IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

DORENA COLEMAN, CURTIS JACKSON, and FEDERICO PEREZ, on behalf of themselves And all others similarly situated, *Plaintiffs,*	§	
v.	§	CIVIL ACTION NO. 1:20-CV-00847-RP
CECILE ERWIN YOUNG, Executive Commissioner, VICTORIA FORD, Chief Policy and Regulatory Officer, MAURICE MCCREARY, Chief Operating Officer, and MICHELLE ALLETTO, Chief Program and Services Officer, in their official Capacities with the TEXAS HEALTH AND HUMAN SERVICES COMMISSION *Defendants.*	§	

DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR PARTIAL DISMISSAL

Plaintiffs use their response to Defendants' narrow motion for partial dismissal to argue the substance of their claims. This case will be resolved on a far more fulsome record, and with a more complete picture, than the one Plaintiffs convey in their complaint and response. Indeed, three appellate courts have recently issued decisions that touch the subject of this lawsuit, all of which indicate that the merits of Plaintiffs' claims are more nuanced than Plaintiffs portray them at this juncture. *See Hoffer v. Secretary, Dep't of Corrections*, 973 F.3d 1263, 1275 (11th Cir. 2020) ("[W]e conclude that the district court erred in concluding that the Secretary had somehow failed to prove a medical justification for delaying DAA treatment to F0- and F1-level inmates."); *Atkins v. Parker*, 972 F.3d 734, 740 (6th Cir. 2020) ("Rather than reveal indifference, therefore, the record supports the conclusion that—by the very sort of 'prioritization' employed by the plaintiff's own expert, Dr. Yao, and by an extensive latticework of procedures in support—Dr. Williams sought to employ the finite

resources at his disposal to maximize their benefit for the inmates in his care [with HCV]."); *Orr v. Shicker*, 953 F.3d 490, 502 (7th Cir. 2020) ("Many of the doctors testified that hepatitis C is a slow-moving disease and that rates of progression vary between individuals. Dr. Patel, a physician at UIC, testified that there was 'probably not significant harm without treatment from stage 2 to stage 3.' In 2016, Dr. Batey, a court-recruited expert, testified that sometimes hepatitis C does not progress for years in patients who do not undergo treatment.").

At this stage, however, the only issue before the Court is the viability of Plaintiffs' "comparability" claims under the Social Security Act. On that front, Plaintiffs stretch the requirement that states must provide treatment to categorically needy individuals that is equal in "amount, duration and scope," 42 C.F.R. § 440.240, past its breaking point. For the reasons discussed below and those already briefed, Plaintiffs' comparability claims should be dismissed.

ARGUMENT

A. The Social Security Act does not provide a cause of action for "chronic condition discrimination."

In their response, Plaintiffs contend that HHSC is engaging in "chronic condition discrimination." Resp. at 14. They argue that "[a]ll chronically ill individuals have a comparable need for treatment in conformity with the standard of care, driven by their individual medical circumstances." *Id.* at 16. But the Social Security Act's comparability provision does not even attempt to define or speak to, and therefore does not mandate, equality of treatment across different diseases according to the prevailing standards of care for those diseases.[1] Instead, the "comparability" provision "prohibits discrimination among individuals with the *same medical needs* stemming from different medical conditions." *Davis v. Shah*, 821 F.3d 231, 258 (2d Cir. 2016) (emphasis added).

[1] Moreover, a state may consider cost-effective alternatives in the provision of medical services, even if those alternatives are not a beneficiary's preferred method of treatment. *See Detgen ex rel. Detgen v. Janek*, 752 F.3d 627, 632 (5th Cir. 2014).

Plaintiffs make a lengthy comparison between HCV with syphilis, but that example proves the point: an individual with syphilis, who may need long-acting penicillin, Resp. at 15 n.11, does not have the same medical needs as someone with HCV. Those two groups of individuals thus have different medical needs stemming from different medical conditions, not the same medical needs stemming from different medical conditions. And "nothing in the statute prohibits a state from offering different services to persons in different categories of medical need or with different degrees of medical necessity." *King by King v. Sullivan*, 776 F. Supp. 645, 654 (D. R.I. 1991); *see also* 42 C.F.R. § 440.230(d) (a state "may place appropriate limits on a service based on such criteria as medical necessity or on utilization control procedures.").

Plaintiffs invite the Court to invent whole cloth a standard to compare treatment across an expansive array of illnesses, but they do not direct the Court to any authority recognizing a "chronic condition discrimination" theory of liability under the Social Security Act. *See* Resp. at 10 n.6. For example, Plaintiffs cite *Pashby v. Delia*, 709 F.3d 307, 325 (4th Cir. 2013), but there, the plaintiffs and their comparators sought the same personal care services. *Id.* In fact, the Fourth Circuit recognized that the individuals' needs were not just comparable but *identical*. *Id.* That is not true here. *Pashby* reinforces the Second Circuit's admonition that the proper focus is on whether categorically needy individuals have the same medical needs, in contrast with Plaintiffs' wider focus on whether a state is meeting the prevailing medical standard of care across separate and distinct diseases. The former is a proper subject of inquiry in a comparability analysis. The latter is not.

Thus, Plaintiffs' "chronic conditional disability" claim, although framed as a comparability claim under Section 1396a(a)(10), is actually best considered a claim under the Social Security Act's provisions related to a state's obligations to provide "reasonable standards" for determining eligibility for Medicaid programs. *See* 42 U.S.C. § 1396a(a)(17). The problem with proceeding under that framework is that Congress did not provide the necessary "concrete standards in the statute for

determining eligibility based on medical need," and thus, a claim raising the specter that a state is violating its duty to provide "reasonable standards" of eligibility is not cognizable as a private cause of action. *See Watson v. Weeks*, 436 F.3d 1152, 1162 (9th Cir. 2006); *see also Lankford v. Sherman*, 451 F.3d 496, 509 (8th Cir. 2006) ("The only guidance Congress provides in the reasonable-standards provision is that the state establish standards 'consistent with [Medicaid] objectives'—an inadequate guidepost for judicial enforcement.").

Accordingly, Plaintiffs have failed to state a viable "comparability" claim between Medicaid enrollees with HCV and Medicaid enrollees with other, broadly defined chronic illnesses. Plaintiffs' first comparability should therefore be dismissed.

B. Plaintiffs fail to state a claim for HCV discrimination.

For closely related reasons, Plaintiffs' claims based on the alleged differences in treatment between individuals who have HCV, but at differing levels of liver damage, also fail. Plaintiffs' allegations make clear that HCV is generally a progressive disease that affects individuals differently at different stages of the illness. *See, e.g.*, Compl. ¶ 37; *see also Shicker*, 953 F.3d at 502 ("Many of the doctors testified that hepatitis C is a slow-moving disease and that rates of progression vary between individuals."). Even assuming that all facts pleaded in the complaint are true, as the Court must at this stage, Plaintiffs still have not shown that authorizing DAAs to some individuals with HCV would constitute "unequal" services under the Social Security Act, because there is not an equal level of need for those medications.

CONCLUSION

For the reasons discussed above, Plaintiffs' "comparability" claims should be dismissed.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2020, a true and correct copy of the foregoing document was served via the Court's CM/ECF system to all counsel of record.

/s/ *Michael R. Abrams*
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