IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

TESSA G., A MINOR, BY AND THROUGH HER FATHER AND NATURAL GUARDIAN, MARK G.
PLAINTIFF

VS. **CASE NO. 4:03CV00493 GTE**

ARKANSAS DEPARTMENT OF HUMAN SERVICES, KURT KNICKREHM, IN HIS INDIVIDUAL CAPACITY AND IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE ARKANSAS DEPARTMENT OF HUMAN SERVICES, AND JAMES GREEN, PH.D., IN HIS INDIVIDUAL CAPACITY AND IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE DIVISION OF DEVELOPMENTAL DISABILITIES SERVICES OF THE ARKANSAS DEPARTMENT OF HUMAN SERVICES
DEFENDANTS **DEFENDANTS**

BRIEF IN SUPPORT OF DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

I. Introduction

This case concerns the Developmental Disabilities Alternative Community Services Medicaid Waiver ("ACS waiver") administered by the Arkansas Department of Human Services ("ADHS"). Plaintiff, already a Medicaid recipient, seeks a preliminary injunction requiring ADHS to immediately accept her ACS waiver application, determine her eligibility for ACS waiver services, and, if she is eligible, provide ACS waiver services. She does not allege that the full array of Medicaid services falls short of meeting her health care needs. Nor does she allege what, if any, ACS waiver services she must have to avoid irreparable injury.

II. Preliminary Injunction Standard

To be entitled to a preliminary injunction, the party seeking the injunction must establish each of the following four requirements:

> (1) The threat of irreparable harm to the moving party;
>
> (2) The balance between the threat of irreparable harm and any injury that granting the injunction would inflict on the other parties;
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> (3) The likelihood that the moving party will succeed on the merits; and
>
> (4) The impact that granting the preliminary injunction would have on the public interest.

Dataphase Systems, Inc. v. C L Systems, Inc., 640 F.2d 109, 113 (8th Cir. 1981). The decision to grant a preliminary injunction is discretionary with the district court and is an extraordinary remedy. As such, it should only be granted if the moving party (plaintiff) has clearly carried the burden of persuasion on all four *Dataphase* requirements. *United Ind. Corp. v. Clorox Co.*, 140 F.3d 1175 (8th Cir. 1998). Simply put, plaintiff cannot establish a threat of irreparable harm before a decision on the merits is reached, nor can she demonstrate a likelihood of success on the merits.

III. The Medicaid Program

Medicaid is an entitlement program administered by the states but jointly financed by the federal and state governments.

> The Medicaid program was created in 1965 and is designed to furnish medical assistance to persons "whose income and resources are insufficient to meet the costs of necessary medical services." 42 U.S.C. § 1396. As the nation's largest means-tested health care financing program, its importance to the nation's health care system cannot be overstated.

Ashley County Med. Ctr. v. Thompson, 205 F. Supp.2d 1026, 1029 (E.D. Ark. 2002).

> The Medicaid program is administered by the states under Medicaid state plans approved by the Secretary of the Department of Health and Human Services (HHS). Each state is required to establish a medical assistance plan (known as the "State Plan") which must describe eligibility standards, the scope of benefits, reimbursement methodologies and certain other details of that state's Medicaid program.

Ashley County Med. Ctr., 205 F. Supp. at 1030.

"Medicaid programs do not guarantee that each recipient will receive that level of health care precisely tailored to his or her needs." *Alexander v. Choate*, 469 U.S. 207, 303 (1985).

IV. EPSDT

Under the Early and Periodic Diagnosis, Screening, and Treatment ("EPSDT") Medicaid provisions, participating states must provide comprehensive benefits for Medicaid eligible persons under age twenty-one.

> [T]he State Plan must include the provision of EPSDT services as those services are defined in § 1396d (r). See §§ 1396a (a)(10)(A), 1396d (a)(4)(B); see also 1396a (a)(43). Section 1396d (r) lists in detail the screening services, vision services, dental services, and hearing services that the State Plan must expressly include, but with regard to treatment services, it states that EPSDT means "[s]uch other necessary health care, diagnostic services, treatment, and other measures described in subsection (a) of this section to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, whether or not such services are covered under the State plan. 42 U.S.C. § 1396d (r)(5).

Pediatric Specialty Care v. Arkansas Dep't of Human Servs., 293 F.3d 472, 480 (8th Cir. 2002).

