

U.S. DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION
JAMES W. McCOY, CLERK

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

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

PLAINTIFF

VS.

4-03-CV-00493 GTE
CASE NO. _____

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

BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTIVE RELIEF

I. FACTS PRESENTED

Title XIX of the Social Security Act, 42 U.S.C. § 1396, et seq., commonly referred to as the Medicaid Act, is a joint federal and state program designed to provide medical assistance to qualified persons. North Memorial Medical Center v. Gomez, 59 F.3d 735, 737 (8th Cir. 1995). Under the Medicaid Act, 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. 42 U.S.C. § 1396. Some Medicaid services are mandatory and must be provided under the plan, and other services are optional.

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3
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U.S. DISTRICT COURT

Arkansas Medical Society, Inc. v. Reynolds, 6 F.3d 519, 526 (8th Cir. 1993). Participation in the Medicaid program is voluntary, but if a state chooses to participate, it must do so in accordance with federal statutes and regulations. Little Rock Family Planning Services, P.A. v. Dalton, 60 F.3d 497, 498 (8th Cir. 1995).

The federal Department of Health and Human Services is charged with administration of the Medicaid program, and has delegated much of its responsibility to Centers for Medicare & Medicaid Services ("CMS"). Arkansas participates in the Medicaid program, and Arkansas Department of Human Services ("ADHS") is the state agency charged with administration of the Medicaid program in Arkansas. Pediatric Specialty Care v. Arkansas Department of Human Services, 293 F.3d 472, 475-476 (8th Cir. 2002). Among the optional services that may be provided by states under the Medicaid Act are intermediate care facility services for mentally retarded or developmentally disabled individuals provided in an intermediate care facility for the mentally retarded ("ICF/MR program"). 42 U.S.C. § 1396d(a)(15). In addition, as an alternative to providing services in an institution under the ICF/MR program, the Medicaid Act gives states the option of providing home and community-based services for mentally retarded and developmentally disabled individuals ("HCBS program"). 42 U.S.C. § 1396n.

ADHS has chosen to provide services under the ICF/MR program, and an ICF/MR program is included in the Arkansas State Medicaid Plan ("State Plan"). ADHS has also chosen to provide services under the HCBS program, and an HCBS program is included in the State Plan. The HCBS program in Arkansas is called the Alternative Community Services Medicaid Waiver Program ("the ACS program") and is administered by the Division of Developmental

Disabilities Services of ADHS. In its current form, the ACS program provides the full range of Medicaid benefits available under the State Plan. In addition, the ACS program provides case management services, consultation services, crisis abatement respite care services, integrated support services, physical adaptation/adaptive aids, specialized medical supplies, and supported employment services.

Under the ACS program approved by CMS, ADHS has agreed to provide ACS services to 3,598 unduplicated recipients in state fiscal year 2002/2003, and the same number of "slots" for state fiscal year 2003/2004. As of May 12, 2003, the defendants have filled only 2,631 of the 3,598 "slots" available in state fiscal year 2002/2003, and the remaining 967 "slots" have not been filled.

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, resulting in a need for 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. The plaintiff's father would like to enroll her in the ACS program, and called ADHS in November of 2002 and requested an application. ADHS would not provide the plaintiff or her father with an ACS enrollment application, but told the plaintiff's father that he could submit 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 her behalf and sent back to ADHS on November 22, 2002. On January 8, 2003, ADHS wrote 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."

ADHS refuses to send an ACS enrollment application to the plaintiff or her father, and has merely placed the plaintiff on a "request list" for an indefinite period of time despite the fact that there are nearly 1000 unfilled slots under the ACS program. Based on information and reasonable belief, ADHS has taken the same action in response to requests for ACS services made by thousands of other disabled individuals.

