U.S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS
AUG 07 2003
JAMES W. McCORMACK, CLERK
By: DEP CLERK

**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' SURREPLY TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Arkansas first obtained approval for a pilot home and community based Medicaid waiver for developmentally disabled individuals ("DD waiver") in 1989. That pilot project, which was limited to ten counties, had a cap of 300 recipients. In 1992 the state requested and received federal permission to put the DD waiver into effect statewide and expand the cap to 472. Subsequent expansions increased the cap to 564, 623, and then to 600. As the economy and state funding improved in the mid 1990's, the cap increased dramatically, doubling in 1995. Additional expansions occurred each year, and by 1999 there were 2,404 slots. As of July 1, 2003, the cap was 3,598[1] and 2,644 individuals were

[1] Counsel apologize for errors in the numbers previously supplied.

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enrolled as DD waiver service recipients. Also as of July 1, 2003, plaintiff was number 2,252 on the DD waiver waiting list.

During the recent state budget deficits in which many Medicaid and other state programs were frozen or cutback, the Department of Human Services and DD waiver providers fought hard for the expanded funding necessary to fill all DD waiver slots. That request is notable not only because it was made during difficult economic times, but also because the DD waiver was the only Medicaid program for which such a request was made. The Arkansas General Assembly responded by providing additional appropriation, mostly in the second year of the biennium, for all 3,598 DD waiver slots. Though the additional appropriation is insufficient to fund all the vacant DD waiver slots at once, it will support a realistic expansion pace allowing providers to hire new staff and take other steps necessary to serve more people while retaining high quality of care.

As all existing DD waiver slots are filled over the course of the 2003-2005 biennium, experience suggests that it is reasonable to predict that seventy-five per cent (75%) of DD waiver applicants will be eligible for waiver services, and that one hundred (100) persons will terminate waiver services each year. If these norms and the DD waiver cap remain constant, then plaintiff should expect waiver services to become available in 2013. (2252[2] minus 954 open slots[3] = 1298. 1298 multiplied by 75% = 973.5.) Thus Tessa could expect to be 973 on the list on July 1, 2005, 873 on the list on July 1, 2006, and so on. Of course, that is not a desirable outcome. Hopefully the Arkansas General Assembly will fund additional cap expansions to enable the list to move more quickly and to enable Tessa to be served much sooner.

[2] Tessa's position on the waiting list.

[3] All open slots, including presently occupied slots that are vacated, will be filled during the current biennium ending June 30, 2005.

This brief history of the DD waiver shows that the Department of Human Services has remained committed to providing waiver services to the extent permitted by funding, the cap, and other practical considerations. As a result, the waiver program has grown much faster than the Medicaid program as a whole. For example, the number of persons receiving waiver services increased from 1,565 to 2,644 from 1999 to present. During that time, overall Medicaid expenditures increased by 166% while waiver expenditures increased by approximately 254%. See attachment "A."

Turning to some specific arguments made by plaintiff, it is undisputed that 42 U.S.C. § 1396a (a)(8) declares that a state plan for medical assistance must: "provide that all individuals wishing to make application for medical assistance under the plan shall have opportunity to do so, and that such assistance shall be furnished with reasonable promptness to all eligible individuals." Inherent in this statute is the assumption that all services under the plan are always available. Waiver services in excess of the cap are not available to plaintiff. Nevertheless, plaintiff was enrolled for DD waiver services and treated as if she is eligible. She will remain on the enrollment list, will keep her place in line for DD waiver services as they become available, and the Department of Human Services will promptly determine her eligibility (i.e., within 90 days as required by 42 C.F.R. §435.911) based on the date that DD waiver services become available.

Ignoring that DD waiver services are not currently available to plaintiff, and assuming that: (1) an eligibility determination made today would establish that plaintiff is eligible for DD waiver services; (2) plaintiff remains eligible when DD waiver services become available; then an eligibility determination made today will have no positive effect. In other words, if eligibility is determined today, that Medicaid determination will

be useless when DD waiver services become available, because the determination will not establish relevant eligibility: eligibility that is contemporaneous with service delivery. If the DD waiver remains in place and plaintiff is eligible when services become available, Medicaid will make reimbursement based on a timely and prompt eligibility determination.

