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United States District Court,
W.D. Missouri,
Central Division.

Steven HILTIBRAN, et al., Plaintiffs,
v.
Ronald J. LEVY, et al., Defendants.

No. 10–4185–CV–C–NKL. | Dec. 27, 2010.

Attorneys and Law Firms

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Opinion

ORDER

NANETTE K. LAUGHREY, District Judge.

***1** Plaintiff Nena Hammond and, by and through their guardians or next friend, Plaintiffs Steven Hiltibran, Nicholas Tatum, and Ronald Coontz, seek declaratory and injunctive relief against Defendants Ronald J. Levy, in his official capacity as Director of the Missouri Department of Social Services, and Ian McCaslin, in his official capacity as Director of the MO HealthNet Division, to enjoin them from denying Medicaid coverage of Plaintiffs' incontinence supplies. Pending before the Court is Plaintiffs' Motion for Preliminary Injunction. [Doc. # 5]. For the following reasons, the Court GRANTS the motion.

I. Factual Background

Missouri participates in the federal Medicaid program and accepts federal matching funds for its program expenditures. [Doc. # 7, at 2]. Missouri's Medicaid program, known as MO HealthNet, provides health services only to the "categorically needy," including Plaintiffs. [Doc. # 7, at 1, 3]; 42 U.S.C. § 1396a(a)(10)(A) (listing groups that comprise the "categorically needy" who must be covered in state Medicaid programs); Mo.Rev.Stat. § 208.151 (Missouri provides Medicaid assistance only to the categorically needy). Plaintiffs are all disabled, low-income Missouri residents who are incontinent due to their disabilities. [Doc. # 7, at 1]. Plaintiffs' physicians have determined that incontinence briefs are medically necessary for Plaintiffs to prevent skin deterioration and infections and to maintain Plaintiffs' ability to live in the community. [Doc. # 7, at 1]. Plaintiffs range in age between 22 and 49. [Docs. # 5–14, ¶ 1; # 5–15, ¶ 1; # 5–16, ¶ 1; # 5–17, ¶ 2].

Missouri provides coverage of incontinence briefs to participants between ages four and twenty. Mo.Code Regs. Ann. tit. 13, § 70–60.010; [Docs. # 5–6, DSS, Provider Bulletin, Vol. 31, No. 52, March 6, 2009 (incontinence briefs listed under "Physician and Durable Medical Equipment"); # 5–7, Missouri Durable Medical Equipment Provider Manual, § 13.22.B (incontinence briefs are "covered for participants age 4 through 20" when there is a medical condition causing incontinence and the briefs are prescribed)]. Those age twenty-one and over who reside in institutional settings, such as nursing homes, also receive Medicaid coverage of incontinence briefs. Mo.Code Regs. Ann. tit. 13, § 70–10.005, Appx. (listing "incontinency pads and pants" under "routine covered medical supplies and services"); 70–10.010, Appx. A (listing "incontinency care (including pads, diapers and pants) under "covered supplies & services"). The Department of Social Services, which administers MO HealthNet, refused Plaintiffs' claims on grounds that their incontinence briefs are personal hygiene items. [Docs. # 7, at 1; # 5–2, at 1; # 5–3, at 1; # 5–4, at 1]. As a result of these policies, three of the plaintiffs lost Medicaid coverage of their incontinence supplies upon turning twenty-one, as they do not live in nursing homes. [Doc. # 7, at 1]. The typical cost of caring for a single person in a nursing home is over $40,000 a year, or over $3,333 monthly. [Doc. # 5–24, ¶ 3]. None of Plaintiffs' treating professionals recommend institutionalizing them in nursing homes. [Docs. # 5–18, ¶¶ 6, 7, 10; # 5–19, ¶ 7; # 5–20, ¶ 13; # 5–21, ¶¶ 6, 9].