II. PRELIMINARY INJUNCTIVE RELIEF

By refusing to give the plaintiff an application for ACS services, the defendants have violated, and continue to violate, the plaintiff's rights under 42 U.S.C. § 1396a(a)(8), 42 U.S.C. § 1396n(c)(2), 42 U.S.C. § 1396a(a)(3), and the procedural due process component of the Fourteenth Amendment to the Constitution of the United States. For these reasons, the plaintiff requests a preliminary injunction that requires the defendants to give the plaintiff an application for ACS services so that her father can prepare and submit the application on her behalf; to process with reasonable promptness the application for ACS services to be submitted by the plaintiff; to issue a decision with reasonable promptness in response to the application for ACS services to be filed by the plaintiff; to promptly notify the plaintiff of the decision made by ADHS with respect to her application for ACS services; to place the plaintiff in the ACS program with reasonable promptness if she subsequently is determined by ADHS to be eligible for ACS services; to provide the plaintiff with a fair hearing, consistent with federal constitutional principles of procedural due process, with respect to any adverse decision made by

ADHS; and to notify the plaintiff of her right to a fair hearing, and any rules issued by ADHS with respect to the filing and prosecution of appeals.

In Dataphase Systems, Inc. v. C L Systems, Inc., 640 F.2d 109 (8th Cir. 1991) (en banc), the Eighth Circuit identified the following factors which should be considered when preliminary injunctive relief is requested:

1. The threat of irreparable harm to the movant;
2. The state of the 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.

Id. at 114. These factors are not to be considered in isolation. "At base, the question is whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined. The equitable nature of the proceeding mandates that the court's approach be flexible enough to encompass the particular circumstances of each case." Id. at 113.

In balancing the equities no single factor is determinative. The likelihood that plaintiff ultimately will prevail is meaningless in isolation. In every case, it must be examined in the context of the relative injuries to the parties and the public. If the chance of irreparable injury to the movant should relief be denied is outweighed by the likely injury to other parties litigant should the injunction be granted, the moving party faces a heavy burden of demonstrating that he is likely to prevail on the merits. Conversely, where the movant has raised a substantial question and the equities are otherwise strongly in his favor, the showing of success on the merits can be less.

Id. In the present case, the Dataphase factors militate clearly in favor of the plaintiff's request for preliminary injunctive relief.

A. THREAT OF IRREPARABLE HARM

The plaintiff, like thousands of other disabled persons in Arkansas who have been placed on the "request list", suffers the threat of irreparable harm because the defendants refuse to give her an application for ACS services. Without an application, the plaintiff has no way of receiving all of the services available under the ACS program. The plaintiff is eligible for, and currently receives, services under the States's TEFRA Waiver Program, but those services do not include many home and community based services available under the ACS program. Without such services, the plaintiff will not develop skills that will allow her to achieve her greatest functional capacity and highest level of independence. The plaintiff faces a real and substantial threat of irreparable harm.

B. BALANCE OF EQUITIES

The state of the balance between this harm and the injury that granting an injunction may inflict on the defendants weighs clearly in favor of the plaintiff and her request for preliminary injunctive relief. If the defendants are ordered to give the plaintiff an application, her father can prepare the application on her behalf and submit it to ADHS for appropriate consideration. Such an injunction will not harm the defendants in any way, and will place the plaintiff on the road to receiving ACS services. To the extent the defendants may argue that budgetary considerations prevent them from filling the open "slots" under the ACS program, "no state may characterize its duty to comply with the requirements of an elective program such as Medicaid as constituting a hardship to its citizens." Illinois Hosp. Ass'n v. Illinois Dept. of Public Aid, 576 F. Supp. 360, 371 (N.D. Ill. 1983). As previously stated, participation in the Medicaid program is voluntary, but if a state chooses to participate, it must do so in accordance with federal statutes and regulations. Dalton, 60 F.3d at 498.

