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

PEDIATRIC SPECIALTY CARE, INC., CHILD & YOUTH PEDIATRIC DAY CLINICS, INC., TOMORROW'S CHILD LEARNING CENTER, LLC, JAMES AND STACEY SWINDLE, AS PARENTS AND NEXT FRIENDS OF JACOB AND NOAH SWINDLE, MINORS, AND SUSANN CRESPINO, AS PARENT AND NEXT FRIEND OF MICHAEL CRESPINO, A MINOR — PLAINTIFFS

VS. — CASE NO. 4:01CV00830 WRW

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; RAY HANLEY, IN HIS INDIVIDUAL CAPACITY AND IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE DIVISION OF MEDICAL SERVICES OF THE ARKANSAS DEPARTMENT OF HUMAN SERVICES, AND ARKANSAS FOUNDATION FOR MEDICAL CARE, INC. — DEFENDANTS

AMENDED COMPLAINT

The plaintiffs, Pediatric Specialty Care, Inc., Child & Youth Pediatric Day Clinics, Inc., Tomorrow's Child Learning Center, LLC, James and Stacey Swindle, as Parents and Next Friends of Jacob and Noah Swindle, Minors, and Susann Crespino, as Parent and Next Friend of Michael Crespino, a Minor, respectfully come before this Court, by and through their attorneys, Kaplan, Brewer, Maxey & Haralson, P.A., and Armstrong Allen, PLLC, and for their Amended

Complaint against the defendants, 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, Ray Hanley, in his individual capacity and in his official capacity as Director of the Division of Medical Services of the Arkansas Department of Human Services, and Arkansas Foundation for Medical Care, Inc., state:

JURISDICTIONAL STATEMENT

1. Plaintiff Pediatric Specialty Care, Inc. is an Arkansas corporation and has its principal place of business in Pulaski County, Arkansas. Pediatric Specialty Care, Inc. is a qualified provider of services under the Child Health Management Services ("CHMS") program which is part of the Arkansas Medicaid plan.

2. Plaintiff Child & Youth Pediatric Day Clinics, Inc. is an Arkansas corporation and has its principal place of business in Craighead County, Arkansas. Child & Youth Pediatric Day Clinics, Inc. is a qualified provider of CHMS services under the Arkansas Medicaid plan.

3. Plaintiff Tomorrow's Child Learning Center, LLC is an Arkansas corporation and has its principal place of business in Mississippi County, Arkansas. Tomorrow's Child Learning Center, LLC is a qualified provider of CHMS services under the Arkansas Medicaid plan.

4. Plaintiff James and Stacey Swindle are the parents of Jacob and Noah Swindle, minors and qualified recipients of therapy services under the CHMS program. The Swindle family resides in Pulaski County, Arkansas.

5. Plaintiff Susann Crespino is the mother of Michael Crespino, a minor and qualified recipient under the CHMS program. The Crespino family resides in Marion County, Arkansas.

6. Defendant Arkansas Department of Human Services ("ADHS") is an agency of the State of Arkansas.

7. Defendant Kurt Knickrehm is Director of the Arkansas Department of Human Services and, based on information and reasonable belief, is a resident of Pulaski County, Arkansas.

8. Defendant Ray Hanley is Director of the Division of Medical Services of the Arkansas Department of Human Services and, based on information and reasonable belief, is a resident of Pulaski County, Arkansas.

9. Defendant Arkansas Foundation for Medical Care, Inc. ("AFMC") is an Arkansas corporation and has its principal place of business in Sebastian County, Arkansas.

10. The plaintiffs seek declaratory and injunctive relief pursuant to 42 U.S.C. § 1983, and contend that the defendants have violated their federal constitutional and statutory rights with regard to actions they have taken with respect to the provision of CHMS services under the Arkansas Medicaid plan.

11. The Court has federal question jurisdiction pursuant to 28 U.S.C. § 1331, civil rights jurisdiction pursuant to 28 U.S.C. § 1343, and venue pursuant to 28 U.S.C. § 1391.

FACTS PRESENTED

12. Title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq. (1992 & Supp. 2000), commonly referred to as the Medicaid Act, is a federal-state cooperative program designed to provide "medical assistance" to persons whose income and resources are insufficient to meet the costs of medical care. The program is financed by both the federal and state governments.

