

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEW HAMPSHIRE**

**Z.B., by his mother and next friend,** )  
**Tara Kilmer,** )  
 )  
**Plaintiff** )

**v.** )  
 )  
**AMMONOOSUC COMMUNITY** )  
**HEALTH SERVICES, INC., et al.,** )  
 )  
**Defendants** )

**Civ. No. 03-540 (NH)**  
**Civ. No. 04-34-P-S (ME)**

**MEMORANDUM DECISION ON PLAINTIFF’S MOTION TO ALLOW LIMITED  
DISCOVERY**

The plaintiff in this action, which was transferred from the District of New Hampshire due to a recusal of the judges of that district (*see* Docket Item 1 and D. of Me. Local Rule 83.12), seeks leave to conduct discovery on the question whether defendant Ammonoosuc Community Health Services, Inc. (“ACHS”) and its employees were acting within the scope of their federal employment at the time of the events giving rise to this action. Plaintiffs’ [sic] Motion to Allow Limited Discovery and Evidentiary Hearing on Factual Issues Raised by the United States’s [sic] Motion to Substitute (Docket No. 10) at 3. This motion was filed in response to the filing by the United States of a motion to substitute itself for AMHS as a party defendant pursuant to 28 U.S.C. § 2679(d). Motion to Substitute the United States for Ammonoosuc Community Health Services, Inc. as Defendant (Docket No. 5). The plaintiff’s deadline for responding to the motion to substitute has been extended to May 28, 2004 or a date 14 days from the date

of decision on this motion, whichever first occurs. Docket No. 12. I deny the motion for leave to conduct limited discovery.

The plaintiff contends that the certification of the United States attorney to the effect that ACHS and its employees were acting within the scope of federal employment at the relevant time, upon which the government's motion to substitute is based, is open to judicial review and that there is "a substantial question about whether ACHS was acting within the scope of its Federal grant employment because the home visiting program of ACHS, which is at issues [sic] in this case was not funded pursuant to the Federal grant application." Plaintiffs' [sic] Memorandum of Law in Support of Motion to Allow Limited Discovery, etc. ("Plaintiff's Memorandum") (Docket No. 11) at 2-5 (emphasis in original). ACHS and the United States do not dispute the first contention but assert that the plaintiff has not demonstrated that any disputed issues of material fact exist with respect to that question. Ammonoosuc and United States' Objection to Plaintiff's Motion for Limited Discovery and Evidentiary Hearing ("Objection") (Docket No. 13) at 2. I agree.

The United States and ACHS "accept as true, for purposes of the substitution motion, plaintiff's allegations that the home-visiting program was either partly or fully funded by the State of New Hampshire." *Id.* at 7. Given this stipulation, it is difficult to discern how anything beyond legal argument will be before the court in connection with the motion to substitute. The plaintiff contends that a particular Public Information Notice issued by the Bureau of Primary Health Care of the federal Department of Health and Human Services cannot serve as the basis for the certification and that the interpretation of applicable statutes and regulations set forth in that document is contrary to the language of those statutes and regulations, contrary to Congressional intent and unconstitutional. Plaintiff's Memorandum at 5. In addition, the plaintiff contends that the United States attorney failed to state the basis for the certification in sufficient

detail. *Id.* at 5-6. Each of these contentions is a legal argument, not dependent in any way on factual discovery.

Even if a factual issue had been suggested by the plaintiff, she has not made “an evidentiary proffer capable of generating a genuine issue of material fact as to whether the defendant was acting outside the scope of . . . employment.” *Ware v. Doane*, 227 F.Supp.2d 169, 173 (D. Me. 2002). Given the stipulation of the United States and ACHS, there appears to be no genuine issue of material fact. Accordingly, neither discovery nor an evidentiary hearing is indicated. *Id.*; *accord*, *Schrob v. Catterson*, 967 F.2d 929, 936 (3d Cir. 1992). *See also Day v. Massachusetts Air Nat’l Guard*, 167 F.3d 678, 686 (1st Cir. 1999) (“Before a court is called upon to convene an evidentiary hearing [on the issue of certification], it is entitled to something more than conclusory abstractions from the party demanding the hearing.”).

In a reply memorandum the plaintiff seeks to raise new issues, contending first that factual discovery “will show that at the time of the home visits in question, Z.B. was no longer receiving medical care from ACHS” and that the services at issue were not within the protection of the Federal Tort Claims Act under 42 C.F.R. § 6.6(b). Plaintiff’s Reply to Ammonoosuc and United States’s [sic] Objection to Plaintiff’s Motion for Limited Discovery and Evidentiary Hearing (“Reply”) (Docket No. 18) at 4-5. This is an entirely new argument, not presented in the plaintiff’s initial motion, and accordingly may not be considered. *See Stenson v. McLaughlin*, 2001 WL 1033614 (D.N.H. Aug. 24, 2001), at \*6 & n.4 (issues raised for the first time in reply briefs will not be considered). The same is true of the plaintiff’s new arguments that discovery is necessary to determine whether Z.B. was a patient or qualified non-patient of ACHS at the relevant time. Reply at 8-9. The plaintiff’s argument that she is entitled to equitable tolling of the applicable statute of limitations if the substitution is allowed and therefore is entitled to discovery on the question

whether ACHS “concealed” its deemed federal-employment status, *id.* at 9- 10, in addition to the fact that it is also new, adds nothing to her claim on the issue before the court. That argument, and the related discovery, will be appropriate only after the substitution issue is decided. The remainder of the plaintiff’s reply memorandum merely restates the legal arguments presented in her original motion. *Id.* at 6-8.

For the foregoing reasons, the plaintiff’s motion for leave to conduct discovery and for an evidentiary hearing on the United States attorney’s certification is **DENIED**.

Dated this 22nd day of April 2004.

/s/ David M. Cohen  
David M. Cohen  
United States Magistrate Judge

**Plaintiff**

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V.

**Defendant**

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