

IN THE UNITED STATES DISTRICT FOR THE  
WESTERN DISTRICT OF MISSOURI  
CENTRAL DIVISION

SUSAN LAVON LANKFORD; RACHEL ELY; )  
JAN EVERETT, as next friend of JOSEPH )  
EVERETT; DONALD EUGENE BROWN; )  
LAURA LEE GREATHOUSE; KIMBERLY )  
VOGELPOHL; ADAM DANIEL TOMASON, )

Plaintiffs, )

v. )

Case No. 05-4285-CV-C-DW

GARY SHERMAN, DIRECTOR, MISSOURI )  
DEPARTMENT OF SOCIAL SERVICES, IN HIS )  
OFFICIAL CAPACITY, )

Defendant. )

ORDER

Pending before the Court is Plaintiffs' Motion for a Preliminary Injunction (Doc. 2). A hearing on the motion was held on September 7, 2005. For the following reasons, Plaintiffs' Motion is DENIED.

I. Facts

Plaintiffs have disabilities ranging from paralysis to cardio-pulmonary disease. They depend on the Missouri Medicaid program for their prescribed durable medical equipment (DME). Provision of DME is an optional service which, pursuant to Senate Bill 539, effective August 28, 2005, the Missouri legislature has not elected to provide. Senate Bill 539 eliminated certain DME provisions, except to categorically needy children, pregnant women, and to persons who are blind. Emergency rule 13 C.S.R. § 70-60.010, effective September 1, 2005, preserves

the provision of DME services to these three groups. Plaintiffs now seek a preliminary injunction to bar implementation of the emergency regulation.

## II. Legal Standard

The standard for determining whether to issue a preliminary injunction is set forth in Dataphase Sys., Inc. v. C L Sys., Inc., 640 F.2d 109 (8th Cir. 1981) (en banc). The Dataphase test involves the examination of four factors: (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. Id. at 113.

## III. Discussion

### A. Irreparable Harm

Denial of the motion for a preliminary injunction presents no threat of irreparable harm to the plaintiffs in this case. Plaintiffs may receive their medical supplies, equipment, and appliances suitable for use in the home if they qualify for home health services. 13 CSR 70-90.010. Home health services is a required service and DME for medical services must be provided through home health services. Further, if a Plaintiff does not qualify for home health services, he or she may go through the fair and established exception process. 13 CSR 70-2.100.

### B. Balance of Harm

The balance of harm in this case weighs against the granting of a preliminary injunction. If the Court instills a preliminary injunction enjoining the implementation of the emergency regulation, it is not that case that all categorically needy persons would receive DME provisions. Rather, under Missouri law, no individual would be entitled to DME. Senate Bill 539.

C. Probability of Success on the Merits

Plaintiffs' probability of success on the merits weighs against the granting of a preliminary injunction. The main thrust of Plaintiffs' argument is that the emergency regulation violates the comparability requirement of the Medicaid Act. 42 U.S.C. § 1396(a)(10)(B). However, Plaintiffs' arguments fails for three reasons.

First, durable medical equipment is not a required service for the categorically needy. 42 C.F.R. § 440.210. Provision of DME is an optional service that Missouri has not elected to provide. Absent the emergency regulation § 205.152.2, Senate Bill 539 requires that DME be denied to all categorically needy individuals. Plaintiffs' argument that McNeil-Terry v. Roling, 142 S.W.3d 828 (Mo. Ct. App. 2004) controls here is misguided. In that case, the Department of Social Services attempted to restrict dental services by regulation without modifying the state statute. However, the Missouri legislature had opted to provide optional dental services by statute. Thus, Missouri was required to comply with the Medicaid Act and applicable regulations in the implementation of those services. 142 S.W.3d at 833. In this case, however, Missouri law requires only that certain services be provided to the blind, pregnant, and children. It has not elected by statute to provide the optional DME services.

Second, the emergency regulation does not violate comparability requirements as there are limitations to the requirement. Specifically, federal Medicaid regulations allow for the provision of more services to children, pregnant women, and other categorically needy persons. See 42 C.F.R. 440.250(b); 42 C.F.R. 440.250(b); 42 C.F.R. 440.250(p). The regulation at issue permits the provision of additional services to children and pregnant women pursuant to the limits of the comparability exceptions.

Third, federal law specifically allows for comparability waivers. 42 U.S.C. 1396n. Missouri has filed a comparability waiver with the Department of Health and Human Services (HHS) and the Center for Medicare and Medicaid Services (CMS) to permit it to provide more DME services or items to the blind than to other categorically needy persons. If the waiver is not obtained, then the state of Missouri cannot provide the additional DME services to the blind.

D. Public Interest

Consideration of the public interest does not mandate the grant of an injunction in this case. The cuts in the optional DME will reduce the State's expenditures by more than \$24.9 million over a 12 month period. While budgetary constraints may not excuse noncompliance with federal Medicaid law, as discussed above, Missouri is in compliance with federal Medicaid law. AMISUB, (PSL), Inc. v. State of Colo. Dep't. of Social Services, 879 F.2d 789, 800-01 (10th Cir. 1989).

IV. Conclusion

For the foregoing reasons, the Plaintiffs' Motion for a Preliminary Injunction is DENIED.  
IT IS SO ORDERED

/s/ DEAN WHIPPLE  
Dean Whipple  
United States District Judge

DATE: September 13, 2005