Though plaintiff can reap no benefit from an eligibility determination made today, she can be harmed. That is because the only way for the Department of Human Services to give effect to a determination of ineligibility is to remove plaintiff from DD waiver enrollment, causing plaintiff to lose her place in line. If plaintiff's condition then deteriorates she must reapply and be assigned a new place in line. The existing process therefore treats potential waiver recipients favorably compared to the immediate and binding eligibility determination sought by plaintiff.

Because a positive eligibility determination that is made before services are available has no effect, the determination is a nullity and a futile act. Only a negative eligibility determination can have effect, albeit an effect adverse to the applicant. Therefore to the extent that any pre-service eligibility determination has consequences, those consequences are undesirable. To avoid undesirable consequences the state would have to discard all negative eligibility determinations. As a result, each eligibility determination made before services are available is useless. Because it is axiomatic that statutes should not be read to compel a futile or useless thing[4], the Medicaid statute should not be read to compel eligibility determinations for services that are not available.

Plaintiff has cited decisions holding that states must take applications, determine eligibility, and provide services for available waiver positions, a point with which the

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[4] *Flynn v. Commissioner of Internal Revenue*, 77 F.2d 180, 183 (5th Cir. 1935).

state agrees. However, plaintiff has cited no authority to establish that applications must be taken for services that are not available. The only authority relevant to that point is *Makin ex rel. Russell v. Hawaii*, 114 F. Supp.2d 1017 (D. Ha. 1999), which holds that Medicaid imposes no obligations to states to furnish waiver services in excess of the waiver cap.

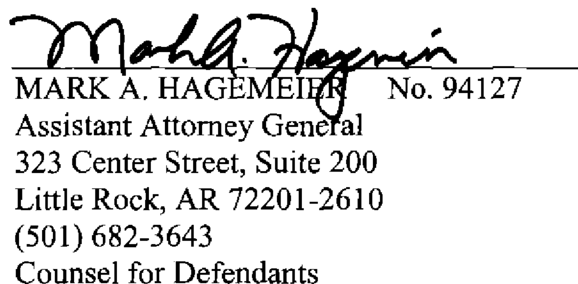
Plaintiff claims that she will be irreparably harmed by not receiving DD waiver services before they become available. However, plaintiff is already eligible to receive any medically necessary service that is defined as medical assistance in 42 U.S.C. § 1396d (a), including "medical care, or any other type of remedial care recognized under State law, furnished by licensed practitioners within the scope of their practice as defined by State law" and "other diagnostic, screening, preventive, and rehabilitative services, including any medical or remedial services ... recommended by a physician or other licensed practitioner of the healing arts within the scope of their practice under State law, for the maximum reduction of physical or mental disability and restoration of an individual to the best possible functional level." 42 U.S.C. § 1396d (a)(6) and 42 U.S.C. § 1396d (a)(13), respectively. Plaintiff does not identify any particular DD waiver service that does not meet these definitions but must be received to avoid irreparable harm. However, plaintiff does state that DD waiver services will provide experiences that will enrich plaintiff's life[5]. Defendants cannot agree that the lack of taxpayer funded enrichment experiences equates to irreparable harm, particularly when such enrichment is not covered by private insurance plans. Furthermore, plaintiff sidesteps the fact that her parents have the ability to purchase such services for her if they wish, thereby avoiding any irreparable harm.

[5] Reply to Response to Motion for Preliminary Injunctive Relief, p. 18.

Putting all this aside for the moment, the fact remains that there is no imminent harm to plaintiff that can be redressed by a preliminary injunction unless plaintiff is placed ahead of hundreds of persons who enrolled before she did. Plaintiff has not explicitly requested that relief, which would cause manifest inequities for which there is neither authority nor logic. Accordingly, defendants ask the Court to deny plaintiff's motion for preliminary injunction.

Respectfully submitted,

MIKE BEEBE
Attorney General

By: 

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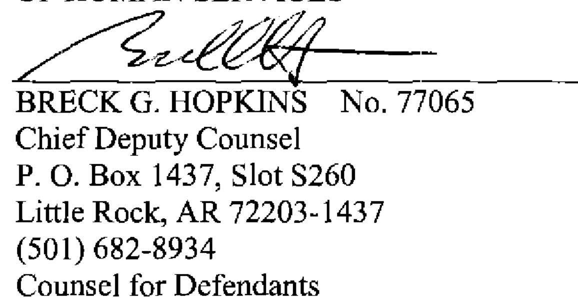
By: 

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CERTIFICATE OF SERVICE

I, Breck Hopkins, do hereby certify that a copy of the above and foregoing Surreply to Plaintiff's Motion for Preliminary Injunction 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 August, 2003.