***2** Plaintiffs were unable to obtain placement in a waiver program despite seeking help from various State agencies and case managers. [Docs. # 5–13, ¶¶ 9–11, 15–16; # 5–17, ¶¶ 10–11; # 5–16, ¶ 7; # 5–14, ¶ 8]. Each of the plaintiffs receives Supplemental Social Security Income assistance and currently struggles to pay for their incontinence supplies through a combination of donations

from charities and family members. One of the plaintiffs, Ms. Hammond, re-wears used diapers because she struggles to "pay for diapers and also meet all of [her] other basic needs." [Doc. # 5–17, ¶ 10]. The monthly cost of her briefs represents between 2% and 13% of her total monthly income of $694. [Doc. # 5–17, ¶¶ 4–5]. The monthly cost of incontinence briefs as to the other plaintiffs represent between 12% and 43% of their incomes ranging from $547 to $694 per month. [Docs. # 5–14, ¶¶ 1, 17; # 5–15, ¶ ¶ 3, 6; # 5–16, ¶¶ 1, 3]. Plaintiffs' families admit that it is likely that they may have to place Plaintiffs in nursing homes to ensure that they receive sufficient incontinence supplies. [Docs. # 5–14, ¶¶ 17, 21; # 5–16, ¶ 11; # 5–15, ¶ 12; # 5–17, ¶ 13].

Plaintiffs filed this lawsuit for declaratory and injunctive relief to enjoin Defendants from denying Medicaid coverage of their medically necessary incontinence supplies and thereby violating federal Medicaid and disability discrimination mandates. Plaintiffs also seek a fair process by which they can establish the medical necessity of adult diapers. [Doc. # 7, at 1]. Plaintiffs contend that Defendants violate the Medicaid Act because their standards for determining whether a participant's incontinence briefs are covered are unreasonable, 42 U.S.C. § 1396a(a)(17), and because they deny "home health services," which includes incontinence briefs, to Plaintiffs, 42 U.S.C. §§ 1396a(a)(10)(A); 1396d(a)(4)(A). Plaintiffs also assert that Defendants violate the integration mandate of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12131–12165, and Section 504 of the Rehabilitation Act, 29 U.S.C. §§ 701, et seq., by requiring Plaintiffs to be institutionalized before MO HealthNet covers the cost of their briefs.

II. Discussion

A plaintiff seeking a preliminary injunction must establish that (1) he is likely to succeed on the merits, (2) he is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in his favor, and (4) an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.,* 555 U.S. 7, 129 S.Ct. 365, 374 (2008); *Dataphase Sys., Inc. v. C.L. Sys., Inc.,* 640 F.2d 109, 113 (8th Cir.1981). The Court finds that Plaintiffs satisfy all of these requirements.

A. Whether Plaintiffs Are Likely to Succeed on the Merits of Their Claims

i. Plaintiffs' "Reasonable Standards" Claim

In choosing to participate in the Medicaid program and receive federal matching funds, Missouri is bound to comply with federal legislation and regulation. *See Lankford v. Sherman,* 451 F.3d 496, 510 (8th Cir.2006) (citing *Meyers v. Reagan,* 776 F.2d 241, 243–44 (8th Cir.1985) ("When a state receives federal matching funds, its medical assistance program must comply with all federal statutory and regulatory requirements."); *Blum v. Bacon,* 457 U.S. 132, 145–46 (1982)). Although federal law does not require Missouri to provide coverage of durable medical equipment ("DME") to its Medicaid recipients, it has chosen to do so. Mo.Rev.Stat. § 208.152.1(19) (requiring payment for "[p]rescribed medically necessary durable medical equipment [DME]). As a consequence of Missouri's voluntary decision to cover DME and federal requirements, *see, e.g.,* 42 U.S.C. § 1396a; 42 C.F.R. § 440.230(c), the Eighth Circuit Court of Appeals found in *Lankford v. Sherman,* 451 F.3d 496 (8th Cir.2006), that "[b]ecause Missouri has elected to cover DME as an optional Medicaid service, it cannot arbitrarily choose which DME items to reimburse under its Medicaid policy." *Lankford,* 451 F.3d at 511. The court further held that Missouri is required to have a "meaningful procedure for requesting noncovered items." *Id.* at 512.

