

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
WESTERN DIVISION  
Case No.: 5:11-cv-354

K.C. et al., individually and on behalf of all others similarly situated, )  
) )  
Plaintiffs, and )  
) )  
M.S., individually and on behalf of all others similarly situated, )  
) )  
Intervenor Plaintiff )  
) )  
v. )  
) )  
LANIER CANSLER, in his official capacity as Secretary of the Department of Health and Human Services, et al., )  
) )  
Defendants. )

**PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER**

On December 20, 2011, Plaintiffs K.C., D.C., and M.S. moved the Court for a Temporary Restraining Order to prevent Defendants from imposing significant reductions in their Medicaid services effective January 1, 2012. On December 21, 2011, Defendant Piedmont Behavioral Health (PBH) filed an “Initial Response” to the Motion. Plaintiffs now file this reply to address new issues raised by PBH.

PBH contends the motion should be denied because the Court previously denied a Temporary Restraining Order. *See* Order (July 12, 2011) (Docket Entry (DE) 19). However, that Order was solely in response to an unverified Complaint and thus occurred before Plaintiffs filed any evidence or legal authority and before Defendants had had any opportunity to respond. The Court specified that “preliminary injunctive relief is still available upon motion properly supported and notice to defendants.” *Id.* at 3. Moreover, that Order denied a request in the Complaint to temporarily enjoin the July 1, 2011 reductions, not the January 1, 2012 cuts. The total amount by which Plaintiffs M.S.’s D.C.’s and K.C.’s services will have been reduced by

Defendants will substantially increase on January 1, so the circumstances before the Court are now different than at the time of its prior Order. *See generally* Pla. Memo in Supp. of Mot. for TRO [DE 70]. Indeed, Intervenor Plaintiff M.S. was not yet even part of the lawsuit when the July 12 Order was entered, and the Court certainly did not prohibit Plaintiffs from returning to court for a TRO if, as has occurred here, the situation changed.

PBH also argues the motion should be denied because a motion for preliminary injunction is already pending. However, the TRO requested is for much more limited relief than sought in Plaintiffs' preliminary injunction motion. The TRO motion seeks relief only for three named plaintiffs, not the entire class, and seeks only to preserve the status quo *as of today* by preventing the scheduled January 2012 reductions, leaving the July 2011 reductions in place until the Court can rule on the preliminary injunction motion. *See* Pla. Mot. for TRO [DE 70].

PBH speculates that Plaintiffs are seeking to circumvent the stay placed by the Court on briefing of the preliminary injunction motion. This is not correct. Rather, Plaintiffs seek much more limited emergency relief until the stay is lifted. PBH claims its attorneys cannot defend the TRO motion until the stay is lifted, but its thorough response filed within one day of the filing of plaintiffs' motion proves the contrary. *See* Def. PBH Initial Resp. to Mot. for TRO [DE 73].

PBH further asserts that because the January 2012 cuts have been scheduled since April 2011, Plaintiffs should have requested this relief sooner. However, Plaintiffs had three good reasons for waiting to file the present motion. First, Plaintiffs were hopeful until this month that the stay would be lifted by now, that the Court would then order expedited briefing as requested by Plaintiffs, and that their preliminary injunction motion could be heard before January 2012. The motion to disqualify has been fully briefed since Plaintiffs filed their Reply on September 22, 2011 [DE 49] and Plaintiffs had no way to know that the stay would remain in effect for so

long. Second, Intervenor Plaintiff M.S. could not file this motion until the Court granted his motion to intervene, which did not occur until December 5, 2011 [DE 67]. Third, as their declarations make clear, Plaintiffs D.C. and M.S. have been until very recently seeking to avoid the January 2012 cuts in their services through requests to PBH to increase their services based on the results of their recent SIS evaluations. Supp. Dec. of Rachele S ¶¶ 2-10; Supp. Dec. of Penny C. ¶¶ 7-9 [DE 70-2 & 70-5]. Only after it became increasingly clear as this month progressed that PBH would not act on those requests were these Plaintiffs compelled to seek emergency relief from this Court. *Id.*

