IN THE UNITED STATES DISTRICT COURT
FOR THE 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

REPLY TO RESPONSE TO MOTION FOR PRELIMINARY INJUNCTIVE RELIEF

The plaintiff requests an injunction that would require the defendants, among other things, to give her an application for ACS waiver services. In paragraph 26 of their Answer, the defendants admit that the plaintiff's father called ADHS in November of 2002 and requested an ACS enrollment application. Furthermore, the defendants admit in paragraph 27 of their Answer, and paragraph 3 of their Response to Motion for Preliminary Injunctive Relief, that they refuse to give the plaintiff an application.

To the extent the defendants state on page 1 of their Brief in Support of Defendants' Response to Plaintiff's Motion for Preliminary Injunction that the plaintiff seeks an injunction

"requiring ADHS to immediately accept her ACS waiver application", they mischaracterize the admitted facts of this case. The defendants simply refuse to give the plaintiff an ACS application, and admit in paragraph 9 of their Answer that they have refused to give applications to thousands of other disabled individuals.

In defense of this lawsuit, the defendants argue that: 1) the plaintiff does not have standing to bring this lawsuit; 2) the federal statutes relied on by the plaintiff do not confer rights enforceable under 42 U.S.C. § 1983; 3) the plaintiff is not faced with a threat of irreparable harm because there are no open slots under the ACS waiver; and 4) the plaintiff cannot prove a likelihood of success on the merits. For the reasons set forth below, these arguments are without merit, and the plaintiff should be granted the injunction requested in her Complaint.

I. STANDING

Standing is the threshold question in every federal case. Federal jurisdiction is "defined and limited by Article III of the Constitution . . . [and] is constitutionally restricted to 'cases' and 'controversies.'" Tarsney v. O'Keefe, 225 F.3d 929, 934 (8th Cir. 1999) (citing Flast v. Cohen, 392 U.S. 83, 94 (1968)). A case or controversy exists only if a plaintiff "personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." Id. (citing Gladstone v. Village of Bellwood, 441 U.S. 91, 99 (1979)). If a plaintiff has not suffered an injury, there is no standing and the court is without jurisdiction to consider the action. Id. (citing Allen v. Wright, 468 U.S. 737, 750-66 (1984)). However, if a lawsuit challenges the legality of government action or inaction, and the plaintiff is affected by such conduct, there is ordinarily little question that the plaintiff has standing. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992).

The plaintiff has standing to assert the claims set forth in her Complaint. According to her Complaint, the plaintiff alleges that the defendants refuse to give her an application for ACS services, that she has a right under the Medicaid Act to receive an application, that she has no way of getting into the ACS program without an application, and that the defendants refuse to provide a fair hearing with respect to her request for an application. By these allegations, the plaintiff clearly states a case or controversy under Article III. The plaintiff is directly affected by the steadfast refusal of the defendants to give her an applications for ACS services, and it would seem that a clearer case of standing could not be imagined. Indeed, a similar argument made by the Florida Department of Health and Rehabilitative Services was characterized as "frivolous" by the district court, and summarily rejected by the Eleventh Circuit in Doe v. Chiles, 136 F.3d 709, n.8 (11th Cir. 2001). See also Lindsey v. Bruton, No. 1:98cv154-T, 1999 WL 33320971, at *2 (W.D. N.C. Jan. 20, 1999) (plaintiffs have standing to assert that North Carolina was using funds intended for home and community-based services for other purposes, and diverting those funds away from their child).

Contrary to what the defendants argue on page 8 of their brief, the issue of standing does not hinge on whether the plaintiff has enforceable statutory rights under the Medicaid Act. Whether the plaintiff has statutory rights enforceable in a case filed pursuant to 42 U.S.C. § 1983 is an issue that relates to the legal merits of her case, and has nothing to do whether she has alleged a case or controversy and, therefore, has a right to sue under Article III. Standing is a jurisdictional issue, and is distinct from legal and factual issues that touch on the merits of a particular case. See Bruggeman v. Blagojevich, 324 F.3d 906, 909-10 (7th Cir. 2003) (equating standing with the legal or factual merits of a case is a "misunderstanding of standing").

Even if the issue of standing hinged on the availability of rights enforceable under 42 U.S.C. § 1983, the defendants overlook the fact that the plaintiff has also filed a claim against them under the procedural due process component of the Fourteenth Amendment. Certainly, there can be no questioning the fact that claims arising under the Constitution are enforceable under 42 U.S.C. § 1983. Maine v. Thiboutot, 448 U.S. 1, 4-6 (1980).

It should be noted that the issue of standing generally arises in Medicaid cases filed by Medicaid providers or other private organizations on behalf of disabled individuals. This case is filed by an individual, not a private organization, and the issue of "representational" standing does not arise. See Pediatric Specialty Care, Inc. v. Arkansas Department of Human Services, 293 F.3d 472 (8th Cir. 2002) (issue of "representational" standing not relevant when a Medicaid recipient is a plaintiff in the case).

The only other argument made by the defendants with respect to the issue of standing is that the Medicaid Act was enacted by Congress pursuant to the Spending Clause, and legislation enacted under the Spending Clause generally does not give rise to a right to sue for its enforcement. The problem with their argument is that it ignores Wilder v. Virginia Hospital Association, 496 U.S. 498 (1990), in which the Supreme Court held that the Medicaid Act explicitly confers a private right of enforcement in favor of Medicaid recipients and providers. Id. at 522-23.