***3** Here, Defendants argue that the guiding standards in *Lankford* do not apply because incontinence briefs are not DME as the briefs are single-use items, whereas Missouri's definition of DME is "equipment that can withstand repeated use." Mo.Code Regs. Ann. tit. 13, § 70–60.010. However, Plaintiffs have demonstrated substantial support that incontinence briefs are "durable medical equipment," [Doc. # 22, at 2–3], including references in provider bulletins issued by the Missouri Department of Social Services [Doc. # 5–6] and the Durable Medical Equipment Manual issued by MO HealthNet. [Doc. # 5–7]. That Missouri's regulations appear to undermine the foundation of Plaintiffs' claim does not dispose of it given Defendants' statements in their manuals and bulletins that are to the contrary. Additionally, that other types of medical supplies, which cannot withstand repeated use such as diabetic supplies and oxygen supplies, are also deemed "durable medical equipment" further support the characterization of incontinence briefs as DME.

Thus, Plaintiffs have established that the rules in *Lankford* likely apply in this instance, which prevents Missouri from "arbitrarily" denying coverage of incontinence briefs in violation of the Medicaid Act's "reasonable standards" requirement. *See* 42 U.S.C. § 1396a(a)(17) (requiring state Medicaid plans to "include reasonable standards"); 42 C.F.R. § 440.230(c) ("The Medicaid agency may not arbitrarily deny or reduce the amount, duration, or scope

of a required service under sections. 440.210 and 440.220 to an otherwise eligible recipient solely because of the diagnosis, type of illness, or condition.”). Because “[t]he purpose of Medicaid as stated in the Act is to enable states to provide medical treatment to needy persons ‘whose income and resources are insufficient to meet the cost of necessary medical services,’ “ *Hern v. Beye,* 57 F.3d 906, 910 (10th Cir.1995) (citing 42 U.S.C. § 1396), the Eighth Circuit Court of Appeals has held that unreasonable standards that are inconsistent with the purposes of the Medicaid Act include those that “reflect[ ] inadequate solicitude for the applicant’s diagnosed condition, the treatment prescribed by the applicant’s physicians, and the accumulated knowledge of the medical community.” *Weaver v. Reagen,* 886 F.2d 194, 200 (8th Cir.1989).

Plaintiffs argue that Missouri’s standards are arbitrary or unreasonable because Medicaid coverage of the briefs cease for anyone over the age of twenty who is not institutionalized but is living in his or her home. Arguably, such standards fall within *Weaver’s* characterization of “unreasonable” because they do not account for recipients’ diagnosed conditions, prescribed treatment, and the medical community’s knowledge. Indeed, such a standard would arguably violate Missouri’s own statute, Mo.Rev.Stat. § 208.152.1(19) (state Medicaid program must cover “[p]rescribed medically necessary durable medical equipment”), because it would deny medically necessary incontinence briefs to participants based on their age and living situation. Courts have struck down state Medicaid policies that restrict access to medical equipment and supplies by applying a standard narrower than “medical necessity.” *See, e.g., Lankford,* 451 F.3d at 511–13 (finding that plaintiffs established a likelihood of success on the merits in their claim that Missouri’s DME regulation curtailing coverage of DME items for certain non-home-health-care recipients conflicts with Medicaid’s reasonable-standards requirement); *Weaver v. Reagan,* 886 F.2d 194, 198 (8th Cir.1989) (“Once a state chooses to offer such optional services it is bound to act in compliance with the Act and the applicable regulations in the implementation of those services.... [A] state’s plan for determining eligibility ... [must] provide treatment that is deemed “medically necessary” in order to comport with the objectives of the Act.”) (citing *Ellis v. Patterson,* 859 F.2d 52, 56 (8th Cir.1988)); *Meyers v. Reagan,* 776 F.2d 241, 243 (8th Cir.1985); *Beal v. Doe,* 432 U.S. 438, 444–45 (1977) (“[S]erious statutory questions might be presented if a state Medicaid plan excluded necessary medical treatment from its coverage .”). Moreover, here, Plaintiffs are denied the opportunity to establish medical necessity for incontinence briefs due to the blanket presumption that the briefs as “non-medical” or “personal hygiene” items for persons over the age of twenty. [Docs. # 5–2, at 1; # 5–3, at 1; # 5–4, at 1; # 5–5, at 2]. Such a characterization of Plaintiffs’ medical needs is arguably an irrebuttable presumption of the type that the Eighth Circuit Court of Appeals has previously stricken as an “arbitrary denial of benefits.” *Pinneke v. Preisser,* 623 F.2d 546, 548–49 (8th Cir.1980) (rejecting Iowa policy that sex reassignment surgery can never be medically necessary). This denies plaintiff a “meaningful procedure for requesting non-covered items,” as required by *Lankford.* 451 F.3d at 512.

