UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISON

STEVEN HILTIBRAN, et. al.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
RONALD J. LEVY, et al.	)	
	)	Case No. 10-4185-CV-C-NKL
Defendants.	)	

PLAINTIFFS' REPLY SUGGESTIONS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

For the most part, Defendants respond to Plaintiffs' Motion for Summary Judgment by repeating the same arguments this Court has already rejected in granting Plaintiffs' Motion for Preliminary Injunction. The Court should again dismiss these arguments and grant Plaintiffs' Motion for Summary Judgment.

First, Defendants do not dispute any of the material facts presented in Plaintiffs' Statement of Uncontroverted Facts, including the fact that Defendants consider incontinence supplies for noninstitutionalized adults to be "personal hygiene" items, and deny Medicaid coverage on this basis. See Defendants' Suggestions in Opposition to Plaintiffs Motion for Summary Judgment (Doc. # 37) ("Defs' Opp.") at 2-3; Plaintiffs' Suggestions in Support of Motion for Summary Judgment (Doc. # 33) ("Plfs' Sugg.") at 24. Defendants also admit all of the key material facts that establish the clear irreparable harm to Plaintiffs from the Missouri Medicaid (MO HealthNet) program's refusal to cover their medically necessary incontinence supplies. Defs' Opp. at 2-3. Therefore, it is appropriate for the Court to enter summary judgment in Plaintiffs' favor.

Defendants make the same *post-hoc* argument this Court appropriately rejected in granting Plaintiffs' Motion for a Preliminary Injunction—that they can exclude any item of DME by relabeling it a "supply" once a person turns 21. Defs' Opp. at 7. This Court found that "Plaintiffs have demonstrated substantial support that incontinence briefs are 'durable medical equipment,' including references in provider bulletins issued by the Missouri Department of Social Services and the Durable Medical Equipment Manual issued by MO HealthNet." Order Granting Preliminary Injunction (Doc. # 28) ("P.I. Order") at 6 (citations omitted). Defendants offer no reason for the Court to change its finding. Missouri has chosen to label, define, and treat incontinence supplies as "durable medical equipment" for all individuals under 21; it may not unreasonably re-label, redefine, and change its treatment of incontinence supplies solely because of a patient's age and community-based living status.

Further, this categorization is irrelevant to the illegality of the policy. As Plaintiffs already established, the "reasonable standards" provision covers supplies, as well as equipment. Plaintiffs' Reply Memorandum in Support of Motion for Preliminary Injunction (Doc. # 22) ("Plfs' P.I. Reply") at 4-6 (and citations therein); Lankford v. Sherman, 451 F.3d 496 (8th Cir. 2006) (noting that ostomy supplies, diabetic supplies, and oxygen were covered under Missouri's DME regulation). 451 F.3d at 501. In Lankford, the Eighth Circuit struck as per se unreasonable a regulation that "completely exclude[d] items like augmentative communication devices, **catheters**, and **parenteral nutrition supplies" for adults.** Id. at 513 (emphasis added).[1] The complete exclusion of

[1] As noted previously, the federal regulation upon which the DME service category is based requires coverage of "[m]edical supplies, equipment, and appliances." See Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction (Doc. # 7) at

incontinence supplies for noninstitutionalized individuals aged 21 and over is similarly unreasonable here.

Moreover, Defendants again try to re-litigate Lankford by arguing that they "have discretion" to "define the covered services in optional areas of care;" are "permitted to define what constitutes DME and medical supplies;" and can "customize" their state plan "through choosing what items the state will cover." Defs' Opp. at 5, 7, 9. However, Defendants cannot arbitrarily pick and choose which medically necessary equipment and supplies they would like to cover. While Medicaid offers a great deal of flexibility and discretion to the State, such discretion *ends* once the State decides to cover an optional service but then denies non-experimental, medically necessary coverage of the service. See Weaver v. Reagen, 886 F.2d 194, 197 (8th Cir. 1989).