II. ENFORCEABILITY OF STATUTORY RIGHTS UNDER 42 U.S.C. § 1983

The next argument made by the defendants is that the Medicaid statutes relied on by the plaintiff in Counts One through Four of her Complaint are not enforceable under 42 U.S.C. § 1983. In Pediatric Specialty Care, the Eighth Circuit held that "[s]ection 1983 provides a federal

cause of action against anyone who, acting pursuant to state authority, violates any 'rights privileges or immunities secured by the Constitution and laws' of the United States." 293 F.3d at 477. "A remedy is available under § 1983 for violations of federal statutory and constitutional law." Id. (citing Thiboutot, 448 U.S. at 4). However, with respect to § 1983 claims based on a federal statute, "a plaintiff must assert a violation of a federal right, not just a violation of a federal law." Id. (citing Blessing v. Freestone, 520 U.S. 329, 340 (1997)).

In determining whether a federal statute gives rise to a federal right, we must consider three factors: 1) whether the provision in question is "intend[ed] to benefit" the plaintiff, that is, "couched in mandatory, rather than precatory, terms"; 2) whether the interest asserted by the plaintiff is not so "vague and amorphous" that it is beyond the competence of the judiciary to enforce; and 3) whether the provision in question creates a binding obligation on the governmental unit. Id. at 477-78. A federal right must be "unambiguously conferred" in order to support a cause of action under § 1983." Gonzaga University v. Doe, 536 U.S. 273, 283 (2002).

Like the statutes at issue in this case, the statutes at issue in Pediatric Specialty Care were Medicaid statutes as well. Applying the three-part test set forth in Blessing, the Eighth Circuit held that the language of 42 U.S.C. § 1396a(a) is "mandatory language", and that 42 U.S.C. §§ 1396a(a)(10)(A), 1396a(a)(43), and 1396d(r) create a "binding obligation on ADHS to create a state plan that includes the provision of EPSDT services as they are defined in § 1396d(r)." 293 F.3d at 478-79. The Eighth Circuit stated that "this obligation is not so ambiguous or amorphous that its enforcement strains judicial competence", and held that the plaintiffs had a federal right under those statutes that is enforceable in a § 1983 action. Id. at 479.

The Medicaid statutes relied on by the plaintiff are, in order of their appearance in the

Complaint, 42 U.S.C. § 1396a(a)(8), 42 U.S.C. § 1396n(c)(2), and 42 U.S.C. § 1396a(a)(3). There appears to be no reported case from the Eighth Circuit, or the District Court for either the Eastern or Western District of Arkansas, that considers whether these statutes create rights that are enforceable under § 1983. However, with the principles of Blessing in mind, and with guidance from Pediatric Specialty Care and cases from other jurisdictions in which the statutes cited by the plaintiff are involved, it is clear that each of these statutes is enforceable under § 1983.

A. THE "OPPORTUNITY TO APPLY" PROVISION OF 42 U.S.C. 1396a(a)(8)

Count One of the plaintiff's Complaint is based on 42 U.S.C. § 1396a(a)(8), which states that the State Medicaid Plan "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". The plaintiff claims that the defendants are violating the "opportunity to apply" provision of this statute by refusing to give her an application for ACS services.

Under the first prong of the Blessing test, we consider whether the language of this provision is couched in mandatory, rather than precatory, terms. "The language of § 1396a(a) is mandatory language." Pediatric Specialty Care, 293 F.3d at 478. Therefore, as a matter of law, the "opportunity to apply" provision is intended to benefit the plaintiff, and the first prong is satisfied.

Under the second prong of the Blessing test, we consider whether the interest asserted by the plaintiff is not so "vague and amorphous" that it is beyond the competence of the judiciary to enforce. The plaintiff submits that there is nothing vague or amorphous about her interest in

receiving an application for ACS services. If anything, the "opportunity to apply" provision of § 1396a(a)(8) stands for the proposition that the plaintiff has the right to receive an application. Clearly, it is impossible for the plaintiff to begin the process of applying for ACS services if the defendants will not give her an application. There is nothing vague or amorphous about the plaintiff's interest in receiving an application, or anything else that puts it beyond the competency of the judiciary to enforce.

Under the third prong of the Blessing test, we consider whether the provision creates a binding obligation on the defendants. The language of § 1396a(a)(8) states that a person "shall" have the opportunity to apply for services, and seems to be just as binding as the Medicaid statutes at issue in Pediatric Specialty Care. In addition, 42 C.F.R. § 435.906 states that the state agency "must afford an individual wishing to do so the opportunity to apply for Medicaid without delay." Read together, the language of 42 U.S.C. § 1396a(a)(8) and 42 C.F.R. § 435.906 create a binding obligation on the defendants to give an ACS application to the plaintiff.

The defendants suggest on page 10 of their brief that they do not have a binding obligation to provide ACS services to the plaintiff because the ACS program is optional and of "finite duration". The plaintiff agrees that the program, like all waiver programs developed under 42 U.S.C. § 1396n(c), is an optional program that Arkansas has chosen to include in its State Medicaid Plan. However, even though the program is optional, the fact remains that the ACS program is part of the Plan, and that the defendants must comply with all federal statutes and regulations that apply to § 1396n(c) waiver programs as long as it remains. Smith v. Rasmussen, 249 F.3d 755, 757 (8th Cir. 2001); Weaver v. Reagen, 886 F.2d 194, 197 (8th Cir. 1989).

