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January 3, 2024

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The Hon. Brian M. Cogan
United States District Judge
United States District Court
225 Cadman Plaza East
Brooklyn, New York 11201

RE: Neurological Surgery Practice of Long Island, PLLC v. U.S. Department of Health and Human Services, 23-cv-2977-BMC
Letter Response to Notice of Resumption of Full IDR Process Operations

Dear Judge Cogan:

We represent the Plaintiff in this lawsuit. Currently before the Court is Plaintiff's motion for leave to file a second amended complaint and preliminary injunction (Dkts. 34-36, 39-40), which was fully submitted on October 20, 2023 (Dkt. 40). The purpose of this letter is to respond to Defendants' Notice of Resumption of Full IDR Process Operations, filed on December 15, 2023 (Dkt 41).

Plaintiff filed a proposed second amended complaint due to the Departments' unilateral suspension of the No Surprises Act independent dispute resolution (IDR) process operations, effective August 25, 2023. The Departments have opposed both motions primarily arguing that: (a) the Practice's claims are moot since, as of October 6, 2023, the Departments have reopened the IDR portal for the initiation of new single and bundled disputes, and (b) that the Departments' have complied with their statutory mandate to "establish" an IDR process. (Def. Mem., pp. 14-15).

The Departments' Notice of Resumption of Full IDR Process seeks to further moot the issues in Plaintiff's proposed second amended complaint arguing that the resumption of the full IDR claims process somehow moots all of Plaintiff's proposed new claims. The Department is wrong.

"The test for mootness . . . is a stringent one" and the Departments "[m]ere voluntary cessation of allegedly illegal conduct does not moot a case" because defendants would still be "free to return to [their] old ways." *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203, 89 S. Ct. 361, 21 L. Ed. 2d 344 (1968). The Departments' contention that the Practice's claims are moot are belied by their tacit admission that they are somehow authorized to open and close the portal at any time, for any reason. Defendants, "cannot automatically moot

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[this] case simply by ending [their] unlawful conduct once sued” and, instead, must show “it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.” *See Fed. Defs. of N.Y., Inc. v. Fed. Bureau of Prisons*, 954 F.3d 118, 126-127 (2d Cir. 2020) (internal citations omitted).

Contrarily, the Departments have no authority, under the NSA, or the implementing regulations (45 C.F.R. § 149.510) to suspend IDR operations at all. Thus, for the timeframe no IDR process was operating, Defendants have, accordingly, failed to take “discrete agency action that [they are] required to take.” *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004); *Sharkey v. Quarantillo*, 541 F.3d 75 (2d Cir. 2008). The Departments have not even attempted to argue that that their unlawful suspension of the IDR could not reasonably be expected to recur and, in fact, they believe they have unfettered access to suspend the portal as they see fit. *See DiMartile v. Cuomo*, 834 Fed. Appx. 677, 679 (2d Cir. 2021) (citing *Friends of the Earth, Inc. v. Laidlaw Env. Servs. (TOC), Inc.*, 528 U.S. 167, 189, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)).

For these reasons, we respectfully request the Court grant Plaintiff’s leave under Fed. R. Civ. P. 15(a)(2) to file the proposed second amended complaint, issue the requested preliminary injunction under Fed. R. Civ. P. 65, and provide such other and further relief that the Court deems proper.

Respectfully,

HARRIS BEACH PLLC



Roy W. Breitenbach

RWB:

cc: Anna Lynn Deffebach, Esq.
Daniel S. Hallak, Esq.