On the merits, PBH argues that it took no “action” requiring due process. PBH Resp. at n. 2 [DE 73]. This hyper-technical argument, which is based solely on an artificial interpretation of federal regulations and not the Constitution, ignores the reality of the situation demonstrated by Plaintiffs’ evidence. PBH did take adverse action to reduce authorization for Medicaid services to the Plaintiffs in its undated notices mailed in March 2011 by imposing a lower maximum dollar amount, effective July 1, 2011, on the amount of services for which PBH would reimburse Plaintiffs’ health care providers. *See* Decs. of Penny C. Ex. G, Africa Heath Ex. G, & Rachele S. Ex. H [DE 31-41, 31-68, 52-11]<sup>1</sup> PBH has made clear that once the maximum budget imposed by that undated notice is exhausted, PBH will *entirely cease* making payments for Plaintiffs’ Medicaid services. *See e.g.* PBH 7/8/11 and 7/13/11 Progress Notes re Alison Johns (attached as Ex. A).<sup>2</sup> The PBH waiver itself specifies that “the budget limits in the Level of

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<sup>1</sup> PBH correctly notes that it is not an actual provider of services, PBH Resp. at n. 2 [DE 73], but this is true in all cases where the authorization to provide services has been reduced or terminated by a Medicaid agency, and the law is very clear that such action by the state Medicaid agency or its agent first requires adequate written notice and the opportunity for a fair hearing. *See* Memo of Law in Supp. of Mot. for Prel. Injun. at 14-20 [DE 32].

<sup>2</sup> These documents were recently obtained from PBH by Plaintiffs’ attorneys in discovery in a state administrative proceeding.

Support Need Matrix are the maximum Individual Budget amount that can be authorized in a waiver participant's Person Centered Plan." See Aff. Ex. E, App. C-4: 3 [DE 31-7 p.8].

The undated notices mailed to Plaintiffs by PBH in March 2011 specified the maximum amount of services PBH would pay for beginning July 1, 2011 and January 1, 2012 and further stated "the annual Category Budget is the maximum amount of base service funds that can be authorized in your Individual Support Plan." See Decs. of Penny C. Ex. G, Africa Heath Ex. G, & Rachelle S. Ex. H [DE 31-41, 31-68, 52-11]. This notice then informed each plaintiff that a PBH employee would contact him or her to develop a new plan to reduce services to fit within this maximum budget. *Id.* Those PBH employees then instructed Plaintiffs that they must sign new plans of care to reduce their services effective July 1, 2011, in many cases specifically informing Plaintiffs' families that they had no appeal rights and that failure to "agree" to the reduction would cause services to stop entirely on July 1, 2011 or that their children could be removed from their home. See *e.g.* Dec. of Penny C. ¶¶ 31, 33, 35, 40, 43, 46, Exs. U, X; Dec. of Africa Heath ¶¶ 20, 24, 30; Dec. of Rachelle S. ¶¶ 21, 22, 24 [DE 31-34, 31-61, 52-3]. PBH thus plainly attempted to circumvent its legal duty to provide the right to a hearing prior to reducing Medicaid services through a system of budget limits coupled with coercion. Such an end-run scheme to prevent Plaintiffs from exercising the right to contest agency action is plainly inconsistent with due process. See *generally* Memo in Supp. of Mot. for Prelim. Injun. at 4-20 [DE 32].

Finally, PBH complains that one of its attorneys will be out of the state next week and that its offices are closed on Monday and Tuesday. However, Plaintiffs have requested a hearing by telephone, which can easily be attended from out of state, and plaintiffs have no objection to

holding the hearing on Friday, December 30.<sup>3</sup> Alternatively, because both sides have filed briefs, the Court could rule on the motion without a hearing.

### CONCLUSION

For the foregoing reasons and those stated in Plaintiffs' prior filings, Plaintiffs request that this Court issue a Temporary Restraining Order prohibiting Defendants from further reducing Medicaid services to Plaintiffs K.C., D.C., and M.S. effective January 1, 2012 until Defendants first comply with the Due Process requirements of the United States Constitution and the Medicaid program.

Dated: December 22, 2011

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<sup>3</sup> The parties have agreed to appear at a hearing on December 29, 2011 before Magistrate Judge Jones concerning the Plaintiffs' Motion to Disqualify Counsel.

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**CERTIFICATE OF SERVICE**

I hereby certify that I have on this day served a true copy of Plaintiffs' REPLY IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER upon the Defendant's attorneys via electronic means through the CM/ECF system to:

Belinda Smith and Iain Stauffer, N.C. Department of Justice

Stephen D. Martin and Wallace C. Hollowell, Nelson, Mullins, Riley and Scarborough

Rabotteau T. Wilder, Womble, Carlyle, Sandridge, and Rice

This the 22nd day of December, 2011.

/s/Douglas Sea  
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