There do not appear to be any cases that deal with the specific issue of whether the "opportunity to apply" provision creates an enforceable right under § 1983 when a state simply refuses to provide an application, perhaps because no state except Arkansas has taken such a harsh position. A similar case, however, was presented in McMillan v. McCrimon, 807 F. Supp. 475 (C.D. Ill. 1992), in which the "opportunity to apply" provision was applied against the Illinois Department of Rehabilitation Services after it provided applications but refused to accept or process them. Like the defendants in the present case, Illinois argued that the plaintiffs were already receiving basic Medicaid benefits, that the plaintiffs had been given a full opportunity to apply for such benefits (but no opportunity to apply for the larger array of benefits available under the waiver), and that as a matter of law the provision does not apply to optional waiver services. Id. at 480. The district court rejected these arguments because the term "medical assistance" used in §1396a(a)(8) is defined as "payment of part or all of the costs of twenty-four listed types of services." Id. In addition, § 1396n(c) states that a State plan "may include as 'medical assistance' under such plan payment for all or part of the cost of home or community-based services." Id. (citing 42 U.S.C. § 1396n(c)(1)). Based on these provisions, the district court held that the "opportunity to apply" provision of §1396a(a)(8) "must extend beyond the initial application for Medicaid eligibility to services and benefits provided to Medicaid eligible persons." Id.

The situation in McMillan is not as oppressive as the situation presented here, where Arkansas refuses to even provide applications. Although distinguishable on its facts, McMillan stands for the proposition that §1396a(a)(8) provides a clear and unambiguous statement of the right to have a waiver application accepted and processed by the State, and that this right can be

readily enforced. Although McMillan did not consider whether the "opportunity to apply" provision creates a right enforceable under § 1983, the fact that Illinois did not see fit to even raise the issue, and that the district court had no problem understanding and enforcing the provision, speaks volumes in favor of its enforceability under the circumstances of this case.

B. THE "REASONABLE PROMPTNESS" PROVISION OF 42 U.S.C. 1396a(a)(8)

As stated above, 42 U.S.C. § 1396a(a)(8) provides that the State Plan "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". The plaintiff claims that the defendants are violating the "reasonable promptness" provision of this statute by refusing to give her an application for ACS services.

Under the first prong of the Blessing test, we consider whether the language of this provision is "couched in mandatory, rather than precatory, terms". "The language of § 1396a(a) is mandatory language." Pediatric Specialty Care, 293 F.3d at 478. Therefore, as a matter of law, the "reasonable promptness" provision is intended to benefit the plaintiff, and the first prong is satisfied.

Under the second prong of the Blessing test, we consider whether the interest asserted by the plaintiff is not so "vague and amorphous" that it is beyond the competence of the judiciary to enforce. The plaintiff submits that there is nothing vague or amorphous about her interest in being given an application for ACS services. If anything, the "reasonable promptness" provision of § 1396a(a)(8) stands for the proposition that the plaintiff has the right to receive an application so that she can fill it out and submit it to ADHS for processing. Clearly, it is impossible for the

plaintiff to even begin the process of applying for ACS services without an application. There is nothing vague or amorphous about the plaintiff's interest in receiving an application, and nothing else that puts this interest beyond the competency of the judiciary to enforce.

Under the third prong of the Blessing test, we consider whether the provision creates a binding obligation on the defendants. The language of § 1396a(a)(8) states that medical assistance "shall be furnished with reasonable promptness to all eligible individuals", and seems to be just as binding as the Medicaid statutes at issue in Pediatric Specialty Care.

A number of other jurisdictions have found that the "reasonable promptness" provision of § 1396a(a)(8) creates an enforceable right under § 1983. In Bryson v. Shumway, 308 F.3d 79 (1st Cir. 2002), the plaintiffs suffered from acquired brain disorders, and had the option to receive medical care for that condition under the New Hampshire Medicaid Plan. The plaintiffs preferred to receive those services in an HCBS waiver program established under § 1396n(c). The plaintiffs alleged that New Hampshire was violating the "reasonable promptness" provision of § 1396a(a)(8) by refusing to fill open slots under the program, and New Hampshire argued that the "reasonable promptness" provision is not enforceable under § 1983. Id. at 88.

After setting forth in comprehensive fashion a legal overview of the Medicaid Act and home and community-based waiver programs under § 1396n(c), the First Circuit got to the issue of whether the "reasonable promptness" provision creates an enforceable right. It discussed Blessing and its three-part test, and held that the provision, "on its face, does intend to benefit the plaintiffs." Id.

> Section 1396a(a)(8) requires that state Medicaid plans provide that medical assistance "shall be furnished with reasonable promptness to all eligible individuals." This paragraph is a part of the litany of procedural and substantive protections which state

> Medicaid plans must provide, such as the opportunity for a hearing, and safeguards against the disclosure of private information. By its terms, it benefits "eligible individuals." Those patients who are on the waiting list and for whom slots are available are, we think, "eligible" under the statute such that they are entitled to reasonable promptness. The first prong of Blessing has been met.
>
> Second, the right conferred is not vague or amorphous. "A statute is not impermissibly vague simply because it requires judicial inquiry into 'reasonableness.'" Common law courts have reviewed actions for reasonableness since time immemorial.
>
> Finally, § 1396a(a)(8) does unambiguously bind the states. The subsection mandates that state plans "must" provide that medical assistance "shall" be provided with reasonable promptness. These are not mere guidelines, but rather requirements which states must meet under the Medicaid system.

