IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

HUNTINGTON DIVISION

BENJAMIN H., by his next friend, Georgann H.,
DAVID F., by his guardian, Carolyn B.,
LORI BETH S., by her next friend, Janie J.,
THOMAS V., by his next friend, Patricia V., and
JUSTIN E., by his next friend, Sherry E.,
Individually and on behalf of all others
similarly situated,

Plaintiffs,

v. CIVIL ACTION NO. 3:99-0338

JOAN OHL, Secretary of the Department
of Health and Human Resources,

Defendant.

Memorandum of Law in Opposition to
Plaintiff's Motion for Preliminary Injunction

The plaintiffs have challenged the decision of the West Virginia Department of Health and Human Resources (hereafter, DHHR) to provide intermediate care level of services in home and community based settings and the manner in which those services are provided. Pursuant to the request for renewal of the Mentally Retarded/Developmentally Disabled Waiver Program (hereafter MR/DD Waiver), which was filed in March 1999, DHHR seeks to continue providing services to mentally retarded and/or developmentally disabled individuals as an alternative to services provided in an Intermediate Care Facility for Mental Retardation (ICF/MR). Primarily,

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the plaintiffs are dissatisfied with the fiscally necessary limitation on the number of slots contained in DHHR's request for renewal of its Home and Community Based Services Waiver. Therefore, the plaintiffs have requested the Court issue injunctive relief prayed for in the complaint. Their motion should be denied as they cannot satisfy their burden of persuasion.

The plaintiffs bear the burden of persuasion in the motion for a preliminary injunction. In Mazurek v. Armstrong, the United States Supreme Court stated "[i]t frequently is observed that a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion. Mazurek v. Armstrong, 520 U.S. 968, 972, 117 S.Ct. 1865, 1867 (1997) (quoting 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure Section 2948, pp. 129-130 (2d ed. 1995).

In this circuit, a balancing of the hardships likely to befall the parties must be used to determine whether a preliminary injunction should be granted. Blackwelder Furniture Co. v. Seilig Mfg. Co., 550 F.2d 189 (4th Cir. 1977). The district court must weigh four factors:

> (1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied,
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> (2) the likelihood of harm to the defendant if the requested relief is granted,
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> (3) the likelihood that the plaintiff will succeed on the merits, and
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> (4) the public interest.

Rum Creek Coal Sales, Inc. v. Caperton, 926 F.2d 353, 359 (4th Cir. 1991)

The district court must balance the first two factors and a preliminary injunction will be granted only if "the plaintiff has raised questions going to the merits so serious, substantial difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation." Blackwelder, 550 F.2d at 195. "As the balance tips away from the plaintiff, a stronger showing on the merits is required." Rum Creek Coal Sales, Inc. 926 F.2d at 359 (4th Cir. 1991).

I. Plaintiffs Will Not Suffer Irreparable Harm if the Preliminary Injunction is Denied

The first factor to be considered is the likelihood of irreparable harm to the plaintiffs if the preliminary injunction is denied. In this case, all five of the named plaintiffs are currently receiving services while they are on the wait list for placement on the MR/DD Waiver Program. In fact, one plaintiff, Lori Beth S. has been having her needs met through these services for the last 8 years. If the plaintiffs do prevail on their claims, they will be placed on the MR/DD Waiver Program. In the meantime, they are not being denied services and therefore, they will not suffer irreparable harm if the preliminary injunction is denied.

II. DHHR Will be Harmed if the Preliminary Injunction is Denied

If a preliminary injunction is granted, the defendants will be harmed. DHHR is unable to completely eliminate the waiting list for the MR/DD Waiver Program due to budgetary restraints. DHHR's budget is not expected to grow in the next year. The decision to limit expansion of the MR/DD Waiver Program to 25 slots per year was

financial. Financially, DHHR cannot take everyone off the wait list.

In fact, DHHR must keep its MR/DD Waiver Program in compliance with the cost neutrality requirements required by federal law. 42 USCA Section 1396 n(C)(2)(D), 42 CFR 441.302 (e) & (f). DHHR must provide satisfactory assurances to the Health Care Financing Administration (HCFA):

> 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; n
> (3) An ICF/MR

42 CFR 441.302 (f).

If the cost neutrality of the program is not maintained, HCFA may refuse to grant a waiver or terminate one if a waiver has already been granted. 42 CFR 441.302.

