UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

STATE OF TEXAS and	§	
LUBBOCK INDEPENDENT SCHOOL	§	
DISTRICT,	§	
***Plaintiffs*,**	§	
	§	**CIVIL ACTION NO. 5:21-CV-300**
v.	§	
	§	
XAVIER BECERRA, in his official	§	
capacity as Secretary of Health and	§	
Human Services, *et al.*,	§	
Defendants.	§	

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Table of Contents

Table of Authorities

Cases

Statutes

Plaintiffs hereby reply to Defendants' Response to Plaintiffs' Motion for Summary Judgment and Brief in Support (Dkt. # 58, 59). Plaintiffs have already addressed most of the arguments in Plaintiffs' Brief in Support of their Motion for Summary Judgment (Dkt. # 54-1) and Plaintiffs' Brief in Support of their Response to Defendants' Motion for Summary Judgment (Dkt. #61). In this Reply, Plaintiffs will only reply to points in Defendants' Response that they have not previously addressed.

1. The Mask and Vaccine Mandates are not "program performance standards."

One of the many problems with the Mask Mandate and the Vaccine Mandate is that they are not "program performance standards." One of Defendants' arguments to the contrary requires a tortured reading of the statute. Defendants contend that they can shoehorn the Mandates into "program performance standards" by working backwards from the definition of "deficiency." But the definition of "deficiency" does not inform the definition of "program performance standards." Dkt. #59 at 6. Defendants' circular interpretation of the statute goes as follows:

1. The Secretary can take action against Head Start programs that violate program performance standards. 42 U.S.C. § 9836a(e).
2. Such action includes "inform[ing] the agency of the deficiencies that shall be corrected" and "with respect to each identified deficiency, require the agency [to do things.]" 42 U.S.C. § 9836a(e)(A), (B).
3. Therefore, violations of "program performance standards" are "deficiencies."
4. A "deficiency" is "a systemic or substantial material failure of an agency in an area of performance that the Secretary determines involves," "(i) a threat to the health, safety, or civil rights of children or staff; [or] (iii) a failure to comply with standards related to early

childhood development and health services, family and community partnerships, or program design and management." 42 U.S.C. § 9832(2)(A).

5. Therefore, any policy that combats "a threat to the health [or] safety [] of children of staff" or "standards related to early childhood … health services" must be a "program performance standard."

The failure of that logic is that while all violations of "program performance standards" are "deficiencies," not all "deficiencies" are violations of "program performance standards." The definition of "deficiency" includes many things, and is not limited merely to violations of "program performance standards." The terms are not equivalent, and the definition of "deficiency" does not inform the definition of "program performance standards."

Because the Mask Mandate and Vaccine Mandate are not "program performance standards," the Interim Final Rule must be set aside. 5 U.S.C. § 706(2)(A), (C).

2. The Court should not read a good-cause exception into 42 U.S.C. § 9836a(a)(2)(A).

42 U.S.C. § 9836a(a)(2)(A) provides: "In developing any modifications to standards required under paragraph (1) [program performance standards], the Secretary shall consult with experts in the fields of child development, early childhood education, child health care, family services (including linguistically and culturally appropriate services to non-English speaking children and their families), administration, and financial management, and with persons with experience in the operation of Head Start programs." There is no good-cause or any other exception to this requirement. There is nothing in the administrative record showing that Defendants complied with this statute, and Defendants admit that they did not comply with this statute: "The Secretary consulted with experts in child health, including pediatricians, a pediatric infectious disease specialist, and the recommendations of the CDC and FDA." 86 Fed. Reg.

68,053–54. The Secretary thus admits that he failed to consult with several required persons (such as experts in the field of linguistically and culturally appropriate services to non-English speaking children and their families), and did not in fact comply with § 9836a(a)(2)(A).

Defendants' reliance on the Supreme Court's holding in *Biden v. Missouri* is misplaced. Dkt. #59 at 9. In that case, the Supreme Court held that the Secretary was absolved of the obligation to "'consult with appropriate State agencies' . . . in advance of issuing the interim rule" because the Secretary had invoked the good cause exception to notice and comment. *Biden v. Missouri*, 142 S. Ct. 647, 654 (2022).

The applicable statute in *Biden v. Missouri*, 42 U.S.C. § 1395z, provides, "In carrying out his functions, relating to determination of conditions of participation by providers of services, under subsections (e)(9), (f)(4), (j)(15), (o)(6), (cc)(2)(I), and [2] (dd)(2), and (mm)(1) of section 1395x of this title, or by ambulatory surgical centers under section 1395k(a)(2)(F)(i) of this title, the Secretary shall consult with appropriate State agencies and recognized national listing or accrediting bodies, and may consult with appropriate local agencies." The Court's holding implied a good cause exception to the consultation requirement. But here, Defendants did not have good cause to skip notice-and-comment, as this Court has already determined. Accordingly, Defendants cannot imply a good cause exception to the consulting requirement of § 9836a(a)(2)(A) to justify their failure to comply with the consultation requirements of that statute.

Moreover, the Supreme Court has not read a good cause exception into § 9836a(a)(2)(A), and this Court should decline to do so. The Supreme Court gave no reasoning for why it read a good cause exception into § 1395z, and so it has given no guidance to lower courts about when lower courts should read exceptions into statutes that are arguably similar to § 1395z.

Because Defendants did not comply with § 9836a(a)(2)(A), the Interim Final Rule must be set aside. 5 U.S.C. § 706(2)(D).