Id. at 88-89 (internal citations omitted). The First Circuit concluded by stating that "there is a § 1983 cause of action arising from the 'reasonable promptness' provision of 42 U.S.C. § 1396a(a)(8) under the state model waiver plan as approved." Id. at 89.

The same result was reached in Doe v. Chiles, 136 F.3d 709 (11th Cir. 2001), in which a group of developmentally disabled individuals claimed that Florida was violating their right to "reasonable promptness" under § 1396a(a)(8) by causing unreasonable delays in the provision of waiver services. Addressing the first prong of the Blessing test, the Eleventh Circuit held that "[t]he plain language of the provision's reasonable promptness clause is clearly intended to benefit Medicaid-'eligible individuals' - such as the appellees in this case. Therefore, we do not hesitate in concluding that the clause meets the first factor." Id. at 715.

With regard to the second prong of the Blessing test, the Eleventh Circuit held that enforcement of the provision would not strain judicial competence. "[S]ection 1396a(a)(8)'s requirement that 'assistance shall be furnished with reasonable promptness to all eligible individuals' presents a sufficiently specific and definite standard readily susceptible to judicial

assessment . . . Indeed, given the egregious facts of this case it is difficult for the appellants to argue that the appellees do not meet the second factor. We agree with the appellees' assertion that in this context, '[i]t is axiomatic that delays of 'several years' . . . are far outside the realm of reasonableness.'" Id. at 717.

Finally with respect to the third prong of the Blessing test, the Eleventh Circuit held that the language of the provision "is undoubtedly cast in mandatory rather than precatory terms." Id. at 718. "In sum, we hold that the appellees have a federal right to reasonably prompt provision of assistance under section 1396a(a)(8) of the Medicaid Act, and that this right is enforceable under section

1983." Id. at 719.

A number of district courts have also concluded that the "reasonable promptness" provision of § 1396a(a)(8) is enforceable under § 1983. See Martin v. Taft, 222 F. Supp. 2d 940, 978 (S.D. Ohio 2002); Antrican v. Buell, 158 F. Supp. 2d 663, 670-671 (E.D. N.C. 2001); Boudreau v. Ryan, No. 00-C-5392, 2001 WL 840583, at *9 (N.D. Ill. May 1, 2001); Boulet v. Cellucci, 107 F. Supp. 2d 61, 71-72 (D. Mass. 2000); Lewis v. New Mexico Department of Health, 94 F. Supp. 2d 1217, 1233-1236 (D. N.M. 2000); Sobky v. Smoley, 855 F. Supp. 1123, 1146-1147 (E.D. Cal. 1994). For the reasons stated in these cases, and in the other cases cited above, the plaintiff has an enforceable right to reasonable promptness under § 1396a(a)(8).

C. THE "FREEDOM OF CHOICE" PROVISION OF 42 U.S.C. 1396n(c)

Under 42 U.S.C. § 1396n(c)(2), an HCBS waiver shall not be granted unless the state provides assurances that:

(A) necessary safeguards (including adequate standards for provider participation) have been taken to protect the health and welfare of individuals provided services under the waiver and to assure financial accountability for funds expended with respect to such services;

(B) the State will provide, with respect to individuals who -

(i) are entitled to medical assistance for inpatient hospital services, nursing facility services, or services in an intermediate care facility for the mentally retarded under the State plan,

(ii) may require such services, and

(iii) may be eligible for such home or community-based care under such waiver,

for an evaluation of the need for inpatient hospital services, nursing facility services, or services in an intermediate care facility for the mentally retarded;

(C) such individuals who are determined to be likely to require the level of care provided in a hospital, nursing facility, or intermediate care facility for the mentally retarded are informed of the feasible alternatives, if available under the waiver, at the choice of such individuals, to the provision of inpatient hospital services, nursing facility services, or services in an intermediate care facility for the mentally retarded;

* * * *

(E) the State will provide to the Secretary annually, consistent with a data collection plan designed by the Secretary, information on the impact of the waiver granted under this subsection on the type and amount of medical assistance provided under the State plan and on the health and welfare of recipients.

Under this section, the Social Security Act "permits States to offer, under a waiver of statutory requirements, an array of home and community-based services that an individual needs to avoid institutionalization." 42 C.F.R. § 441.300. In addition, unless a state provides the following satisfactory assurances to CMS, CMS will not grant a waiver under § 1396n and may terminate a waiver already granted:

(a) Health and Welfare - Assurance that necessary safeguards have been taken to protect the health and welfare of the recipients of the services. Those safeguards must include -

(1) Adequate standards for all types of providers that provide services under the waiver;

(2) Assurance that the standards of any State licensure or certification requirements are met for services or for individuals furnishing services that are provided under the waiver; and

(3) Assurance that all facilities covered by section 1616(e) of the Act, in which home and community-based services will be provided, are in compliance with applicable State standards that meet the requirements of 45 C.F.R. Part 1397 for board and care facilities.

* * * *

(c) Evaluation of need - Assurance that the agency will provide for the following:

(1) Initial evaluation - An evaluation of the need for the level of care provided in a hospital, a NF, or an ICF/MR when there is a reasonable indication that a recipient might need the services in the near future (that is, a month or less) unless he or she receives home or community-based services. For purposes of this section, "evaluation" means a review of an individual recipient's condition to determine -

(i) If the recipient requires the level of care provided in a hospital as defined in § 440.10 of this subchapter, a NF as defined in section 1919(a) of the Act, or an ICF/MR as defined by § 440.150 of this subchapter; and

(ii) That the recipient, but for the provision of waiver services, would otherwise be institutionalized in such a facility.