In Lankford, these Defendants argued, as they do here, that they had the right to choose which specific items to provide within an "optional" Medicaid service category. The Eighth Circuit, however, rejected this argument, finding that the "state's failure to provide Medicaid coverage for medically-necessary services **within a covered Medicaid category** is both **per se unreasonable** and inconsistent with the stated goals of Medicaid." 451 F.3d at 511 (emphasis added). Thus, Defendants do not have discretion to "define" their DME coverage in a way that excludes medically necessary items such as adult diapers. They can no more exclude adult diapers than they can exclude the

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8,13-14; Plfs' P.I. Reply at 5 (and citations therein). And the CMS policy relied on by the Eighth Circuit and the United States Supreme Court specifically references "medical *supplies*, equipment, and appliances suitable for use in the home" as being the basis for its guidance on coverage of DME. See Plfs' P.I. Reply at 5, n. 6; Ex. 12 (Doc. # 5-13) (emphasis added); Slekis v. Thomas, 525 U.S. 1098, 1099 (1999); Lankford, 451 F.3d at 507, 511-13. It is no wonder that Defendants' state Medicaid Plan clearly indicates that they cover *medically necessary* supplies and gives examples some of the supplies that they cover. Ex. 33, 34 (Docs. # 22-6, # 22-7).

catheters, diabetic supplies, wheel chair batteries and other items at issue in Lankford. Defendants' argument that they need not cover incontinence briefs because they are "supplies" is nothing more than the *post-hoc* rationalizations of counsel and must be rejected by this Court. See Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212-13 (1988); Plfs' P.I. Reply at 4 (and the cases cited therein).[2] Their policy is unreasonable and violates the Medicaid Act.

Defendants also repeat the same erroneous arguments concerning home health benefits. Defs' Opp. at 9-11. This Court correctly found that Defendants' policy regarding adult diapers violates Medicaid's "home health requirement" by denying medically necessary incontinence supplies which are a mandatory home health service for all Missouri Medicaid recipients. P.I. Order at 9-10. See also Plfs' P.I. Reply at 7-10

[2] The Court previously rejected Defendants' arguments that incontinence supplies can be excluded because they are "single-use" or "personal hygiene" items. P.I. Order at 6, 8. Adjusting their tack, Defendants *now* argue that they only cover supplies necessary to make medical equipment functional; a *new test* unsupported in law or policy. Defs' Opp. at 7-8. This is another argument fashioned for purposes of litigation, and one which is not supported by any contemporaneous policy rationale. Defendants point to Lankford where *one* of the eliminated items of DME was "wheelchair batteries" needed to power the wheel chairs that were still covered by the State. Defs' Opp. at 7, n. 1. However, the policies struck down in Lankford involved a *wide range* of medical equipment and supplies, and the Court's rationale was clearly not limited to only those DME items that were necessary to the operation of *other* DME. The proper standard is whether the items of DME (whether equipment, supplies, or appliances) are non-experimental and medically necessary, not whether they are needed to make other DME functional. Defendants have no authority to exclude medically necessary equipment or supplies based on arbitrary tests that they invent during the course of litigation.

Defendants' ever-shifting litigation position is also reflected in their latest brief. While Defendants' original policy "rationale" for excluding adult coverage of incontinence briefs is that they are "personal hygiene" items, they argued at the preliminary injunction stage that they do not cover them because they are supplies. They now argue simultaneously that they have "not elected to provide medical supplies," that they *do cover supplies* but are "permitted to *define* what constitutes DME and medical supplies," and that they cover supplies but only to the extent necessary to make equipment functional. Defs' Opp. at 7-8 (emphasis added). These inconsistent positions are entitled to no weight and should be rejected by this Court.

(and the cases cited therein). Defendants again attempt to refute Plaintiffs' home health claim by seeking to impose *additional* conditions on the receipt of home health services, including incontinence supplies. Defs' Opp. at 9-11. For the reasons expressed previously, this Court should once again reject Defendants' claim that Plaintiffs must meet these new conditions (adopted by counsel in the course of litigation) in order to be eligible for incontinence supplies. Plfs' P.I. Reply at 7-10. Plaintiffs are entitled to "home health" services under federal law; therefore, they are also entitled to receive medically necessary incontinence supplies.[3] Defendants are violating federal law by denying Plaintiffs mandatory home health services.