3. There is no good-cause exception in 42 U.S.C. § 9836a(a)(2)(B).

42 U.S.C. § 9836a(a)(2)(B) provides: "In developing any modifications to standards required under paragraph (1), the Secretary shall take into consideration [ten categories of information]." There is no good-cause or any other exception to this requirement. There is nothing in the administrative record showing that Defendants complied with this statute. Indeed, Defendants admit non-compliance with this statute. The Interim Final Rule stipulates that Defendants considered "the Office of Head Start's past experience with the longstanding health and safety Head Start Program Performance Standards," as required by § 9836a(a)(2)(B)(i), and "the circumstances and challenges typically facing children and families served by Head Start agencies including the disproportionate effect of COVID–19 on low-income communities served by Head Start agencies and the potential for devastating consequences for children and families of program closures and service interruptions due to SARS–CoV–2 exposures." 86 Fed. Reg. at 68,054. But this does not match any of the other nine categories. Defendants did not take into consideration most of the ten categories of required information.

Defendants argue that the implied good cause exception from *Biden v. Missouri* applies to § 9836a(a)(2)(B) as well as to § 9836a(a)(2)(A). Dkt.#59 at 9. But that exception specifically applies to consultation requirements such as are in subsection (a)(2)(A), not the kind of requirements in subsection (a)(2)(B). *Biden v. Missouri*, 142 S. Ct. at 654. Thus, Defendants were required to comply with § 9836a(a)(2)(B) but did not do so. The Interim Final Rule must be set aside. 5 U.S.C. § 706(2)(D).

4. Defendants did not comply with 42 U.S.C. § 9836a(a)(2)(C)(ii).

42 U.S.C. § 9836a(a)(2)(C)(ii) provides: "In developing any modifications to standards required under paragraph (1), the Secretary shall ensure that any such revisions in the standards will not result in the elimination of or any reduction in quality, scope, or types of health, educational, parental involvement, nutritional, social, or other services required to be provided under such standards as in effect on December 12, 2007." There is nothing in the administrative record showing that Defendants complied with this statute. Defendants argue that they did comply with it, citing "*e.g.* 86 Fed. Reg. 68,055." Dkt. #59 at 10. The "e.g." is apparently meant to imply that the cited page is just one of multiple indications that Defendants complied with § 9836a(a)(2)(C)(ii). But there is no such analysis on page 68,055, and word searches for "elim," "reduc," "quality," "scope," and "2007" in the entire Interim Final Rule failed to find any such analysis. Therefore, the Interim Final Rule must be set aside. 5 U.S.C. § 706(2)(D).

5. Defendants did not consult with Indian tribes, as required by § 9836a(a)(2)(D).

42 U.S.C. § 9836a(a)(2)(D) provides, "In developing any modifications to standards required under paragraph (1), the Secretary shall consult with Indian tribes, including Alaska Natives, experts in Indian, including Alaska Native, early childhood education and development, linguists, and the National Indian Head Start Directors Association on the review and promulgation of standards under paragraph (1) [program performance standards] (including standards for language acquisition and school readiness)." There is nothing in the administrative record showing that Defendants complied with this statute, and the Interim Final Rule reveals that they did not comply with this statute. In a paragraph titled "Tribal Consulting Statement," Defendants claim they consult with Indian tribes generally, on a regular schedule, but there is no indication they consulted with Indian tribes about the Interim Final Rule. 86 Fed. Reg. at 68,052.

In their Response, Defendants state that Plaintiffs' reading of the "lengthy" Tribal Consulting Statement is "perplexing." Dkt. #59 at 10. But the 23-line description of regularly scheduled meetings does not describe consulting with Indians tribes about the Interim Final Rule, as required by the statute, and thus is an admission that the required consultation did not occur.

Defendants also suggest that the implied good cause exception to consulting requirements from *Biden v. Missouri* also applies to the requirement that Indian tribes be consulted. For the same reasons a good cause exception does not apply to subsection § 936a(a)(2)(A), there is no good cause exception to the requirement to consult Indian tribes. The Interim Final Rule must be set aside. 5 U.S.C. § 706(2)(D).

PRAYER

For the foregoing reasons, and the reasons detailed in Plaintiffs' Motion for Summary Judgment, the Court should grant Plaintiffs' Motion for Summary Judgment.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

GRANT DORFMAN
Deputy First Assistant Attorney General

SHAWN E. COWLES
Deputy Attorney General for Civil Litigation

/s/ Charles K. Eldred
CHARLES K. ELDRED
Special Litigation Counsel
Administration Law Division
State Bar No. 00793681
Charles.Eldred@oag.texas.gov

JOHNATHAN STONE
Assistant Attorney General
Civil Medicaid Fraud Division
State Bar No. 24071779

AMY L.K. WILLS
Assistant Attorney General
General Counsel Division
State Bar No. 24093379

Office of the Attorney General
Administrative Law Division
P.O. Box 12548, Capitol Station
(512) 936-1706 • fax (512) 320-0167
Austin, Texas 78711-2548

ATTORNEYS FOR PLAINTIFF
STATE OF TEXAS

CHRISTOPHER D. HILTON
Chief, General Litigation Division

/s/ Amy S. Hilton
AMY S. HILTON
Assistant Attorney General
General Litigation Division
State Bar No. 24097834
Amy.Hilton@oag.texas.gov

Office of the Attorney General
General Litigation Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 936-1327 • fax (512) 320-0667

ATTORNEYS FOR PLAINTIFF
LUBBOCK INDEPENDENT
SCHOOL DISTRICT

CERTIFICATE OF SERVICE

We certify that a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) on May 18, 2022.

/s/ Charles K. Eldred Charles K. Eldred

/s/ Amy S. Hilton Amy S. Hilton