(2) Periodic reevaluations - Reevaluations, at least annually, of each recipient receiving home or community-based services to determine if the recipient continues to need the level of care provided and would, but for the provision of waiver services, otherwise be institutionalized in one of the following institutions:

(i) A hospital;

(ii) A NF; or

(iii) An ICF/MR.

(d) Alternatives - Assurance that when a recipient is determined to be likely to require the level of care provided in a hospital, NF, ICF, or ICF/MR, the recipient or his or her legal representative will be -

(1) Informed of any feasible alternatives available under the waiver; and

(2) Given the choice of either institutional or home and community-based services.

* * * *

(f) Actual total expenditures - Assurance that the agency's actual total expenditures for home and community-based and other Medicaid services under the waiver and its claim for FFP in expenditures for the services provided to recipients under the waiver will not, in any year of the waiver period, exceed 100 percent of the amount that would be incurred by the State's Medicaid program for these individuals, absent the waiver, in -

(1) A hospital;

(2) A NF; or

(3) An ICF/MR.

42 C.F.R. § 441.302.

Under these federal statutes and regulations, when a state, like Arkansas, participates in both the ICF/MR program and the HCBS program, a disabled person has an enforceable right to be notified of feasible alternatives for the appropriate level of care, and freedom to choose to receive care under the ICF/MR program or HCBS program. In Wood v. Tompkins, 33 F.3d 600 (6th Cir. 1994), the Sixth Circuit held that 42 U.S.C. § 1396n(c)(2) and 42 C.F.R. § 441.302 "protect the health and welfare of home care Medicaid recipients" and "impose mandatory duties upon participating states". Id. at 608.

> [T]here is nothing vague or amorphous about what the statute or corresponding regulations require of participating states. The duties set forth therein do not involve any fuzzy, undefined concepts like 'reasonable efforts.' Rather, these duties involve unambiguous directives that are well within the ability of the judiciary to enforce.

Id. Based on its analysis, the Sixth Circuit specifically held that 42 U.S.C. §§ 1396n(c)(2)(A), (B), (C), and (E), and 42 C.F.R. §§ 441.302(a), (c), (d), and (f)(2) create rights that may be enforced under § 1983. Id. at 607-611.

The Sixth Circuit seems to be the only federal appellate circuit that has considered this issue, and it appears that only one federal district court has as well. In Lindsey v. Bruton, No. 1:98cv154-T, 1999 WL 33320971 (W.D. N.C. Jan. 20, 1999), the plaintiffs alleged that North Carolina was using funds intended for home and community-based services for other purposes, and diverting those funds away from their child, in violation of 42 U.S.C. § 1396n(c)(2) and 42 C.F.R. § 441.302. Applying the three-part test set forth in Blessing, and finding Wood highly persuasive, the district court held that 42 U.S.C. §§ 1396n(c)(2)(A), (B), (C), and (E), and 42 C.F.R. §§ 441.302(a), (c), (d), and (f)(2) create rights that may be enforced under § 1983. Id. at *6. The result should be no different in this case.

D. THE "FAIR HEARING" PROVISION OF 42 U.S.C. 1396a(a)(3)

Pursuant to 42 U.S.C. § 1396a(a)(3), the State Plan "must . . . provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness". The plaintiff claims that the defendants are violating this provision by not providing her with an opportunity for a fair hearing after they refused to send her an ACS enrollment application, and by placing her on a "request list" for an indefinite period of time.

Under the first prong of the Blessing test, we consider whether the language of this provision is "couched in mandatory, rather than precatory, terms". "The language of § 1396a(a) is mandatory language." Pediatric Specialty Care, 293 F.3d at 478. Therefore, as a matter of law, the "fair hearing" provision is intended to benefit the plaintiff, and the first prong of the Blessing test is satisfied.

Under the second prong of the Blessing test, we consider whether the interest asserted by the plaintiff is not so "vague and amorphous" that it is beyond the competence of the judiciary to enforce. The plaintiff submits that there is nothing vague or amorphous about her interest in being given a right to a fair hearing if the defendants refuse to give her an application for ACS services. The "fair hearing" provision provides the plaintiff a right to an appeal if the defendants deny her claim, or fail to consider her claim with reasonable promptness, and there is nothing vague or amorphous about this concept. The judiciary would certainly be competent to enforce the plaintiff's interest in receiving a fair hearing.

Under the third prong of the Blessing test, we consider whether the provision creates a binding obligation on the defendants. The language of § 1396a(a)(3) states that the State plan "must provide" for granting an opportunity for a fair hearing to the plaintiff, and thus creates a binding obligation on the defendants. Certainly, the language of the "fair hearing" provision is mandatory language, and is just as binding as the Medicaid statutes at issue in Pediatric Specialty Care. See Meachem v. Wing, 77 F. Supp. 2d 431, 438 (S.D. N.Y. 1999) (the "fair hearing" provision is enforceable under § 1983).

