Department of Health (“DOH”) lacks responsibility for implementing the FQHC payment plan and pending State litigation in which fundamentally different relief is sought somehow should deter a federal court from enforcing federal law.

II. REPLY

A. The Commonwealth Has Failed to Controvert The Facts Contained in Plaintiffs' Supporting Declarations Concerning Its Failure to Implement An FQHC Payment Plan

At the heart of plaintiffs' case is the contention that the Commonwealth has failed to implement a prospective payment system ("PPS") applicable to FQHCs as required by federal Medicaid law. Plaintiffs' request for relief is consistent with the requirements of the Eleventh Amendment.¹ Contrary to the Commonwealth's assertions that other Commonwealth agencies are involved in implementing managed care in the Commonwealth (Defendant's Statement of Fact ¶¶4, 6), DOH is the sole department in the Commonwealth legally designated as the "single state agency" that administers and is responsible for the Commonwealth's Medicaid program. *See* 42 C.F.R. § 431.10. Accordingly, the responsibility for implementing PPS rests solely with DOH.

Both Federal Rules of Civil Procedure 56 and Local Rule 56 provide that facts contained in a statement of material facts shall be deemed admitted unless properly controverted.²

¹ It is for this reason that the Commonwealth's statements concerning the litigation by the health centers for amounts past due in State court are irrelevant.

² Furthermore, pursuant to Fed. R. Civ. P. 56(C), summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). A party opposing a properly supported motion for summary judgment bears the burden of establishing the existence of a genuine issue of material fact. *Anderson*, 477 U.S. at 248-249. "When a motion for summary judgment is made and supported as provided in [Rule 56], an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in [Rule 56] must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Anderson*, 477 U.S. at 252.

Plaintiffs' summary judgment and preliminary injunction motion was supported by the Declarations of Jose Orlando Colon and Roberto Viera-Suárez ("Colon Declaration" and "Suárez Declaration" respectively). Those Declarations described how DOH has utterly and completely failed to implement the statutory FQHC payment requirements under 42 U.S.C. § 1396a(bb). To fulfill those responsibilities DOH should have: (1) calculated each FQHC's FY99 and 2000 costs; (2) developed a per-visit rate based on such costs; (3) directly paid each FQHC such supplemental sums, in addition to any received from any MCO as would be due to each FQHC under the 2000 law. These supplemental payments should have begun January 1, 2001. As the Colon and Suárez Declarations demonstrated, no supplemental payment under the 2000 law has ever been made, nor does DOH or any other Commonwealth agency currently have the capacity to calculate or make the required supplemental payment.

The sole fact proffered by the Commonwealth with respect to implementation of PPS responsibilities is its submission of a Medicaid State Plan Amendment to the Centers for Medicare and Medicaid Services ("CMS"), attached as Exhibit 2 to Defendant's Statement of Material Facts. The State Plan Amendment, a piece of paper and nothing more³, falsely promises that the Commonwealth will implement PPS. As to actual implementation, defendant's Opposition fails to contradict the testimony in the Colon and Suárez Declarations that:

Neither DOH nor any other agency or instrumentality of the Commonwealth has never: (1) developed or approved a report format to be submitted by FQHCs under which the FQHCs would calculate their FY99 and 2000 costs and use that calculation to set their per-visit rates due as of January 1, 2001 and beyond; (2)

³ See 42 C.F.R. 430.10 defining a Medicaid State Plan as a ". . . written statement submitted by the agency describing the nature and scope of its Medicaid program and giving assurance that it will be administered in conformity with the specific requirements of Title XIX . . ."

designated any office, staff, agent, intermediary or other party to whom such reports (even if they had been prepared) could be submitted by the FQHCs; (3) designated or employed any office, staff, agent, intermediary or other party to make the supplemental payments each FQHC was and is due; and (4) issued any advice, notice, description or any other information to FQHCs that would tell the FQHCs they could receive any such supplemental payments.

Thus, these facts - - that the Commonwealth has done nothing to implement an actual PPS methodology for its FQHCs - - are deemed admitted. Moreover, the Commonwealth's false State Plan Amendment promise to implement PPS conclusively demonstrates defendant's understanding that the Commonwealth had the very PPS responsibilities we claimed in our motion.

III. CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that their motion for preliminary injunction and summary be granted.

Respectfully submitted,



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