If the preliminary injunction is granted, the defendant will risk violating the budget neutrality requirements of federal law and having its waiver program terminated by HCFA. Thus, DHHR, and the plaintiffs, have a likelihood of harm if the preliminary injunction is granted.

III. Balance of the First Two Factors Favors the Defendant

When the likelihood of irreparable harm to the plaintiffs if the preliminary injunction is denied is balanced against the likelihood of harm to the defendants, the balance of hardship weighs in the favor of the defendant. Thus, as the balance tips

away from the plaintiff, the plaintiffs must make a stronger showing on the merits.

IV. The Plaintiffs Cannot Meet Their Burden of Persuasion On the Merits of the Case

The plaintiffs must make a stronger showing on the likelihood of prevailing on the merits of the case than if the balance of hardship tipped in their favor. The plaintiffs are unable to meet their burden on their Medicaid Act, Due Process or Americans with Disabilities Act claims.

A. Dismissal of this Case is Supported By the Doctrine of Abstention

This case is appropriate for dismissal by the doctrine of abstention.

> Circumstances appropriate for abstention have been confined to three general categories: (a) cases presenting a federal constitutional issue which might be mooted or presented in a different posture by state court determination of pertinent state law, (b) cases where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar, and (c) cases where, absent bad faith, harassment or a patently invalid state statute, federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings, or state nuisance proceedings antecedent to a criminal prosecution, which are directed at obtaining the closure of places exhibiting obscene films or collection of state taxes.

Colorado River Water Conservation District v United States, 424 U.S. 800, 800, 96 S.Ct. 1236, 1236, (1976) (Headnote 10).

In 1981, the Supreme Court of Appeals of West Virginia transferred E.H. v Matin, 284 S.E.2d 232, back to the Circuit Court of Kanawha County with instructions. Since then, Judge Andrew MacQueen has overseen the reorganization of the mental health care delivery system in West Virginia. In fact, a court monitor, David Sudbeck, has been employed to assist the court in this responsibility. Daniel Hedges, one of the

plaintiffs' attorneys, has been the motivating force in that process. Any issues the plaintiffs may have with the mental health care delivery system should be taken before this state court.

In this case, abstention is appropriate as it satisfies the first category. Here, the plaintiffs have raised a federal constitutional issue which might be mooted or presented in a different posture by state court determination of pertinent state law. Thus, abstention is appropriate and the case should be dismissed.

B. The Plaintiffs Cannot Meet Their Burden of Persuasion Regarding The Merits of Their Medicaid, Due Process or ADA Claims

Since DHHR is unable financially to provide a slot for everyone who would like to be on the Waiver Program, a wait list is maintained by each Behavioral Health Center. The Behavioral Health Centers do not determine eligibility, as only the Office for Behavioral Health Services makes eligibility determinations. However, the individuals on the wait list are provided with services. In this case all five plaintiffs are currently receiving services through Medicaid. This wait list does not violate the Medicaid Act, Due Process Clause or The Americans with Disabilities Act.

1. The Freedom of Choice Claim

Under 42 USCA Section 1396 (n)(c)(2)(C) requires that "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."

Obviously, the plaintiffs have been informed of the feasible alternatives but currently the alternative is unavailable due to fact demand for the slots exceeds the budget for this optional program. However, the plaintiffs continue to receive services while on the wait list. The plaintiffs cannot demonstrate a likelihood of prevailing on this claim.

2. Amount, Duration & Scope Claim

While 42 USCA Section 1396 a(a)(10)(B) does provide that medical assistance made available to one individual shall not be less in amount, duration or scope than that made available to another such individual, 42 USCA Section 1396 n(c)(3) specifically allows a state's MR/DD Waiver Program to waive the requirements of 42 USCA Section 1396 a(a)(10)(B) relating to amount, duration or scope. In this case, West Virginia's MR/DD Waiver Program has waived that requirement. Therefore, the plaintiffs cannot demonstrate a likelihood of prevailing on this claim.