III. THREAT OF IRREPARABLE HARM

Whether a preliminary injunction should issue involves consideration of: 1) the threat of irreparable harm to the movant; 2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; 3) the probability that movant will succeed on the merits; and 4) the public interest. Dataphase Systems, Inc. v. C L Systems, Inc., 640 F.2d 109, 112 (8th Cir. 1981). When applying these factors, "a court should flexibly weigh the case's particular circumstances to determine whether the balance of equities so favors the movant that justice requires the court to intervene." United Industries Corp. v. Clorox, 140 F.3d 1175, 1179 (8th Cir. 1998).

The defendants argue at page 5 of their brief that the plaintiff does not suffer a threat of irreparable harm arising out of their refusal to give her an application for ACS services. The plaintiff disagrees. Because the defendants refuse to give an application to the plaintiff, she has no way of applying for ACS services. If she cannot apply for ACS services, she has no way to get them. By foreclosing the plaintiff's ability to receive waiver services, the defendants have exposed her to a very real threat of physical and emotional harm that clearly satisfies her burden of proving a "threat of irreparable harm". Chu Drua Cha v. Noot, 696 F.2d 594, 599 (8th Cir. 1982) (irreparable harm established because loss of some medical care cannot be made up by the later entry of a money judgment) (citing Turner v. Walsh, 435 F. Supp. 707, 711 (W.D. Mo. 1977) (termination or reduction of Medicaid benefits is sufficient irreparable injury to justify temporary restraining order), aff'd per curiam, 574 F.2d 456 (8th Cir. 1978) (approving the district court's opinion as "well-reasoned")). The defendants provide ACS services because they enrich the lives of those who need them, i.e. disabled individuals for whom these services were specifically designed, and there can be no serious question that depriving the plaintiff of her only

opportunity to receive these services exposes her to a threat of irreparable harm.

The defendants argue that the plaintiff cannot prove a threat of irreparable harm simply because there are no open slots under the ACS program. The defendants are mistaken. On page 5 of their brief, the defendants tell the Court that there are only 3,067 total slots under the ACS program, but a letter obtained from the defendants under the Arkansas Freedom of Information Act shows that there are 3,598 total slots under the program at this time. See the letter attached hereto and marked as "Exhibit 1". This letter is dated August 6, 2002, and is from Dr. James Farris, Regional Administrator for the federal Department of Health & Human Services, Centers for Medicare & Medicaid Services, to Ray Hanley, former Director of the Division of Medical Services of the Arkansas Department of Human Services. In the letter, Dr. Farris states that he is pleased to inform Mr. Hanley that his request for an amendment to the Arkansas Home and Community-Based Services Waiver has been approved effective July 1, 2001. The letter states that 2,998 slots were approved for state fiscal year 2001/2002, and 3,598 slots were approved for state fiscal year 2002/2003. There are 3,598 slots approved for the current fiscal year.

The defendants state on page 6 of their brief that there were 2,665 "unduplicated individuals" receiving waiver services on June 30, 2003. Based on this number, there were 993 open slots at that time. According to other information provided by the defendants, there are approximately 2,596 people on the "request list" maintained by the defendants. These people are basically waiting in line to receive an ACS application. See the document attached hereto and marked as "Exhibit 2". The defendants refuse to give an application to any of these people, including the plaintiff, and refuse to determine whether any of them are entitled to one of the open slots.

The defendants argue on page 11 of their brief that the plaintiff does not face a threat of irreparable harm in this case because she is 2,285 on the "request list", and would not get a slot even if all open slots were filled overnight. Their argument is based on the idea that each person ahead of the plaintiff on the "request list" will be found eligible for ACS services. This may not be the case. According to the ACS Provider Manual, eligibility for waiver services "includes a determination of categorical eligibility, a level of care determination, a comprehensive diagnosis and evaluation, the development of a plan of care, a cost comparison to determine cost-effectiveness, and notification of a choice between home and community-based services and institutional services." See § 227.000 of the DDS Alternative Community Services Waiver Program Manual attached hereto as part of "Exhibit 3". Without an application, there is no way for anyone to say that the plaintiff will not qualify for ACS services.

In addition, the argument made by the defendants is based on the presumoption that waiver slots are filled on a "first come, first serve" basis. While this may very well be the case, the plaintiff understands that most states employ some form of triage procedure to prioritize services based on severity of need. Even if the defendants do not use such a procedure and fill slots on a "first come, first serve" basis, their argument belies the fact that there were 993 open slots under the ACS program less than a month ago.

The sad fact of the matter is that the defendants refuse to give ACS applications to the people on the "request list", and thereby subject each of them to a threat of irreparable harm by the sheer delay involved in waiting to see if they even qualify for ACS services. Why the defendants refuse to give these people applications is beyond the plaintiff, especially when there are nearly 1,000 open slots. Give the people applications, let them apply, determine their

eligibility with reasonable promptness, fill the open slots, and let those who do not get a slot wait for one to come open or, if they choose, go to court and argue that more slots should be created. If the plaintiff is given an application but her claim of eligibility denied, she can appeal that decision to ADHS while she would otherwise be waiting for an open slot. The plaintiff should not have to wait in line for an application, only to find out months or years later, after she makes it to the top of the list and finally gets an application, that the defendants reject her claim for eligibility. Under this scenario, the plaintiff would lose the slot that came open for her, after years of waiting on the "request list", while she appeals the adverse eligibility decision to ADHS and, if necessary, through the state-court system under the Arkansas Administrative Procedure Act. If the defendants deny her claim for eligibility, the plaintiff can do all of this now and avoid the wait. Who knows, if ACS applications are provided and the open slots are filled, the plaintiff may get a slot and not have to wait at all.