Defendants also offer nothing new in response to Plaintiffs' Olmstead claims. Plaintiffs have already established that they meet the elements of a "community integration" claim, and this Court has appropriately found that Defendants violate the ADA and Section 504 by covering adult diapers in nursing homes but not in the community. P.I. Order at 10-13. Defendants do not refute this Court's finding that Plaintiffs face a substantial risk of institutionalization; nor do they dispute Plaintiffs' claims that Defendants are able to accommodate their requests to remain in the

[3] Defendants again argue that home health services are limited to "services for temporary recovery from specific, episodic health incidents," not "ongoing conditions requiring continuing care." See Defs' Opp. at 11. As pointed out previously, this position contradicts federal law, which in fact facilitates coverage of medical equipment and supplies for individuals with *chronic* conditions. Plfs' P.I. Reply at 11; see 42 C.F.R. §§ 440.210(a)(1) (requiring coverage of home health services for categorically needy recipients), 440.70(a), (b) (defining mandatory home health to include medical supplies, equipment, and appliances); 440.70(b)(3)(iii) (requiring recipient's need for medical supplies, equipment and appliances to be reviewed *annually*) (emphasis added). Defendants' other arguments regarding limitations on *home health aide* services and coverage of "non-routine" supplies needed for nursing care are either irrelevant or attempt to impose additional conditions that go well beyond the scope of what is required for coverage of medical equipment and supplies under federal law. See Plfs' P.I. Reply at 7-10. The Court should again reject these erroneous arguments.

community because it is less costly to serve them in the community. P.I. Order at 11-12; Defs' Opp. at 2-3. Defendants also do not refute the Court's finding that Plaintiffs have met the elements of an ADA claim and that Defendants discriminate by covering incontinence supplies for individuals residing in institutions while failing to cover them for individuals residing in the community. P.I. Order at 12-13. Instead, Defendants' allege that "Missouri has waiver programs designed to prevent institutionalization." Defs' Opp. at 12. However, the mere existence of waiver programs with limited slots and waiting lists in a select number of counties is insufficient to defeat Plaintiffs' clearly established ADA and Section 504 claims.[4]

Finally, Defendants make a last-ditch effort to defend their illegal policy by erroneously suggesting that this lawsuit is "in effect, a collateral attack on CMS's approval of the state Medicaid plan" Defs' Opp. at 13. This argument, too, is foreclosed

[4] As Plaintiffs pointed out previously, Steven Hiltibran has qualified for the new Prevention Waiver for individuals with severe developmental disabilities but no other plaintiff has been found eligible for that waiver. Plfs' Sugg. at 25-26, n.3. In fact, until the Court's preliminary injunction, no other Plaintiff had been able to obtain diapers through waivers or any other means in spite of their repeated attempts to do so through their state case managers and case workers. See P.I. Order at 14-15; Plfs' P.I. Reply at 10-13. And even Steven's waiver slot can be revoked at any time according to the terms of the waiver itself and by virtue of the fact that there are no rules governing the Prevention waiver program. See Plfs' Sugg. at 25, n.3. See also Hutchings v. Roling, 151 S.W. 3d 85, 88 (Mo. Ct. App. 2004) where the state reduced the number of waiver slots in response to budgetary shortfalls.

Defendants' arguments notwithstanding, Plaintiffs need not prove that the *only* way they could ever receive diapers is through admission to a nursing home. Def. Opp. at 12-13. Rather, they must demonstrate a *risk* of institutionalization. P.I. Order at 11, citing Fisher v. Okla. Health Care Auth., 335 F.3d 1175, 1185 (10th Cir. 2003); see also U.S. Dep't of Justice, Statement of Interest in Support of Prelim. Inj. (Doc. # 19) at 3-4.

