

COPY

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE OFFICE OF  
FILED ADMINISTRATIVE HEARINGS  
01 DHR 2346

2002 JAN 17 P 4: 37

ASSOCIATION FOR HOME AND  
HOSPICE CARE OF NORTH CAROLINA,  
INC.,

)  
OFFICE OF  
ADMINISTRATIVE  
HEARINGS  
)

Petitioner,

v.

)  
)  
) PRELIMINARY INJUNCTION  
)  
)

DIVISION OF MEDICAL ASSISTANCE,  
NORTH CAROLINA DEPARTMENT OF  
HEALTH AND HUMAN SERVICES,

Respondents.  
)

Upon the motion of Petitioner Association for Home and Hospice Care of North Carolina, Inc. ("AHHC") , for a preliminary injunction pursuant to N.C. Gen. Stat. § 150B-33(b) and Rule 65 of the North Carolina Rules of Civil Procedure, this Court has reviewed the evidence of record, the relevant authorities, and the arguments of counsel for both parties and makes the following FINDINGS OF FACT AND CONCLUSIONS OF LAW based upon the evidence presented:

1. The Petitioner AHHC is an association of approximately 350 home care and hospice agencies in North Carolina ("AHHC Agencies"). This number represents 90% of the licensed home health agencies in North Carolina and AHHC Agencies provide the majority of Personal Care Services under the Medicaid program. More than 80,000 persons receive Medicaid home health services and approximately 20,000 persons receive Medicaid Personal Care Services in North Carolina each year.

2. The Respondent, Division of Medical Assistance, North Carolina Department of Health and Human Services (“DMA”), is the agency responsible for the administration of North Carolina’s program of medical assistance (the “Medicaid Program”).

3. DMA authors and maintains the Medicaid Program’s State Plan which outlines services and procedures for the Medicaid Program and which is submitted to the United States Department of Health and Human Services for approval.

4. On December 19, 2001, AHHC filed a Petition for a Contested Case Hearing in this court challenging new positions by DMA that (1) it will not pay for Home Health Services and Personal Care Services if a physician’s verbal order is not countersigned within 30 days and it will consider the first day of service for payment purposes to be the day the order is signed; and (2) it will not pay for Personal Care Services when an individual has an acute episode in which they receive Home Health Services covered by Medicare, even if such services are provided on different days (such individuals being known as “dually eligible individuals”) (these two positions are collectively referred to as “DMA’s New Positions”).

5. AHHC asserts that DMA’s New Positions substantively and procedurally violate Federal law in that (1) DMA’s actions fail to treat equally all persons within the group of medically and categorically needy (42 C.F.R. § 440.240); (2) DMA is failing to furnish Medicaid promptly to recipients without delay (42 C.F.R. § 435.930); (3) DMA has failed to consider the impact of its positions on the equality of access to care (42 U.S.C. § 1396a(a)(30A)); (4) DMA failed to file an amendment to the State Plan (42 C.F.R. § 430.12); and (5) DMA failed to give sufficient public notice of its intent to change standards for payment (42 C.F.R. § 447.205(a)). AHHC asserts that DMA’s New Positions substantively and procedurally violate State law in that they are contrary to existing regulations, they violate North Carolina’s Policy Act for the Aging (N.C. Gen. Stat. § 143B-181.3), and they are not the product of any rulemaking process.

6. DMA has not promulgated its two New Positions pursuant to rulemaking under the Administrative Procedure Act. The challenged New Positions do not appear in the State Plan. Rather, DMA printed indications of its New Positions in the May 2001 "Medicaid Bulletin" which is mailed monthly to providers and informally advised providers of its New Positions during the latter half of 2001.

7. DMA's New Positions are standards or statements of general applicability and thus are rules under N.C. Gen. Stat. § 150B-2(8a). The New Positions represent changes in established DMA practice which are contrary to existing regulations and N.C. Gen. Stat. § 143B-181.3.

8. Based upon the testimony and affidavits received, DMA's New Positions may also violate Federal law in that (1) DMA's actions fail to treat equally all persons within the group of medically and categorically needy (42 C.F.R. § 440.240); (2) DMA is failing to furnish Medicaid promptly to recipients without delay (42 U.S.C. § 1396a(a)(8), 42 C.F.R. § 435.930); (3) DMA failed to consider the impact of its positions on the equality of access to care (42 U.S.C. § 1396a(a)(30A)); (4) DMA failed to file an amendment to the State Plan (42 C.F.R. § 430.12); and (5) DMA failed to give sufficient public notice of its intent to change standards for payment (42 C.F.R. § 447.205(a)).