The defendants suggest that the plaintiff cannot show a need for ACS services, and will not suffer irreparable harm if she does not get them, because she is eligible for Medicaid benefits under the TEFRA Demonstration Waiver, her parents have private insurance, and her parents are obligated under state law to provide her "necessities". These arguments are without merit. First, the plaintiff would gladly demonstrate her need for ACS services if the defendants would simply give her an application. Second, the TEFRA Demonstration Waiver is an optional program that could be cut tomorrow. Indeed, Arkansas Governor Mike Huckabee threatened to terminate the TEFRA program in January of 2002. Third, no person may qualify for ACS services unless they qualify for Medicaid in the first place. See § 228.000 of the DDS Alternative Community Services Waiver Program Manual attached hereto as part of "Exhibit 3". It is absurd to argue

that a person does not need ACS services, and will not suffer irreparable harm if he or she does not receive them, simply because he or she qualifies for Medicaid. The defendants would not have filled the first slot under the waiver if that were the case. Fifth, the plaintiff's parents do not have private insurance that will pay for the services available to the plaintiff under the ACS program. Sixth, although the plaintiff's parents love their daughter more than anything in the world, they are not trained to provide the services available to the plaintiff under the waiver. Clearly, the plaintiff faces a threat of irreparable harm by not being given an opportunity to apply for ACS services.

IV. LIKELIHOOD OF SUCCESS ON THE MERITS

The plaintiff is a five-year-old girl with Down syndrome, and was born with congenital heart defects that have required surgery. She cannot speak or recognize dangers, and needs constant supervision. The plaintiff requires supplemental feeding through a gastrostomy tube in order to meet her nutritional needs, and has other developmental and physical disabilities resulting from her Down syndrome that can be treated with the services the defendants have seen fit to include in the ACS program.

The plaintiff currently receives Medicaid services under the Child Health Management Services ("CHMS") program, the Medicaid program in Arkansas designed to treat children with developmental delays, age six and under. See Pediatric Specialty Care, 293 F.3d at 475-76 (describing the CHMS program in detail). As the years pass by and the plaintiff grows out of the CHMS program, she will need the services provided under the ACS waiver to help her stay out of an institution. The plaintiff's parents do not want their daughter to be placed in an institution, and want her to stay at home for as long as they can take care of her. With ACS services, the

plaintiff can stay at home and stay out of an institution. Waiver services are designed for people just like the plaintiff, are provided nowhere else under the State Medicaid Plan, and include the following:

A. Supportive living

Enables individuals to reside successfully in their own homes and assist them in acquiring, retaining, and improving the self-help, socialization, and adaptive skills necessary to reside successfully in the home and community-based setting.

B. Community experiences

Allows individuals to gain experience and abilities that will prevent institutionalization, and improve community acceptance, job opportunities, and general well being.

C. Respite care

Services to or for waiver participants, regardless of their age, who are unable to care for themselves because of the absence or need for relief of non-paid individuals, including parents of minors, primary caregivers and spouses of participants, who normally provide the care.

D. Non-medical transportation

Enables individuals to gain access to ACS and other community services, activities, and resources.

E. Waiver coordination

Ensures the delivery of all direct care services.

F. Supported employment

Services for individuals for whom competitive employment at or above the minimum wage is unlikely, or who, because of their disabilities, need intensive ongoing support to perform in a competitive work setting.

G. Adaptive equipment

Provides for the purchase, leasing, and repair of adaptive, therapeutic, and

augmentative equipment required to enable individuals to increase, maintain, or improve their functional capacity to perform daily life tasks that would not be possible otherwise.

H. Environmental modifications

Provides for adaptations to the individual's place of residence that are necessary to ensure the health, welfare, and safety of the individual, or which enable the individual to function with greater independence and without which the individual would require institutionalization.

I. Specialized medical supplies

Provides items necessary for life support, and the ancillary supplies and equipment necessary for the proper functioning of such items, including non-durable medical equipment not available under the State Plan.

J. Supplemental support

Help improves or enable the continuance of community living, to allow the opportunity to participate in integrated leisure, recreational, social, and educational activities, and make a positive difference in the life of the participant.

K. Case management

Involves the on-going monitoring of the provision of services included in the participants multi-agency plan of service.

L. Consultation

Assists participants and their parents, guardians, and responsible individuals in carrying out the participant's service plan.

M. Crisis intervention

Delivered in the participant's place of residence or other local community site by a mobile intervention team or professional.

N. Crisis center

Services provided in a crisis center equipped to provide short-term intervention, including 24-hour emergency medical care.

See § 211.000 of the DDS Alternative Community Services Waiver Program Manual attached hereto as part of "Exhibit 3".

The plaintiff's father would like to enroll his daughter in the ACS program, and called ADHS in November of 2002 and requested an application. ADHS would not give the plaintiff's father an application, but said they would send him a Client's Choice form in which he could designate whether he was interested in obtaining services for his daughter under the ACS program or ICF/MR program. ADHS sent a Client's Choice form to the plaintiff's father, which he prepared on behalf of his daughter and sent back to ADHS on November 22, 2002.

On January 8, 2003, ADHS sent a letter to the plaintiff's father in which it acknowledged that it had received his Client's Choice form, and that his daughter "has been added to the Request List and currently is number 2285 on the waiver request list." By their own admission, the defendants refuse to send an ACS application to the plaintiff, and have merely placed her on a "request list" for an indefinite period of time. All the while, there are approximately 993 unfilled slots under the program.

