IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:11-CV-354-FL

| | | |
|---|---|---|
| L.S., a minor child, by and through his father and next friend, Ron S.; K.C., a minor child, by and through his mother and next friend, Africa H.; ALLISON TAYLOR JONES; and D.C., a minor child, by his mother and next friend, Penny C., | ) | |
| Plaintiffs, | ) | |
| v. | ) | ORDER |
| LANIER M. CANSLER, in his official capacity as Secretary of the Department of Health and Human Services; PAMELA SHIPMAN, in her official capacity as Area Director of Piedmont Behavioral Health Care Area Mental Health, Developmental Disabilities, and Substance Abuse Authority; and PIEDMONT BEHAVIORAL HEALTHCARE AREA MENTAL HEALTH, DEVELOPMENTAL DISABILITIES AND SUBSTANCE ABUSE AUTHORITY doing business as PBH, | ) | |
| Defendants. | ) | |

This matter came before the court on class action complaint filed July 5, 2011, wherein plaintiffs request temporary, preliminary, and permanent injunctive relief. Plaintiffs allege that defendant, in implementing a new "Supports Needs Matrix" system for allocating funding for individuals with developmental disabilities who would otherwise qualify for services in an Intermediate Care Facility for the Mentally Retarded, have violated their rights under the Medicaid Act and the Due Process Clause of the Fourteenth Amendment. Plaintiffs allege that application of

the Supports Needs Matrix reduces or terminates Medicaid services, and that plaintiffs have been denied adequate written notice, an opportunity for a fair hearing to contest the reduction in services or to appeal their assignment to particular level of service, and the ability to continue receiving services at the prior authorized level pending the outcome of such hearing. Plaintiffs seek to enjoin defendants from denying, reducing or terminating Medicaid services to plaintiffs and putative class members based upon the "Supports Needs Matrix" system, and to require defendants to prospectively reinstate services that have been denied, reduced or terminated to plaintiffs and class members whose services are reduced, denied, or terminated by reason of that system.

Although no formal motion rises to the face of the docket, the court has cause to consider plaintiffs' request for temporary injunctive relief lodged in the complaint. To obtain such relief, plaintiffs must demonstrate that they are likely to succeed on the merits, that they will likely suffer irreparable harm in the absence of an injunction, that the balance of equities tip in their favor, and that an injunction is in the public interest. See Winter v. Natural Resources Defense Council, 555 U.S. 7, 129 S. Ct. 365, 374 (2008). Additionally, a court may issue a temporary restraining order without notice to the opposing party only if:

> (A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and (B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

Fed. R. Civ. P. 65(b)(1).[1]

[1] For a defendant to have "notice," he or she must be given a fair opportunity to oppose the motion and prepare for such opposition. See Hoechst Diafoil Co. v. Nan Ya Plastics Corp., 174 F.3d 411, 422 (4th Cir. 1999) (citing Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers Local No. 70, 415 U.S. 423, 433 n.7 (1974)). Here, where the parties have consented to allow defendant Lanier M. Cansler additional time to respond to the complaint, on the grounds that counsel needs an additional thirty (30) days to prepare an answer or other appropriate response, and where no separate motion for temporary injunctive relief has been lodged on the docket, the court concludes that there has been no fair opportunity to prepare an opposition to plaintiffs' request.

Plaintiffs have not satisfied the requirements of Winter or Rule 65(b)(1) at this juncture. From a procedural standpoint, they have not submitted a verified complaint or affidavit showing immediate and irreparable injury, loss, or damage, and there has been no certification by plaintiffs' counsel of any efforts to give notice to defendants and why it should not be required. Nor, on the facts before it, is the court able to conclude that plaintiffs have demonstrated a likelihood of success on the merits, that the balance of equities tip in their favor, or that a temporary injunction is in the public interest. It appears from the complaint that all plaintiffs are continuing to receive services, albeit with reduced budgets, and a generalized fear that plaintiffs' conditions are "likely to regress" at these lower funding levels is insufficient by itself to warrant the extraordinary relief sought.[2] Accordingly, plaintiffs' request for temporary injunctive relief is DENIED.

Preliminary injunctive relief is still available to plaintiffs upon motion properly supported and notice to defendants. The parties are encouraged to confer and propose alternative dates for conference by telephone with the court immediately after response is made to the complaint by defendants. At conference, the court will discuss the case schedule and briefing on the anticipated motion for preliminary injunction.

SO ORDERED, this the 12th day of July, 2011.

Louise W. Flanagan

LOUISE W. FLANAGAN
Chief United States District Judge

[2] For plaintiffs to obtain temporary emergency injunctive relief, the court would have to assume that this deterioration would occur between now and the time by which defendants could respond to the complaint and a properly served motion for a preliminary injunction. This unsupported assumption is not one the court is willing to make.