Prior to the litigation, Plaintiffs obtained diapers as best they could with their limited incomes, foregoing other vital necessities to do so. They now receive Medicaid coverage of diapers pursuant to a preliminary injunction entered by the Court. Plaintiffs' Statement of Uncontroverted Material Facts (Doc. # 33), at ¶ 128; Defs' Opp. at 3. As the Court has found, they are in fact at substantial risk without permanent injunctive relief.

by the Court's previous findings: "The approved State Medicaid plan does not indicate any limitation on the coverage of medically necessary incontinence briefs, nor the duration of the coverage for individuals with chronic conditions whose needs for these services are reviewed annually by a physician." P.I. Order at 9. As the Court noted, "Plaintiffs do not contend that Missouri's State Plan, as written, contains provisions that violate the American with Disabilities Act or the Medicaid Act. Rather, it is the state's policy of deeming incontinence briefs as 'personal hygiene' items when they are used by individuals over the age of twenty–which the State Plan does not address–that Plaintiffs wish to enjoin." P.I. Order at 15. See also Neb. Pharm Ass'n v. Neb. Dep't of Social Services, 863 F. Supp. 1037, 1047 (D. Neb. 1994) (refusing to grant deference to CMS approval of state plan because the specific practice at issue was not described in the state plan and, thus, review did not evidence requisite "thorough and reasoned consideration" of the issue at hand) (citation omitted); Aitchison v. Berger, 404 F. Supp. 1137, 1148 (S.D.N.Y.1975), aff'd, 538 F.2d 307 (2d Cir. 1976) (holding approval of state plan "is not more than slightly persuasive" when "the so-called approval does not appear to have followed explicit attention to the question now confronted").

In fact, Defendants do not list *every* DME item in their state plan. They merely list "examples" and indicate that "*medically necessary* items of miscellaneous durable medical equipment are covered and provided through the MO HealthNet Durable Medical Equipment Program." Plfs' P.I. Reply at 13, n. 14. (emphasis added); Ex. 33, 34 (Docs. # 22-6, # 22-7). Defendants' policy of excluding medically necessary incontinence supplies by arbitrarily labeling them "personal hygiene items" is actually

inconsistent with their own State Medicaid Plan, which requires coverage of "*medically necessary* supplies." Ex. 33 (emphasis added); Ex. 34.

Thus, Defendants provide no support for their suggestion that CMS has approved their illegal policy of excluding incontinence supplies from covered DME as a "personal hygiene" item in all circumstances, let alone that any such approval (had it occurred) would be dispositive in this case.[5] Defendants' policy of re-classifying medically necessary incontinence supplies as "personal hygiene" items for noninstitutionalized adults is so arbitrary that it is "per se unreasonable" and in clear violation the federal Medicaid statute. See Lankford, 451 F.3d at 511. Moreover, Defendants' arbitrary policy violates federal requirements to cover mandatory home health services, 42 U.S.C. § 1396a(a)(10)(D), and the ADA and Section 504, and must therefore be stricken by this Court.

CONCLUSION

For the foregoing reasons and those stated in Plaintiffs' original memorandum, this Court should grant Plaintiffs' Motion for Summary Judgment and declare the Defendants' incontinence supplies policy in violation of the Medicaid Act, the ADA and Section 504 of the Rehabilitation Act. Further, it should enter a permanent injunction enjoining Defendants from applying the illegal policy and from arbitrarily limiting the scope of medically necessary adult diapers through any other means. Finally, the Court

[5] The cases cited in Defendants' brief offer no support for their suggestion. One case accords deference to an explicit CMS decision interpreting the Medicaid drug payment statute in the context of a state plan approval, where the court found CMS' interpretation to be a permissible construction of the Medicaid outpatient drug payment statute and one which was *consistent* with the plain meaning of that statute. Pharm. Research and Mfrs of Am. v. Thompson, 362 F.3d 817, 821-24 (D.C. Cir. 2004). The other case is an appeal of a federal agency decision rejecting retroactive application of state-proposed changes to the Missouri Medicaid program, which has nothing to do with this case.

should order Defendants to establish a meaningful and fair procedure whereby all adult Missouri Medicaid recipients can obtain medically necessary incontinence briefs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 4, 2011, I electronically filed the foregoing with the clerk of the Court using the CM/ECF system which sent notification of such filing to the following counsel of record:

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