3. EPSDT Claim

The Early and Periodic Screening, Diagnosis and Treatment (hereafter, EPSDT) Services program is a well-child program. Under the program, eligible children receive services including, but limited to, dental services, vision services and hearing services. 42 USCA Section 1396 d(r). If anything is required beyond the preventive screen, the child is referred to a specialist under 42 USCA Section 1396 d(r)(5). The EPSDT program is meant only to provide a preventive screen. Thus, the plaintiffs cannot demonstrate a likelihood of prevailing on the merits of this claim.

4. Reasonable Promptness Claim

42 USCA Section 1396 a(a)(8) requires a state plan to "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." In this case, all the plaintiffs are currently receiving services. Medicaid has provided the plaintiffs with assistance with reasonable promptness.

This case is distinguishable from McMillan V. McCrimon in which the program refused to accept applications or fill slots. In the present case, the behavioral health centers are taking applications and the Office of Behavioral Health Services is filling slots. However, the demand for the slots continue to exceed the money available for this optional program and thus, a wait list is required. The plaintiffs cannot demonstrate a likelihood of prevailing on this claim.

5. Due Process Claim

The wait list does not violate the due process clause as it is rational.

It is important to note the five named plaintiffs are currently receiving medical assistance under the State Medicaid plan. Thus, currently, they are not being denied assistance.

Unlike Goldberg V. Kelly, 397 US 254, 90 S.Ct. 1011 (1970), this case does not involve termination of welfare benefits. Rather, they are simply having their services provided as they wait for placement on the Waiver Program. The process of placing individuals on a wait list is rationally related to a governmental interest.

The Court in Goldberg stated, "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." Goldberg, 397 US at 263, 90 S. Ct. at 1018 (1970)(quoting Cafeteria & Restaurant Workers Union, etc. V. McElroy, 367 US 886, 895, 81 S. Ct. 1743, 1748-1749 (1961)). In this case, DHHR must maintain a wait list simply because the number of individuals who would like MR/DD waiver services exceeds the budgetary constraints of DHHR. The governmental interest involved is the agency's fiscal interests.

The individuals on the wait list have an interest in being placed on the waiver program. However, they are provided with services as they wait. Thus, the governmental interest in this case outweighs the private interest. The wait list is rationally related to a governmental interest. The plaintiffs cannot show a likelihood of prevailing on the due process claim.

6. Americans with Disabilities Act

DHHR has not violated the Americans with Disabilities Act. Individuals with disabilities are being integrated as required by 28 CFR Section 35.130 (d). The plaintiffs claim by virtue of being placed on a wait list, they will be able to receive treatment only at a state psychiatric hospital. However, not one of the named parties has had to resort to that option because they have received services while on the wait list. Additionally, because the number of slots for the program have been limited due to finances, those individuals in a critical level who otherwise wouldn't be adequately

served on the wait list have been placed on the program. The plaintiffs cannot show a likelihood of prevailing on this claim.

V. The Public Interest Dictates a Preliminary Injunction be Denied

DHHR is unable to completely eliminate the waiting list for the MR/DD Waiver Program due to budgetary restraints. DHHR's budget is not expected to grow in the next year. The decision to limit expansion of the MR/DD Waiver Program to 25 slots per year was financial. Financially, DHHR cannot take everyone off the wait list.

In fact, DHHR must keep its MR/DD Waiver Program in compliance with the cost neutrality requirements required by federal law. 42 USCA Section 1396 n(c)(2)(D), 42 CFR 441.302 (e) & (f). DHHR must provide satisfactory assurances to the Health Care Financing Administration (HCFA):

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> (1) A hospital
> (2) A NF;
> (3) An ICF/MR

42 CFR 441.302 (f).

If the cost neutrality of the program is not maintained HCFA, may refuse to grant a waiver or terminate one if a waiver has already been granted. 42 CFR 441.302.

In this case, the public interest dictates the motion for preliminary injunction be

denied.

Conclusion

The plaintiffs cannot meet the burden in their motion for a preliminary injunction. They cannot satisfy the four factors required for a preliminary injunction as discussed herein and thus, their motion for preliminary injunction should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Kimberly L. Stitzinger, Assistant Attorney General, counsel for the West Virginia Department of Health and Human Resources, herein hereby certify that I have served a true and accurate copy of the foregoing "Answer of Defendant, Joan Ohl to Complaint of Benjamin H., Et Al." , by regular U.S. mail, first-class postage prepaid this 4th day of June, 1999 to the following:

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