V. The ACS Waiver

ADHS created ACS services via a Medicaid waiver approved by the Secretary of Health and Human Services under the provisions of 42 U.S.C. § 1396n (c) (Section 1915 (c) of the Social Security Act). Section 1915 (c) permits State Medicaid Plans to:

> Include as "medical assistance" under such plan payment for part or all of the cost of home or community-based services (other than room and board) approved by the Secretary which are provided pursuant to a written plan of care to individuals with respect to whom there has been a determination that but for the provision of such services the individuals would require the level of care provided in a hospital or a nursing facility or intermediate care facility for the mentally retarded the cost of which could be reimbursed under the State plan.

Waivers are not permanent. Initial waiver approval cannot exceed three years, and thereafter, waivers are limited to additional five-year periods. 42 U.S.C. § 1396n (c)(3). Waiver services must be cost neutral. *See*, 42 U.S.C. § 1396n (c)(2)(D) (average per capita waiver cost cannot exceed average per capita institutional cost).

States must impose an upper limit on the number of persons serviced under the ACS waiver:

> The State must indicate the number of unduplicated beneficiaries to which it intends to provide waiver services .... The number will constitute a limit on the size of the waiver unless the Secretary [of the United States Department of Health and Human Services] approves a greater number of waiver participants in a waiver amendment.

42 C.F.R. § 441.303 (f)(6). This number "becomes the 'population limit' on the [waiver] services." *Makin ex rel. Russell v. Hawaii*, 114 F. Supp. 2d 1017, 1028 (D. Hi.1999). 42

U.S.C. § 1396n (c)(10) requires at least 200 individuals be served. The ACS waiver is limited to 3,067 persons[1].

In addition to the comprehensive array of services defined as medical assistance in 42 U.S.C. § 1396d (a)(1)-(27), the ACS waiver provides for the following relevant services[2]:

(1) Supportive Living Services: assistance with acquisition, retention, or improvement in skills related to activities of daily living, such as personal grooming and cleanliness, bed making and household chores, eating and the preparation of food, and the social and adaptive skills necessary to enable the individual to reside in a non-institutional setting. Supportive living services payments are not made to family members or for routine care and supervision which would be expected to be provided by a family or group home provider. *See*, Exhibit A, pp. 42, 43.

(2) Environmental accessibility adaptations: physical adaptations to the home such as ramps and grab bars. *See*, Exhibit A, p. 49.

(3) Personal emergency response portable electronic systems. *See*, Exhibit A, p. 69.

(4) Most consultation services described in Exhibit A on p. 71.

(5) Fees for activities that compliment and reinforce community living. *See*, Exhibit A, p. 78.

[1] A copy of the ACS waiver is attached as exhibit "A."

[2] The list excludes services such as prevocational employment services, supported employment services, and transitional expenses to move out of an institution or prevent the need to return to an institution.

(6) Some waiver coordination services, e.g., worker coordination, planning input into the plan of care, assuring timely submission of behavior reports, records review, and fiscal intermediary services.

Plaintiff has not alleged that she is in need of, or would be entitled to any of these ACS waiver services. Nor has plaintiff alleged that she will be irreparably harmed if she does not immediately receive these services at public expense.

The complaint acknowledges that there are a maximum number of "slots" that the Department of Health and Human Services has approved for the ACS waiver. *See*, complaint, ¶¶ 23, 30, and 44. A total of 3,067 slots for unduplicated individuals is approved. *See*, Exhibit A, p. 106. However, the allegations in the complaint regarding the number of vacant slots are incorrect. As of June 30, 2003, there were 2,665 unduplicated individuals receiving waiver services. Theoretically this leaves 402 slots available, but in practice, turnover would make it impossible to keep every slot filled every day. Plaintiff is number 2,255 on the waiting list.

VI. Plaintiff's Medicaid Coverage

Plaintiff's financial eligibility for Medicaid normally would be determined by considering her family's income and resources. Using those tests plaintiff would not be Medicaid eligible. Medicaid is available to plaintiff because Arkansas sought and obtained approval for a Medicaid waiver, referred to by plaintiff as the TEFRA waiver, that allows ADHS to make plaintiff Medicaid eligible while disregarding her parents' income and resources. The waiver provides for a co-pay, the amount of which is based on parental income and determined by reference to a sliding scale. *See*, Exhibit B.

Having become Medicaid eligible, plaintiff enjoys the full array of Medicaid care

furnished under EPSDT. In addition, plaintiff has private health care coverage and may look to her parents to provide needed care. As a result, it is unlikely – and plaintiff has not alleged – that ACS waiver services are necessary for her to obtain any medically necessary care.