Based on these facts, the plaintiff is confident in her ability to succeed on the merits of this case. A similar situation was presented in Benjamin H. v. Ohl, No. 3:99-0338, Slip op. (S.D. W.V. July 15, 1999). In that case, the plaintiffs were a group of mentally retarded and developmentally delayed individuals who were eligible for benefits under the West Virginia Medicaid Plan. West Virginia, like Arkansas, participates in both the ICF/MR program and the HCBS program. The plaintiffs expressed a preference to receive services under the HCBS waiver program (equal to the ACS waiver in Arkansas). They requested applications, but were placed on a "waiting list" for an indefinite period of time. For this reason, the plaintiffs filed

claims pursuant to 42 U.S.C. § 1983, and alleged that the defendant's policies and procedures denied potential applicants the opportunity to apply for medical assistance. Id. at 21.

The district court granted preliminary injunctive relief to the plaintiffs on this claim. It found that West Virginia had no clear policies, procedures, or forms regarding applications under the waiver program. Critical elements of application policies and procedures had not been reduced to writing, such as criteria for ranking individuals placed by the State on a "waiting list" for services. Individuals were discouraged from applying unless the State thought they were eligible, and no one was given the fully-completed application packet required by the State unless they were on the waiting list and the State had a slot open and waiting to be filled. Id. at 11.

Under these facts, virtually identical to our own, the district court concluded that "[t]hese practices violate the statute requiring that 'all individuals wishing to make application for medical assistance under the plan shall have the opportunity to do so.' 42 U.S.C. § 1396a(a)(8). They also violate the corresponding regulations, which provide that '[t]he agency must afford an individual wishing to do so the opportunity to apply for Medicaid without delay.' 42 C.F.R. § 435.906." Id. at 28. For these reasons, the district court held that the plaintiffs were likely to prevail on this claim, and granted a preliminary injunction. Id. at 31. A copy of the Benjamin H. decision is attached hereto and marked as "Exhibit 4".

The same result was reached in McMillan v. McCrimon, 807 F. Supp. 475 (C.D. Ill. 1992), in which the plaintiffs were severely disabled persons who were eligible for Medicaid and at risk of institutionalization. They claimed that they would be able to avoid entering an institution if they could apply for the Illinois HCMS waiver program, but that the State refused to

accept their applications. Id. at 477. The district court found that the "opportunity to apply" provision applies to waiver programs, that the plaintiffs would suffer irreparable harm without if an injunction was not issued, and that the plaintiffs established a likelihood of success on the merits of their claim. Id. at 479-482.

The defendants cite Makin v. Hawaii, 114 F. Supp. 2d 1017 (Haw. 1999), in support of their argument that the plaintiff cannot demonstrate a likelihood of success on the merits. Their reliance on Makin is misplaced. To be sure, Makin involved a situation in which the plaintiffs could not obtain service under the Hawaii HCBS waiver "because of a lack of state funding for the services." Id. at 1020.

The plaintiff understands that the ACS waiver, like the HCBS waiver in Hawaii, contains a provision which states that:

> The State will make waiver services available to individuals in the target group up to the lesser of the number of individuals indicated as factor C for the waiver year, or the number authorized by the State legislature for that period of time.
>
> The State will inform HCFA in writing of any limit which is less than factor C for that waiver year.

See page 106 of the ACS waiver attached to the Brief in Support of Defendants' Response to Plaintiff's Motion for Preliminary Injunction as "Exhibit A". Unlike the situation in Makin, the Arkansas legislature has not limited the number of slots that may be filled under the ACS program, and the defendants have not informed HCFA (now CMS) of any legislative limit that has been placed on these slots. Indeed, the Arkansas legislature recently stated that:

> Services which are covered by the Arkansas State Medicaid Program or under the Alternative Community Services Waiver Program (ACS) will be utilized to the maximum extent possible for any individual who is eligible for Medicaid coverage. It is the intent

of this section that DDS, as a general policy, maximize the use of Medicaid funding available for appropriate services.

2003 Ark. Acts 16 Spec. Sess. § 12.

V. CONCLUSION

For these reasons, the plaintiff is entitled to the injunction requested in her Complaint.

Respectfully submitted,

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

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CERTIFICATE OF SERVICE

I, an attorney for the plaintiff, certify that I have served a copies of the foregoing pleading on opposing counsel by depositing copies thereof, postage prepaid, in the United States Mail, addressed as follows:

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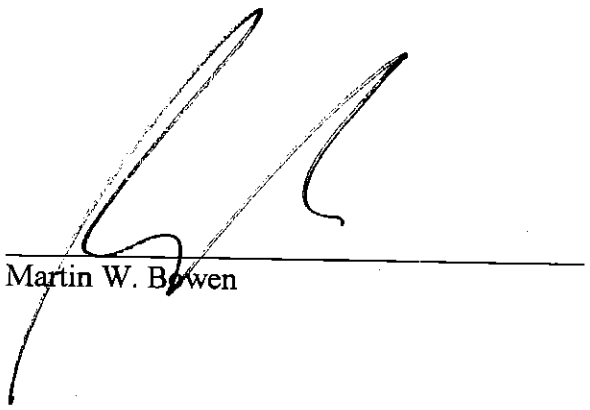
this 29th day of July, 2003.



Martin W. Bowen

UNITED STATE DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS

Exhibits Attached to Original Document in Courts's Case File