9. In addition to advising AHHC Agencies that they may not bill Medicaid for services falling in the two challenged categories, DMA has indicated that it intends to recoup payments it made to providers if it discovers that the services were provided pursuant to an order that was signed more than 30 days after being verbally given and that it intends to recoup payments made for Personal Care Services provided to a patient who was receiving Medicare home health services.

10. As a result of DMA's New Positions, the following events have occurred:

- (a) AHHC Agencies have been forced to discharge dually eligible individuals from either Medicare Home Health services or Medicaid Personal Care Services or not accept the referral of dually eligible individuals, causing great distress and hardship to the individual patients and to the AHHC Agencies;
- (b) AHHC Agencies may be forced to delay provision of services to patients until they have received a signed order from the physician or discharge patients before the 30<sup>th</sup> day of service if the physician fails to countersign the verbal order for services; and
- (c) AHHC Agencies have suffered and will continue to suffer financial harm in the form of lost business, lost patient referrals, and additional staffing difficulties.

11. AHHC has no other adequate remedy at law in that AHHC Agencies cannot recover money damages for the Respondent's violation of the Administrative Procedure Act, Federal law, and State law and if such damages were available, the amount would be difficult, if not impossible, to determine. Any and all of the Respondent's future activities in furtherance of its New Positions will continue to cause AHHC, the AHHC Agencies, and Medicaid recipients of North Carolina further injury.

12. DMA suffers no significant harm in not beginning recoupment actions pursuant to its New Positions and in acting to maintain the *status quo* that existed prior to its New Positions regarding verbal orders and dual eligibility.

THEREFORE, the Court concludes as a matter of law that:

1. AHHC has shown probable cause and established by the evidence a likelihood of success on the merits of its Petition for Contested Case, specifically that DMA's positions both substantively and procedurally violate Federal and State law and require rulemaking;

2. AHHC has shown and established by the evidence that without a preliminary injunction, it is likely to suffer irreparable loss, and, in the opinion of the court, issuance of a preliminary injunction is necessary for the protection of AHHC's rights during the course of litigation;

3. The potential for harm to AHHC in the absence of a preliminary injunction is greater than the potential for harm to DMA if a preliminary injunction is granted; and

4. No security for the issuance of an injunction is required because DMA suffers no material harm by issuance of an injunction.

WHEREFORE, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

1. That, until further order of this court, the Respondent DMA, is hereby restrained from posting, publishing, or otherwise disseminating information pertaining to its New Positions that (1) DMA will not pay for home health services and Personal Care Services if a physician's verbal order is not countersigned within 30 days and it will consider the first day of service for payment purposes to be the day the order is signed; and (2) DMA will not pay for Personal Care Services when an individual has an acute episode in which they receive home health services covered by Medicare. This does not prohibit providing information to providers or recipients on other issues;

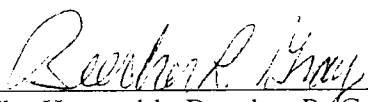
2. That, until further order of this court, the Respondent DMA is hereby restrained from pursuing or initiating recoupments pursuant to its New Positions as described in paragraph 1 above; provided, however, DMA is not restrained from pursuing recoupment on other grounds;

3. The Respondent DMA shall post a copy of this Order on its website, and shall provide a link to this posting in the February 2002 Medicaid Bulletin posted on its website. Further, the Respondent shall make reference to this Order and provide an address to the website posting of the Order in the March 2002 Bulletin that is mailed to all Medicaid providers. Lastly, the Respondent shall mail a copy of this Order to all AHHC Agencies.

4. Discovery in this contested case shall be completed on or before March 4, 2002. The Court will enter a separate Scheduling Order providing a date for filing dispositive motions and a date for hearing. The parties should attempt to agree on a proposed Scheduling Order to present to the undersigned, but if the parties are unable to agree, the undersigned will consider each party's proposed Scheduling Order before entering its Scheduling Order.

5. No security for the issuance of this Order is required.

ENTERED this 18 day of January, 2002 at 10:26 A.M. o'clock.

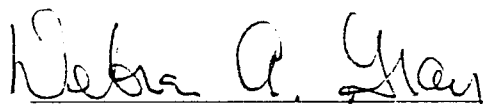
  
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The Honorable Beecher R. Gray  
Administrative Law Judge Presiding

A copy of the foregoing was mailed to:

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This the 18 day of January, 2002.



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