VII. Discussion

(a) Lack of Irreparable Harm

Plaintiff must prove that she will suffer irreparable harm before the trial on the merits if she does not receive ACS waiver services to which she has an enforceable entitlement. If ADHS eligibility procedures will cause plaintiff no injury during the interim between the filing of the motion for preliminary injunction and the trial on the merits, then there is no basis to conclude that plaintiff will be irreparably harmed.

There is no irreparable harm because there are no available waiver services to which plaintiff is entitled. This can be illustrated by assuming, for the sake of discussion, that if ADHS determined plaintiff's eligibility today, plaintiff: (1) would be eligible for the ACS waiver program; and (2) would qualify for one or more ACS waiver services that are not otherwise covered under EPSDT. Even if ADHS immediately fills every vacant ACS waiver slot, 1,852 other slots must become available before plaintiff can be served[3]. That can happen in only two ways: (1) present recipients terminate their ACS waiver services; and (2) ACS waiver enrollees that are ahead of plaintiff on the enrollment list may ultimately be determined ineligible

Thus, there is no available waiver slot, nor is it likely that a slot will become available anytime soon. As a result, plaintiff suffers no harm due to the status of her

[3] 2,254 persons ahead of plaintiff minus the 402 vacant slots equals 1,852.

ACS waiver enrollment and eligibility determination, and certainly suffers no immediate or irreparable harm that must be remedied via preliminary injunction.

(b) Likelihood of Success on the Merits

Plaintiff must establish standing in a case or controversy under Article III of the United States Constitution. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Standing has three elements. First, plaintiff must sustain an invasion of a legally protected interest which is (a) concrete and particularized; (b) actual or imminent as opposed to conjectural or hypothetical. *Lujan*, 504 U.S. at 560. Second, the injury must be caused by the defendant. *Id.* Third, it must be likely, not speculative, that the injury will be redressed by a favorable decision. *Lujan*, 504 U.S. at 561. Plaintiff must support the allegations necessary for standing with "competent proof." *McNutt v. General Acceptance Corp.*, 298 U.S. 178, 189 (1936).

Plaintiff brought her claims under 42 U.S.C. § 1983 to enforce Spending Clause legislation. Under its spending power, Congress may attach "conditions on the receipt of federal funds [requiring] compliance by the recipient with federal statutory and administrative directives." *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (quotation omitted). The Spending Clause does not authorize mandatory legislation. Rather, compliance with Spending Clause legislation is voluntary. "States are given the choice of complying with the conditions set forth in the Act or forgoing the benefits of federal funding." *Pennhurst State School and Hosp. v. Halderman*, 451 U.S. 1, 11 (1981).

Plaintiff's standing hinges on the assertion that certain Medicaid provisions confer legally enforceable rights upon her. Plaintiff lacks standing if the statutes she relies upon do not confer enforceable rights. Similarly, plaintiff's standing is prudentially limited if

her alleged injury falls outside the "zone of interests" protected by the statute. *Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 39 n. 19 (1976).

The test to determine if a federal statute creates enforceable rights has evolved from *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989) through *Blessing v. Freestone*, 520 U.S. 329 (1997) to *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002). *Gonzaga* emphasizes that Congress must express a clear and unambiguous intent to confer *individual rights*. 536 U.S. at 288. To create enforceable individual rights the statute "must be 'phrased in terms of the persons benefited.'" 536 U.S. at 284, quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 692 n. 13 (1979). Statutory provisions that focus on "the aggregate services provided by the State, rather than 'the needs of any particular person'" confer no individualized enforceable rights. 536 U.S. at 288, quoting *Blessing*, 520 U.S. at 343.

Accordingly, plaintiff must establish that the Medicaid statute authorizing the ACS waiver: (1) establishes plaintiff's individual entitlement to waiver services; and (2) focuses on the needs of plaintiff rather than the aggregate services provided by the state. The first issue – entitlement to waiver services – is easily disposed of because Medicaid explicitly authorizes an upper limit on the number of participants in waiver programs. *See, Makin ex rel Russell v. Hawaii*, 114 F.Supp. 2d 1017, 1028 (D. Haw. 1999):

> In sum, while the Medicaid Act requires a state to offer feasible alternatives available under the waiver to all eligible individuals, the HCBS-MR program is not "available" under the statute when the slots available under the "population limit" have been filled. Thus, the State of Hawaii is in compliance with the Medicaid statute even if there are over 750 "eligible" individuals on the HCBS-MR wait list so long as there is other appropriate treatment available to them under the Medicaid program. The HCFA Secretary approved the State's "population limit" for the HCBS-MR program and nothing in the statute requires the State to provide HCBS-MR services beyond the limit.