ii. Plaintiffs’ Claim Based on the Mandatory Home Health Services Requirement of the Medicaid Act

***4** All Medicaid recipients in Missouri are entitled to “home health services” including “[m]edical supplies [and] equipment.” 42 U.S .C. §§ 1396a(a)(10)(A), 1396a(a)(4)(A), 1396a(a)(10)(D); 42 C.F.R. §§ 440.70(b)(3), 441.15, 440.210. Missouri’s approved Medicaid plan expressly provides that “[m]edically necessary supplies, which are not routinely furnished in conjunction with patient care visits and which are direct, identifiable services to an individual patient, are reimbursable to the [patient’s home health] agency.” [Doc. # 19–2 (June 3, 2010 Amendment to Missouri State Medicaid Plan, Att. 3 .1–A para 7.c)]. The United States Department of Health and Human Services Centers for Medicare and Medicaid Services has stated that the denial of home health services to Missouri Medicaid beneficiaries violates 42 U.S.C. § 1396a(a)(10)(D). [Doc. # 5–12, at 1]. 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. *See* 42 C.F.R. § 440.70(b)(3)(I).

The State Medicaid plan further states that “[n]eeded items of medical equipment prescribed by a physician are available to all recipients including recipients of home health, through the Durable Medical Equipment program.” [Doc. # 19–2, at 3]. As Plaintiffs have demonstrated support that incontinence briefs are “durable medical equipment,” *see* Part II.A.i., they have met their burden of establishing the likelihood of success on the merits as to this claim.

iii. Plaintiffs’ ADA and Rehabilitation Act Claims

Due to the “non-medical” status that Missouri regulations assign to incontinence briefs to persons over age twenty,

these individuals must submit themselves to an institution in order to receive state Medicaid coverage for their medically necessary incontinence supplies. The Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12131–12134, prohibits public entities from discriminating against individuals with disabilities by, for example, violating the "integration mandate": "[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Section 504 of the Rehabilitation Act applies the same standards to entities that receive federal financial assistance: "No otherwise qualified individual with a disability ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). "The rights, procedures, and enforcement remedies under Title II are the same as under section 504." *Layton v. Elder,* 143 F.3d 469, 472 (8th Cir.1998) (citing *Pottgen v. Mo. State High Sch. Activities Ass'n,* 40 F.3d 926, 930 (8th Cir.1994)). As the Supreme Court held in *Olmstead v. L.C.,* 527 U.S. 581 (1999), public entities are required to provide community-based services to person with disabilities when (1) such services are appropriate; (2) the affected persons do not oppose community-based treatment; and (3) community-based services can be reasonably accommodated, taking into account the resources available to the entity and the needs of other persons with disabilities. *Id.* at 607. Persons at risk of institutionalization may make an integration mandate challenge without having first been placed in institutions. *Fisher v. Okla. Health Care Auth.,* 335 F.3d 1175, 1185 (10th Cir.2003).