13. The federal Department of Health and Human Services is charged with administration of the Medicaid program, and has delegated much of its responsibility to the Centers for Medicare & Medicaid Services.

14. Arkansas participates in the Medicaid program, and ADHS is the state agency charged with administration of the Medicaid program in Arkansas.

15. Under the Medicaid program, if a State agrees to establish a Medicaid plan that satisfies the requirements of Title XIX, the federal government will pay a specified percentage of the total amount expended as "medical assistance" under the plan.

16. Federal law requires that in setting reimbursement rates for medical providers enrolled in the Medicaid program, the rates must be sufficient to assure efficiency, economy, and quality of care, and sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population. There is a binding obligation on each state to utilize methods and procedures which consider these factors in setting reimbursement rates.

17. Participation in the Medicaid program is voluntary, but once a State chooses to participate, it must comply with federal statutory and regulatory requirements.

18. The Medicaid Act defines "medical assistance" as "payment of part or all of the cost of [enumerated] care and services". As a general matter, a State may choose which enumerated services to provide, but some services are mandated for most categories of needy persons who receive services under the plan.

19. Essentially, there are three categories of potential recipients under the Medicaid Act: the "categorically needy", the "medically needy", and those whose needs are determined in reference to the poverty level.

20. A State plan must provide "medical assistance" to the "categorically needy", but may choose whether to provide services to the "medically needy".

21. Among those services for the "categorically needy"is early and periodic screening, diagnostic, and treatment services ("EPSDT") for qualified recipients under the age of 21.

22. The CHMS program is set forth under that part of the State plan designated for the "categorically needy" and under that part of the State plan which relates specifically to EPSDT.

23. EPSDT services include those provided under the CHMS program.

24. On November 30, 2001, the defendants announced a decision they have made to redefine the CHMS program and no longer pay for day treatment and therapy services (referred to herein as "the decision"). According to a press release issued by the defendants, the decision will change how services are delivered to children who do not have serious medical problems but who nonetheless are considered at risk.

25. The plaintiffs, and all other providers, children, and families involved in the CHMS program, will suffer extreme injury, loss, and hardship if the decision is not enjoined.

26. The CHMS program comprises an array of clinic services that are intended to provide full medical multi-discipline diagnosis, evaluation, and treatment for the purpose of intervention, treatment, and prevention of long-term disability for eligible recipients.

27. Services under the CHMS program are designed for children who have the most significant medical and developmental diagnoses, and for those who present with multiple, complex conditions. Thousands of children are enrolled in the CHMS program at any given time.

28. Generally stated, services under the CHMS program can be broken down into three broad categories: diagnosis and evaluation services, therapy services, and early intervention day treatment services.

29. When the CHMS program first went into effect, a child could enter the program based on a referral from his or her physician (referred to in Medicaid terms as a Primary Care Physician or "PCP"). Diagnostic and evaluation services were provided at the CHMS clinic. CHMS staff developed a treatment plan, and the treatment plan was approved by the PCP. The treatment plan included therapy services provided in conjunction with early intervention day treatment services designed to result in the maximum reduction of the child's physical and mental disabilities.

30. Initially, payment for CHMS services was fairly straightforward. Services provided under the treatment plan were billed by procedures codes, and payment was equal to the amount of time spent in providing the particular service multiplied by the rate for that service established by ADHS. Given the nature of this formula, ADHS could reduce payment for CHMS services by limiting the amount of services that could be provided, or by reducing rates.

31. In the beginning, however, and as previously stated, the amount of services provided to a child was based on the treatment plan developed by the CHMS clinic and approved by the PCP. The only part of the payment formula controlled by ADHS was the rate.

32. The amount of therapy services provided to a child depended on the child's particular disabilities. Therapy services could include physical therapy, speech therapy, occupational therapy, or psychotherapy, or a combination thereof.

33. As for early intervention day treatment services (referred to in Medicaid terms as "core services "), children generally received a minimum of six hours of core services per day, five days per week. ADHS routinely reimbursed providers for that amount of core treatment at the rates it established for such services.

34. In the fall of 1997, payment for core services was approximately $125.00 per child per day. ADHS, in an effort to reduce payments under the CHMS program, asked CHMS providers if the rates for core services could be reduced or handled in such a way so as to make the program less expensive.