> As determined above, Defendants did not violate Section 1396a (a)(8) of the Medicaid Act by failing to provide all Plaintiffs with HCBS-MR services because the State is only required, under the provision, to provide available "medical assistance" with reasonable promptness. Further, the HCBS-MR services are not "available" if the "population limits" are reached when the eligible individual requests them.
>
> Plaintiffs attempt to use case law to show that lack of resources and funds are not an excuse for failing to provide statutory entitlements. The court agrees with this since a state must comply with federal conditions on federal funds. However, as Defendants correctly argue, Plaintiffs have no entitlement to the HCBS-MR services under the statute unless there are open slots within the "population limits" that can be filled. Clearly, in this case, there are not enough slots available to provide HCBS-MR services to the entire Plaintiffs' class.

Makin ex rel. Russell v. Hawaii, 114 F. Supp. 2d at 1030.

> Defendants have not violated the "reasonable promptness" provision by maintaining wait lists for HCBS-MR programs. Under the statute, the State is only required to provide services for the number of individuals approved by the HCFA, or the State legislature. This is particularly true since there is space available in the ICF/MR facilities that provides Plaintiffs with possible alternative treatment.

Makin ex rel. Russell v. Hawaii, 114 F. Supp. 2d at 1031.

Given the upper limit on the number of persons to be served, it is impossible to conclude either that the statute authorizing the waiver was intended to confer individual rights on the plaintiff, or that plaintiff's interest in receiving waiver services fall within the zone of protection of the Medicaid statute. A population limit is not a right conferred on an individual: it is a limitation on the aggregate services provided by the state. Because the provision concerns aggregate services, it fits neatly within the *Gonzaga* holding that such provisions confer no individualized enforceable rights. *Gonzaga Univ. v. Doe*, 536 U.S. at 288.

The conclusion that Congress conferred no individual rights by permitting waivers is further bolstered by the fact that all waivers are of finite duration. 42 U.S.C. §

1396n (c)(3). The automatic termination of a waiver – subject to extension – cannot be reconciled with the contention that the waiver was intended to create an enforceable federal right in the beneficiaries.

Furthermore, "Section 1983 only provides a remedy for violations of rights expressly secured by federal statutes or the Constitution. *Kurtz v. City of Shrewsbury*, 245 F.3d 753, 758 (8th Cir. 2001). There is no constitutional right to Medicaid services. *Maher v. Roe*, 432 U.S. 464 (1977). Federal regulations cannot create enforceable Medicaid rights. *Harris v. James*, 127 F.3d 993 (11th Cir. 1997). Therefore, any enforceable Medicaid mandate must appear in the Medicaid statute.

ACS waiver services were not created by Congress, or even by federal regulation, but instead by the state's waiver document. ACS waiver services are not mandated by the Medicaid statute, but instead are a permitted *exception* to the Medicaid statute. It is therefore impossible to construe ACS waiver services as a federal right, let alone the sort of clear and unmistakable right required by *Gonzaga*. It necessarily follows that plaintiff has no enforceable entitlement to ACS waiver services.

In any case, an eligibility determination made today would not benefit the plaintiff because that determination will not establish plaintiff's eligibility at the time an ACS waiver slot becomes available. A new eligibility determination will be required. In the meantime, plaintiff will not be prejudiced because she submitted an ACS waiver enrollment that guarantees her consideration for ACS waiver services without regard to her present eligibility status. In other words, plaintiff will be no better off if determined eligible today, but could be worse off if determined ineligible and deprived of her position on the ACS waiver enrollment list.

Finally, given that there are 2,254 persons awaiting 402 vacant ACS waiver slots, there is no basis to conclude that the alleged injury can be redressed by a favorable decision unless the Court orders that plaintiff be placed in line ahead of other persons similarly situated. Similarly, a preliminary injunction will not redress plaintiff's alleged injury because plaintiff's eligibility status and receipt of ACS waiver services must be contemporaneous.

Conclusion

For the foregoing reasons, defendants respectfully ask that the motion for preliminary injunction be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Breck Hopkins, do hereby certify that a copy of the above and foregoing Brief in Support of Defendants' Response to Motion for Preliminary Injunctive Relief was served upon Martin W. Bowen, Attorney at Law, 100 Morgan Keegan Drive, Suite 100, Little Rock, AR 72202, by placing a true and correct copy in the U. S. Mail, with sufficient postage, this 7 day of July, 2003.

Breck Hopkins

UNITED STATE DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS

Exhibits Attached to Original Document in Courts's Case File