***5** Here, Plaintiffs struggle to pay for their incontinence supplies through a combination of donations from charities and family members. Each of the plaintiffs receives Supplemental Social Security Income assistance. One of the plaintiffs, Ms. Hammond, re-wears used diapers because she struggles to "pay for diapers and also meet all of [her] other basic needs." [Doc. # 5–17, ¶ 10]. The monthly cost of her briefs represents between 2% and 13% of her total monthly income of $694. The monthly cost of incontinence briefs as to the other plaintiffs represent between 12% and 43% of their incomes ranging from $547 to $694 per month. Plaintiffs' families admit that it is likely that they may have to place Plaintiffs in nursing homes to ensure that they receive sufficient incontinence supplies. Plaintiffs face a substantial risk of institutionalization. *Compare Fisher,* 335 F.3d at 1184 (finding that medical costs of 36.6% of a monthly income of $547 places "a severe burden on [plaintiff's] finances and could easily force [plaintiff] to enter a nursing home [to receive coverage for plaintiff's medical needs]" and that costs for other plaintiffs of 8% per month on uncovered medical expenses has a "real effect on [plaintiffs'] finances" given monthly incomes of $725 and $313). Here, all of the Plaintiffs receive less than $725 per month and a substantially larger proportion of that income is spent on needed medical supplies. Indeed, Plaintiffs' desire to remain in the community, typified by Ms. Hammond's resorting to re-use diapers, "does not mean that they do not face a substantial risk of harm." *Id.* at 1184–85. Thus, Plaintiffs have shown that may make an integration mandate challenge.

It is undisputed that Plaintiffs meet the first two elements of an integration mandate challenge—that they are appropriate for and do not oppose community placement. Plaintiffs assert that as to the third element, Defendants already fund incontinence supplies for persons below age twenty-one who are non-institutionalized and also provide coverage to persons who live in institutional settings. According to Plaintiffs, that they have not entered nursing homes so as to receive Medicaid-covered incontinence briefs saves Missouri money—the cost of paying for adult diapers ranges between $80 and $300 monthly per person [Doc. # 7, at 21 (the varying amounts paid by Plaintiffs)], whereas the cost of caring for a single person in a nursing home is over $40,000 a year, or over $3,333 monthly. [Doc. # 5–24, ¶ 3]. Therefore, Plaintiffs assert that this shows that Defendants are logistically able to accommodate the coverage of medically necessary incontinence briefs for persons under age twenty-one and that they have the resources to cover the cost of nursing home care for those over the age of twenty-one, which far exceeds the cost of briefs alone, without impacting the coverage of other persons with disabilities. Defendants do not specifically dispute this contention. The Court finds that Plaintiffs have made a showing that under *Olmstead,* Defendants are required to provide incontinence briefs to non-institutionalized adults if they provide briefs to institutionalized adults.

iv. Conclusion as to Plaintiff's Likelihood of Success on the Merits

***6** For Plaintiffs to establish that they are likely to succeed on the merits of their claims, they must be "at least ... sufficiently likely to support the kind of relief it requests." *Sanborn Mfg. Co. v. Campbell Hausfeld/Scott Fetzer Co.,* 997 F.2d 484, 488 (8th Cir.1993). Based on the foregoing, the Court concludes that Plaintiffs have sufficiently pointed to governing law in support of their claims and have demonstrated a fair chance of success at

trial. Accordingly, Plaintiffs have met their burden of establishing a likelihood of success on the merits in their claims against Defendants.

B. Whether Plaintiffs Will Suffer Irreparable Harm if Defendants Are Not Enjoined

As discussed in Part II.A.iii, Plaintiffs face a substantial risk of institutionalization. Here, none of Plaintiffs' treating professionals recommend institutionalizing them in nursing homes. [Docs. # 5–18, ¶¶ 6, 7, 10; # 5–19, ¶ 7; # 5–20, ¶ 13; # 5–21, ¶¶ 6, 9]. Testimony of medical professionals support Plaintiffs' assertion that institutionalization of a person for incontinence alone is medically inappropriate. [Docs. # 7, at 18 (citing Huskey Decl. [Doc. # 5–22], ¶ 24; # 5–24, ¶ 14)]. Additionally, if Plaintiffs are not institutionalized but are unable to obtain incontinence supplies due to their precarious financial situations, Plaintiffs are likely to suffer from skin deterioration and infections. [Doc. # 7, at 1]. The potential harm to Plaintiffs' health and physical condition whether or not institutionalized is irreparable. *See Kai v. Ross,* 336 F.3d 650, 656 (8th Cir.2003) ("[T]he danger to plaintiffs' health, and perhaps even their lives, gives them a strong argument of irreparable injury.").

