UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NEUROLOGICAL SURGERY PRACTICE OF LONG ISLAND, PLLC, Plaintiff, - against - UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*, Defendants.	:	**MEMORANDUM DECISION AND ORDER** 23-cv-02977 (BMC)

COGAN, District Judge.

Plaintiff Neurological Surgery Practice of Long Island, PLLC brought this action against the United States Department of Health and Human Services, Department of the Treasury, Department of Labor, and high-level officials of those agencies (collectively, "HHS"). It alleged that defendants have failed to lawfully implement the No Surprises Act, Public Law No. 116-260 ("NSA"), in violation of the Administrative Procedure Act, 5 U.S.C. § 706, *et seq.*, and the Fifth Amendment's Due Process and Takings Clauses. The failure, plaintiff alleges, is that HHS had suspended the Federal Independent Dispute Resolution portal, an arbitration process that HHS had created pursuant to the requirements of the No Surprises Act. The portal is an arbitration mechanism for resolving disputes between health care providers and insurers that included extensive rules and procedures.

In prior motion practice in the case, the Court granted defendants' motion to dismiss and denied plaintiff's motion for a preliminary injunction. See Neurological Surgery Practice of Long Island, PLLC v. U.S. Dep't of Health and Human Svcs., No. 23-cv-2977, 2023 WL

4552860 (E.D.N.Y. July 17, 2023). Familiarity with that decision is presumed, and the Court will therefore not restate the background of the case in detail. But to summarize, plaintiff claimed that although HHS had implemented the No Surprises Act through creating the IDR portal and rules as required, it had unlawfully suspended or "paused" the portal, leaving plaintiff without a mechanism to obtain payment on disputed out-of-network insurance claims. HHS responded that the "pause" was necessitated because it had originally estimated that the portal and the arbitration process would handle about 22,000 claims but in fact 334,828 claims were filed. In addition, some of the rules were vacated by the district court in Texas Medical Ass'n v. U.S. Dep't of Health and Human Svcs., 654 F. Supp. 3d 575 (E. D. Tex. 2023), and Texas Medical Ass'n v. U.S. Dep't of Health and Human Svcs., 587 F. Supp. 3d 528 (E.D. Tex. 2022), and thus had to be reimplemented. HHS claimed that it had fulfilled its statutory duty by implementing the IDR portal and rules in the first place and the No Surprises Act did not prevent it from pausing the procedure to refine it in response to unforeseen circumstances like judicial decisions or gross underestimation of claims.

This Court agreed with HHS that there was no violation of the No Surprises Act, nor grounds for relief under the Administrative Procedures Act or the Fifth Amendment. Nevertheless, with some skepticism, it granted plaintiff leave to file an amended complaint. Plaintiff has done so and has renewed its motion for a preliminary injunction. HHS seeks to dismiss the amended complaint and opposes the injunction motion, not only on the same grounds it previously raised, but because since the date of the original dismissal, it has ended the pause and reinstated the rules for the processing of all claims. As a result, HHS argues, this case is moot. Plaintiff argues that since HHS claims to have discretionary power to pause the rules

again if it deems a pause necessary, which plaintiff claims it does not, the "likely to recur" exception to mootness applies.

I agree with HHS that this case is moot. The portal has been up and running since last October for the vast majority of claims and became operational for all claims on December 15, 2023. There is nothing in the record to suggest that the new process is inadequate to handle the previously-unanticipated number of claims; or that the concerns expressed by the court in the Eastern District of Texas have not been accommodated in the new rules; or that if some other practical infirmity arises, it cannot be dealt with without the kind of global pause that was implemented here at the inception of the portal. Although HHS has the burden of demonstrating that it is not reasonably likely that the facts giving rise to plaintiff's claims are going to recur, see Federal Defenders of New York, Inc. v. Federal Bureau of Prisons, 954 F.3d 118, 125-27 (2d Cir. 2020), it would be too much to ask it to prove a negative. "Likely to recur" does not mean an entirely speculative possibility that complained-of conduct may occur in the future when all present circumstances point to the fact that it will not.[1]

Accordingly, plaintiff's motion for a preliminary injunction is denied and HHS's motion to dismiss is granted on the ground of mootness.

SO ORDERED.

Brian M. Cogan

U.S.D.J.

Dated: Brooklyn, New York
March 30, 2024

[1] Even if the Court was not dismissing the amended complaint on the ground of mootness, the Court agrees with HHS that the Court's reasoning in dismissing the original complaint is just as applicable to the amended complaint. There are no new allegations, and plaintiff is simply rearguing the substantive points under the No Surprises Act that this Court already rejected. The amended complaint would therefore be dismissed even if it wasn't moot.