Breck Hopkins

MEDICAID FACTSHEET
DDS ACS WAIVER

DDS ACS Waiver Expenditures
as % of Total Hosp/Med Exp:
SFY99: 3.13%
SFY00: 3.79%
SFY01: 4.56%
SFY02: 4.32%
SFY03: 4.69%

Medicaid offers certain home and community based services as an alternative to institutionalization. These services are available for a limited number of eligible individuals with a developmental disability who would otherwise require an ICF/MR level of

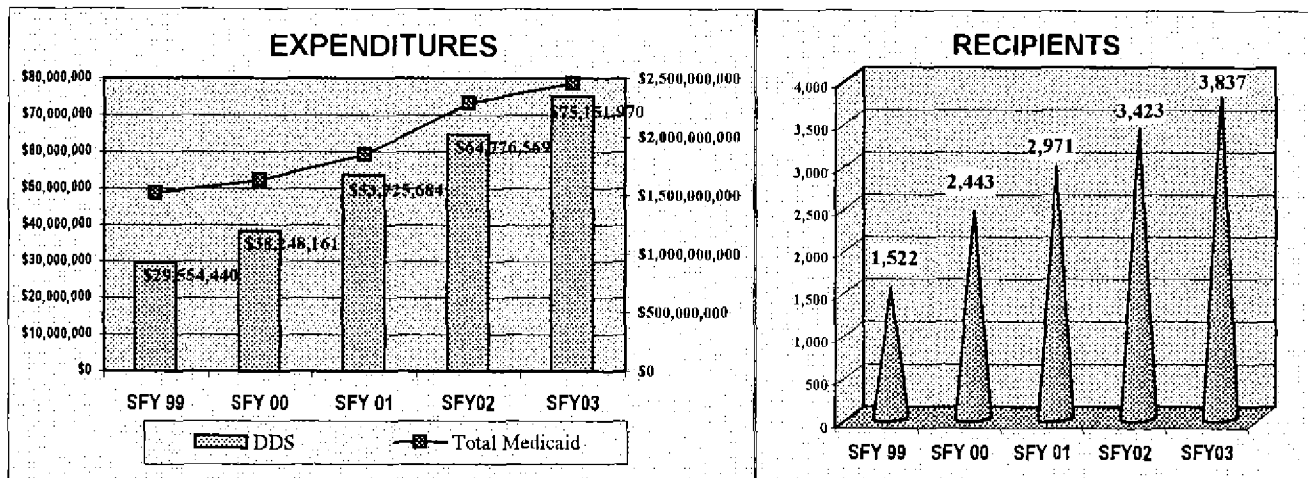
The DDS ACS Waiver is administered by the Division of Developmental Disabilities

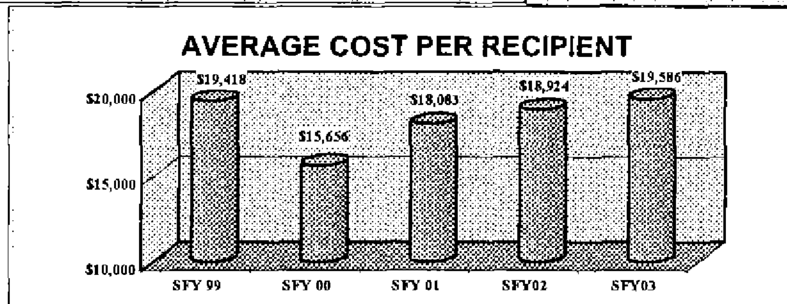
Services provided under this program are as follows:

- **Crisis Abatement Respite Care Services**
- **Integrated Supports Services**
- **Supported Employment Services**
- **Physical Adaptation Services**
- **Specialized Medical Supplies**
- **Case Management Services**
- **Consultation Services**
- **Crisis Center/Intervention Services**

Home and community based waiver services are available only to individuals who are not inpatients (residents) of a hospital, nursing facility (NF), or intermediate care facility for the mentally retarded (ICF/MR).

ACS Waiver Program services do not require Prior Authorization.





Source: DSS Reports; Medicaid Statistical Reports; Medicaid Provider Manual

"Attachment A" to Defendants' Surreply to Plaintiff's Motion for Preliminary Injunction
Tessa G. v. ADHS; U.S.D.C. No. 4:03CV00493 GTE