Defendants argue that "[c]ontinuation of a long-standing policy for the duration of this litigation is not irreparable harm" and that Plaintiffs "are not threatened with a loss of existing Medicaid benefits." [Doc. # 17, at 9]. However, Defendants do not place into context the "continuation" of Missouri policy or Plaintiffs "loss" of benefits. Three of the plaintiffs had received coverage of their incontinence briefs up until they turned twenty-one years old; their benefit was "lost" upon turning twenty-one due to the structure of Missouri's "continuing" policies. Indeed, all Plaintiffs are not threatened by a loss of benefits, but have already lost benefits to which they allege they are entitled. Defendants also argue that Plaintiffs have not applied for any State waiver programs that may provide incontinence briefs as special medical supplies. [Doc. # 17, at 9–10]. However, not only are such waiver programs insufficient to remedy Defendants' alleged violations of the law, *see Lankford,* 451 F.3d at 512–13, all Plaintiffs were unable to obtain placement in a waiver program despite seeking help from various State agencies and case managers. [Docs. # 5–13, ¶¶ 9–11, 15–16; # 5–17, ¶¶ 10–11; # 5–16, ¶ 7; # 5–14, ¶ 8]. Thus, the Court finds that Plaintiffs will be irreparably harmed if Defendants are not enjoined.

C. Whether the Balance of Hardships Tips in Plaintiffs' Favor

***7** Defendants argue that an injunction "would require Missouri to bear the administrative burdens associated with amending its State Plan." [Doc. # 17, at 10]. However, 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. This does not necessarily require Missouri to amend its State Plan. To the extent that Defendants appear to argue that they will be burdened by administrative costs associated with new claims as a consequence of the injunction, Defendants have not identified the nature or extent of these additional costs. On the other hand, the irreparable harm to Plaintiffs' health and physical condition, *see* Part II.B, clearly outweigh the indiscernible administrative costs to Defendants. *Lopez v. Heckler,* 713 F.2d 1432, 1437 (9th Cir.1983) ("Faced with such a conflict between financial concerns and preventable human suffering, we have little difficulty concluding that the balance of hardships tips decidedly in plaintiffs' favor.").

D. Whether an Injunction is in the Public Interest

Defendants argue that "Missouri courts have noted that the state has a compelling governmental interest in carrying out the Medicaid program," which includes "incorporating cost containment measures." [Doc. # 17, at 10]. According to their theory, an injunction would prevent Missouri from enforcing such budgetary concerns and thus "[t]he public interest is better served by the status quo until this litigation is concluded." [Doc. # 17, at 10].

On the other hand, an injunction would preserve the public interest that is embodied by Congress' enactment of the Medicaid program. Moreover, enforcement of the federal law is in the public interest. Here, Defendants are in alleged violation of three federal statutes—the Medicaid Act, Americans with Disabilities Act, and Rehabilitation Act. Thus, a preliminary injunction would serve to prevent both the potential discriminatory segregation of persons with disabilities into nursing homes and the potential physical harm on Plaintiffs and others who are similarly situated who are unable to purchase incontinence supplies. After weighing these varied interests, the Court finds that an injunction will better serve the public.

III. Conclusion

The Court finds that Plaintiffs have established the requirements necessary for a preliminary injunction. Accordingly, it is hereby

ORDERED that Plaintiffs' Motion for Preliminary Injunction [Doc. # 5] is GRANTED.