C. PROBABILITY OF SUCCESS ON THE MERITS

The plaintiff has a strong probability of success on the merits. Count I and Count II of her Complaint are based on 42 U.S.C. § 1396a(a)(8), which provides that a 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 defendants, while acting under the color of state law, have violated this enforceable federal right by refusing to send an ACS enrollment application to the plaintiff, and by placing her on a “request list” for an indefinite period of time. Although the defendants have allowed the plaintiff’s father to submit a Client’s Choice form on behalf of his daughter, they have placed her on a “request list” for an indefinite period of time without determining if she is eligible for ACS services and entitled to one of the open “slots”. Such conduct violates the plaintiff’s right to an opportunity to apply for Medicaid services, and her right to receive Medicaid services with reasonable promptness, as guaranteed by 42 U.S.C. § 1396a(a)(8). See Doe v. Chiles, 136 F.3d 709 (11th Cir. 1998).

Count III of the plaintiff’s Complaint is based on 42 U.S.C. § 1396n(c)(2), which provides that when a state, such as Arkansas, participates in both the ICF/MR program and the HCBS program, it must inform eligible individuals about feasible alternatives for the appropriate level of care, and recipients must be allowed to choose to receive care under the ICF/MR program or the HCBS program. The defendants, while acting under the color of state law, have violated this enforceable federal right by depriving the plaintiff of her freedom to choose ACS services under 42 U.S.C. § 1396n(c)(2). Cramer v. Chiles, 33 F. Supp. 2d 1342, 1352 (S.D. Fla. 1999).

Count IV of the plaintiff's Complaint is based on 42 U.S.C. § 1396a(a)(3), which provides that a state Medicaid 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 defendants, while acting under the color of state law, have violated this enforceable federal right by not providing the plaintiff with an opportunity for a fair hearing before ADHS after they refused to send her father an ACS enrollment application, and by placing her on a "request list" for an indefinite period of time. Although the ADHS Office Policy Manual provides a fair hearing with respect to "decisions regarding the eligibility of or receipt of services", there is no provision of that manual, or any other state law or regulation, that provides a fair hearing if ADHS refuses to provide an opportunity to apply for ACS services, or fails to act on a request for ACS services with reasonable promptness. The letter sent by ADHS to the plaintiff's father on January 8, 2003, in which the defendants notified him that his daughter was being placed on a "request list", does not make reference to any right the plaintiff has to a fair hearing if her father believes that ADHS has not given her an opportunity to apply for ACS services, or that ADHS has failed to consider her request with reasonable promptness. Because the defendants have failed to provide the plaintiff with a right to a fair hearing, they are violating her right to a fair hearing as guaranteed by 42 U.S.C. § 1396a(a)(8).

Count V is essentially identical to Count IV, but is based on the procedural due process component of the Fourteenth Amendment to the Constitution of the United States.

D. PUBLIC INTEREST

The public interest will be served by granting temporary injunctive relief in this case. Clearly, the public interest is served when state agencies like ADHS are enjoined from taking unsound, harmful, and illegal positions that adversely impact the health and welfare of the citizens of this State. The position taken by the defendants, i.e. their refusal to provide the plaintiff and other disabled individuals with applications for ACS services, is unsound, harmful, illegal, and contrary to the public interest.

III. CONCLUSION

For these reasons, the plaintiff's Motion for Preliminary Injunctive Relief should be granted, and a preliminary injunction should be issued that requires the defendants to give the plaintiff an application for ACS services so that her father can prepare and submit the application on her behalf; to process with reasonable promptness the application for ACS services to be submitted by the plaintiff; to issue a decision with reasonable promptness in response to the application for ACS services to be filed by the plaintiff; to promptly notify the plaintiff of the decision made by ADHS with respect to her application for ACS services; to place the plaintiff in the ACS program with reasonable promptness if she subsequently is determined by ADHS to be eligible for ACS services; to provide the plaintiff with a fair hearing, consistent with federal constitutional principles of procedural due process, with respect to any adverse decision made by ADHS; and to notify the plaintiff of her right to a fair hearing, and any rules issued by ADHS with respect to the filing and prosecution of appeals.

Respectfully submitted,

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