35. Based on this call, a work group consisting of ADHS staff and CHMS providers was created. As a result of their work, an agreement was reached that limited the daily payment for core services to $95.00 per child per day. This agreement went into effect on April 1, 1998, and provided as follows:

> Effective for claims with dates of service on or after April 1, 1998, the Division of Medical Services will implement a $95.00 per day rate for the CHMS-Early Intervention Services (ages 0 through 5) procedure codes. One day of care will be defined as a minimum of 6 hours of service that can include the following procedures with maximums noted below.
>
> 99211

99212
Z1570
Z1571 (Maximum 3 units)
Z1572
Z1575

36. Despite this agreement, ADHS announced in early 1999 that the daily rate for core services would be reduced from $95.00 to $75.00 per child per day.

37. ADHS, Mr. Knickrehm, and Mr. Hanley decided to reduce the rate for core services for purely budgetary reasons and without considering the factors of efficiency, economy, quality of care, and equal access as required by federal law. ADHS, Mr. Knickrehm, and Mr. Hanley refused to conduct a study that considered those factors, and a lawsuit was filed against to enjoin their decision. That lawsuit was filed in the United States District Court for the Eastern District of Arkansas, Western Division, given Case No. LR-C-99-810, and assigned to the Honorable James M. Moody.

38. PSCI filed a motion for temporary injunctive relief along with its Complaint. The Court conducted a hearing with respect to that motion, and ruled that the defendants failed to consider the factors of efficiency, economy, quality of care, and equal access before they reduced the daily rate for core services. The Court concluded that the defendants violated the federal statutory rights of PSCI as provided by 42 U.S.C. § 1396a(a)(30)(A), and temporarily enjoined the rate change just before it went into effect. An order to that effect was filed with the Court on November 5, 1999. See the Order attached hereto and marked as "Exhibit A".

39. Thereafter, ADHS, Mr. Knickrehm, and Mr. Hanley submitted an offer of judgment to PSCI. PSCI accepted the offer, and a Judgment reflecting the agreement was filed on December 14, 1999. See the Judgment attached hereto and marked as "Exhibit B". In

accordance with the agreement, ADHS, Mr. Knickrehm, and Mr. Hanley were permanently enjoined from implementing the $75.00 daily rate for core services. They were also ordered to not reduce rates for services under the CHMS program below the rates in effect on November 6, 1999, unless such reductions are based on an analysis of the costs incurred by efficient and economic providers of such services and are established in conformity with applicable state and federal laws.

40. During that time, on October 1, 1999, ADHS, Mr. Knickrehm, and Mr. Hanley implemented a "utilization control" measure that requires "prior authorization" for all children who wish enter the CHMS program.

41. Generally stated, prior authorization is a form of utilization control by which a state Medicaid agency can verify a patient's need for medical services before services are provided. Prior authorization does not define the services that are available under a particular program, but is a tool the agency may use to ensure that only necessary medical services will be provided.

42. Since its inception, this "first layer" of prior authorization has been administered by AFMC and its employees under contract with ADHS. Referral by the PCP is still required, and a treatment plan must still be developed by the CHMS provider and approved by the PCP. However, the defendants control the admission of each child into the program, regardless of the prescription written by the PCP. Medical reviewers employed by AFMC, including nurses and doctors, decide whether to admit or deny children without deference to the PCP and without conducting a physical examination of the child. They also refuse to admit children with serious developmental delays in only one area of function.

43. On March 1, 2000, within weeks after resolution of the litigation referred to above, ADHS, Mr. Knickrehm, and Mr. Hanley added a "second layer" of prior authorization to the CHMS program. Unlike the "first layer" of prior authorization, which relates solely to the admission of children into the CHMS program, the "second layer" controls the type and amount of medical services for which ADHS will pay once a child is allowed to enter the program. The prescription written by the PCP no longer determines the types and amounts of services that may be provided. The defendants do not examine the child and do not give any deference to the prescription written by the PCP.

44. As with all programs provided by ADHS under the state Medicaid plan, a provider manual has been issued with respect to the CHMS program. Among other things, the CHMS Provider Manual ("the Manual") defines the services available to children under the program. The Manual makes general reference to the two levels of prior authorization referred to above, but does not set forth any standards or criteria for determining whether a child may be admitted into or removed from the program, or the type and amount of services for which the defendants will pay.

