

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION**

STATE OF MISSISSIPPI, *et al.*,

Plaintiffs,

v.

XAVIER BECERRA, in his official capacity
as Secretary of Health and Human Services,
et al.,

Defendants.

Civil Action No. 1:22-cv-00113-HSO-RPM

JOINT SCHEDULING REPORT

The parties hereby submit this Joint Scheduling Report setting forth their positions as to how this case should proceed.

1. Defendants' Position

Plaintiffs challenge Defendants' authority to issue the "clinical practice improvement activity" called "create and implement an anti-racism plan" set forth at Medicare Program; CY 2022 Payment Policies Under the Physician Fee Schedule and Other Changes, 86 Fed. Reg. 64,996, 65,969 (Nov. 19, 2021). This question can be resolved on motions for summary judgment based on the administrative record. In addition, however, Defendants wish to propound jurisdictional discovery regarding Plaintiffs' standing, which was discussed in the Court's Memorandum Opinion of March 28, 2023 (ECF No. 52). Finally, before the parties commence discovery, the Court should resolve the question of whether to grant the pending motion to intervene (ECF No. 61). Defendants intend to request an extension to respond to that motion.

Defendants therefore propose the following schedule:

- jurisdictional discovery begins after the Court rules on the motion to intervene and then issues a scheduling order
- 30 days from date of scheduling order – Defendants to serve the Administrative Record
- 90 days from date of scheduling order – jurisdictional discovery closes
- 120 days from date of scheduling order – Plaintiffs’ motion for summary judgment due
- 165 days from date of scheduling order – Defendants’ opposition and cross-motion for summary judgment due
- 195 days from date of scheduling order – Plaintiffs’ opposition and reply due
- 215 days from date of scheduling order – Defendants’ reply due

2. Plaintiffs’ Position

As this Court knows, Plaintiffs are challenging a CMS rule concerning anti-racism plans on the ground that it “exceed[s] CMS’s statutory authority.” *Colville v. Becerra*, 2023 WL 2668513, at *7 (S.D. Miss. Mar. 28). That rule was first enacted for performance year 2022. CMS enacted an identical rule for performance year 2023. The reporting deadline for PY2023 is in April 2024, and MIPS scores are calculated a few months later. *See Timelines and Important Deadlines PY 2023*, CMS, qpp.cms.gov/content-management/node/2114.

Because time is short, Plaintiffs plan to file a motion for summary judgment by June 2. *See* Fed. R. Civ. P. 56(b) (party can seek summary judgment “at any time” before discovery). To resolve that motion, neither discovery nor an administrative record is needed. Plaintiffs’ statutory-authority claim is a pure question of law that turns on the face of the regulation. And the theory of standing that this Court approved in its motion-to-dismiss opinion involves undisputed facts (like state anti-discrimination laws) that are subject to judicial notice. Plaintiffs respectfully ask the Court to reach a decision on their forthcoming motion before delving into

what might turn out to be unnecessary discovery and motions practice. Of course, as part of that motion, Defendants are free to invoke Rule 56(d) as a defense.

Aside from that desire to litigate a narrow summary-judgment motion first, Plaintiffs largely agree with Defendants. If this Court disagrees with Plaintiffs' approach, then Plaintiffs have no objection to Defendants' proposed schedule. Plaintiffs also plan to join Defendants' request for a short extension to respond to the motion to intervene.

Dated: May 18, 2023

Respectfully submitted,

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