45. In fact, the defendants have not promulgated any written guidelines or regulations that govern the process of prior authorization under the CHMS program. For example, and without limitation, there are no written guidelines or regulations that define:

a. The qualifications of those who may be employed by AFMC to make decisions relative to issues of medical care for children with physical and mental disabilities;

b. The standards and criteria to be used by AFMC in deciding which children may be admitted into the CHMS program;

c. The standards and criteria to be used by AFMC in deciding the types of services that children may or may not receive;

d. The standards and criteria to be used by AFMC in deciding the amounts of services that children may or may not receive;

e. The standards and criteria to be used by AFMC in deciding whether ADHS will pay for physical therapy, occupational therapy, and speech therapy services;

f. The standards and criteria to be used by AFMC in deciding whether or not services prescribed by a PCP may be ignored or declined;

g. The reports and supporting documentation that CHMS providers must submit in order to get paid for services they provide;

h. The manner in which the defendants may issue new rules that affect the process of prior authorization;

i. The manner in which the defendants must provide notice of such new rules to CHMS providers; or

j. The rules that govern the process by which decisions made by the defendants may be questioned or appealed.

46. The fact that no written guidelines or regulations exist with respect to the process of prior authorization renders the process constitutionally infirm. The lack of any meaningful standards leaves the entire process of prior authorization subject to arbitrary, capricious, and truly irrational decision-making on the part of the defendants.

47. The absence of written guidelines or regulations is the result of a decision made by the defendants. That decision has resulted in the following:

a. Denial of admission of eligible children into the CHMS program;

b. Removal of eligible children from the CHMS program;

c. Denial of services to children enrolled in the CHMS program; and

d. Limitation or reduction of the types and amounts of services that may be provided to children enrolled in the CHMS program.

48. Together and separately the defendants have abused the process of prior authorization in this way, and have done so for budgetary reasons and to retaliate against the CHMS program. For example, the defendants have unilaterally reduced the amount of core services available to every child allowed into the program from approximately six hours to 3.5 hours per child per day, regardless of the child's medical or psychological condition. Children will not experience the maximum reduction of their physical and mental abilities with only 3.5 hours of core services per child per day. To ensure they receive this maximum benefit, the plaintiffs have continued to provide six hours of core services per child per day and they should be paid for those services.

49. With respect to physical therapy, occupational therapy, and speech therapy services, the defendants have even gone so far as to apply the process of prior authorization only after such services are provided, with the plaintiffs forced to either deny the provision of federally-mandated services or assume the risk that those services will not be approved. In addition, the defendants have issued new rules regarding entitlement to these types of therapy,

without notice to the plaintiffs, and used these new rules to deny payment to the plaintiffs and future services to children.

50. Such decisions have been made for budgetary reasons, and to retaliate against the CHMS program, without considering the factors of efficiency, economy, quality of care, and equal access as required by 42 U.S.C. § 1396a(a)(30)(A). These decisions have no medical basis and violate prescriptions written by PCPs. These decisions are inconsistent with community standards of medical care, and in many cases have forced the plaintiffs to provide CHMS services for which the defendants will not pay.

51. While AFMC issues written decisions with respect to children seeking enrollment and services under the CHMS program, those decisions are not signed and fail to identify the persons who made them. The plaintiffs have tried to identify and speak with the persons who make these decisions, but the defendants refuse to identify these persons or allow the plaintiffs to speak with them.

52. The defendants have acted in this manner for the sole purpose of reducing payments under the CHMS program. ADHS, Mr. Knickrehm, and Mr. Hanley tried to lower the daily rate for core services in 1999, but Judge Moody determined that they violated well-settled law in the process. Not able to change rates, they contracted with AFMC to manipulate the other half of the payment equation by limiting entry into the program and reducing the types and amounts of services for which ADHS will pay. They even tried to terminate the CHMS program altogether, but this Court has enjoined that effort as well.

53. While it is true that the defendants have not reduced rates for services as they tried to do in 1999, they have nonetheless reduced payments under the CHMS program by refusing to

admit children into the program, expelling children from the program, denying services to children enrolled in the program, and either limiting or reducing the provision of critical medical services mandated by federal law.

54. The defendants continue to act in an arbitrary, capricious, and truly irrational manner by changing the rules as they relate to the process of prior authorization without notifying CHMS providers that such changes have been made. The defendants then deny services to qualified children based on the failure of CHMS providers to comply with these rules. The plaintiffs have asked the defendants to issue written guidelines or regulations so as to avoid these problems, but the defendants have refused to do so.

55. By their conduct, the defendants have violated the plaintiff's rights under 42 U.S.C. § 1396a(a)(30)(A). That statute requires the defendants to consider the factors of efficiency, economy, quality of care, and equal access before payments are reduced under the Medicaid program. The defendants have not considered these factors in any way, and have used the process of prior authorization to reduce payments under the CHMS program for purely budgetary reasons.

56. In addition, the defendants have violated the rights of children enrolled in the CHMS program, and of those removed or kept out of the program by the defendants, under 42 U.S.C. § 1396d(a)(13). That statute requires the defendants to provide services to children qualified for enrollment in the Medicaid program that result in the maximum reduction of their physical and mental disabilities. Children enrolled in the CHMS program, and those who would be enrolled in the program but for the defendants, have profound disabilities that may be treated with services provided only under the CHMS program.

57. The conduct of the defendants is arbitrary, capricious, truly irrational, and conscious shocking. As a result, the defendants have violated the federal constitutional rights of the plaintiffs, the children enrolled in the CHMS program, and the children the defendants have either removed or kept out of the program. The defendants have violated their rights to due process and equal protection of the laws, and they should be held liable for all damages resulting from such conduct.

58. The conduct of the defendants has been willful and malicious and in knowing violation of the federal statutory and constitutional rights of the plaintiffs, the children enrolled in the CHMS program, and the children they have either removed or kept out of the program. For these reasons, punitive damages should be imposed against Mr. Knickrehm, Mr. Hanley, and AFMC so as to prevent similar conduct in the future.

59. As for the lack of any written guidelines or regulations as they relate to the process of prior authorization, the plaintiffs request emergency, temporary, and permanent injunctive relief against the defendants by which the current system of prior authorization is enjoined until written guidelines or regulations can be drafted.

60. The defendants have violated the rights of the plaintiffs to procedural and due process.

61. At all times described herein, the defendants were acting under color of state law.

JURY DEMAND

62. The plaintiffs demand a jury trial with regard to all issues of fact that may arise herein.

WHEREFORE, the plaintiffs, Pediatric Specialty Care, Inc. and Child & Youth Pediatric Day Clinics, Inc., pray that their request for injunctive relief be granted, that they be awarded judgment for compensatory damages against defendants Kurt Knickrehm, Ray Hanley, Dr. Michael Moody, and the Jane/John Doe defendants, jointly and severally, that they be awarded judgment for punitive damages against Kurt Knickrehm, Ray Hanley, Dr. Michael Moody, and the Jane/John Doe defendants, that they be awarded their costs herein expended, including reasonable attorney fees pursuant to 42 U.S.C. § 1988, and that they be awarded all other relief to which they may be entitled.

Respectfully submitted,

PEDIATRIC SPECIALTY CARE, INC., CHILD & YOUTH PEDIATRIC DAY CLINICS, INC., TOMORROW'S CHILD LEARNING CENTER, LLC, JAMES AND STACEY SWINDLE, AS PARENTS AND NEXT BEST FRIENDS OF JACOB AND NOAH SWINDLE, MINORS, AND SUSANN CRESPINO, AS PARENT AND NEXT BEST FRIEND OF MICHAEL CRESPINO, A MINOR, Plaintiffs

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CERTIFICATE OF SERVICE

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

Mr. Breck Hopkins
Office of Chief Counsel
Arkansas Department of Human Services
P.O. Box 1437
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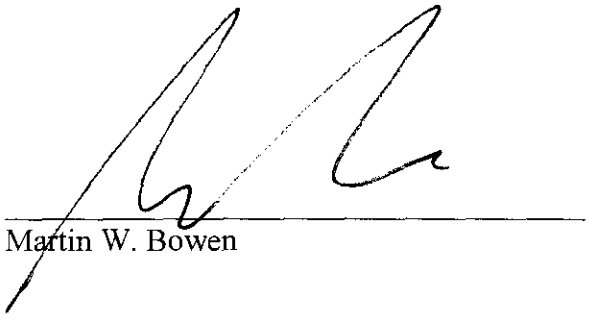
this 6th day of January, 2003.



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