

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

O.B. by and through his parents GARLAND)
BURT and JULIE BURT, **C.F.** by and through)
his mother, KRISTEN FISHER, **J.M.** and **S.M.**)
by and through their parents, DAN MCCULLOUGH)
and MICHELE MCCULLOUGH,)
individually and on behalf of a class,)

Plaintiffs,)

vs.)

FELICIA F. NORWOOD, in her official capacity)
as Director of the Illinois Department of)
Healthcare and Family Services,)

Defendant.)

No. 15-CV-10463

Judge: Charles P. Kocoras

Magistrate: Michael T. Mason

**PLAINTIFFS' AND CLASS'
SECOND MOTION TO ENFORCE
AND/OR MOTION TO MODIFY
PRELIMINARY INJUNCTION ORDER**

Now comes the Plaintiffs and Class, by and through their attorneys, and file this Second Motion to Enforce and/or Modify the Preliminary Injunction Order.

I. Non-Compliance With Preliminary Injunction Order and Orders of this Court.

1. Nine months after this Court entered a Preliminary Injunction Order against Defendant, Defendant has failed to “take immediate and affirmative steps to arrange” for in-home shift nursing services at her approved levels. *See* ECF No. 42 at 2. Defendant has not reported that any step has been taken that improved staffing for a Plaintiff or Class Member, nor has Defendant

committed to take any future steps to comply with the Preliminary Injunction Order.¹ Simply put, Defendant has not shown that a single Plaintiff or Class Member has benefitted from the entry of the Preliminary Injunction Order.

2. Since the Seventh Circuit affirmed the entry of the Preliminary Injunction, Class Counsel has had numerous discussions with Defendant's attorneys and have submitted numerous proposals to Defendant suggesting immediate and affirmative steps she can undertake in order to provide relief to Plaintiffs and Class and, to date, Defendant has done nothing that will provide any timely benefit to a Plaintiff or Class Member.

3. In response to this Court's Order of November 1, 2016, Class Counsel proposed a Joint Action Plan to Defendant, which set forth both non-economic and economic steps with corresponding timelines or deadlines that Defendant should undertake in order to provide relief to the four Plaintiffs and eight Class Members. *See* ECF No. 97; *see also* Exhibit "A." Class Counsel recognizes that success for this small group of twelve could serve as a template to provide success for the entire Class. To date, Defendant has failed to provide a meaningful response to Plaintiffs' proposed Joint Action Plan. This Court's November 1st Order set a deadline of December 13, 2016 to have an action plan signed by the parties. That deadline has lapsed, despite Plaintiffs' best efforts.

4. Plaintiffs and Class filed their First Motion to Enforce on June 17, 2016. ECF No. 66. When reviewing the record in this case, which included the First Motion to Enforce (ECF No. 66) and this Court's ruling on that motion (ECF No. 79), the Seventh Circuit Court of Appeals

¹ Plaintiffs can identify only one step that Defendant has taken since April 6, 2016, which is to remove her requirement that nurses serving Plaintiffs and Class Members have a certain amount of experience. However, Defendant has yet to report that a single Plaintiff or Class Member benefitted from this change.

noted that “there is no indication that HFS will (unless compelled by the courts) lift a finger to find nurses to provide home nursing for children in O.B.’s situation.” ECF No. 94 at 7.²

5. On August 5, 2016, this Court ruled on the Plaintiffs’ First Motion to Enforce the Preliminary Injunction Order, requiring Defendant to report monthly on “staffing percentages, based upon newly received paid claims data” in addition to “information regarding the steps undertaken to arrange for in-home shift nursing services based on the [Defendant’s] case-by-case review”. ECF No. 79 at 8. Defendant only provided two of the four court-ordered reports, despite Plaintiffs’ inquiries regarding the status of overdue reports. Neither of the two submitted reports identified a single Plaintiff or Class Member who has benefitted from the Preliminary Injunction Order.

II. Illinois Medicaid Nursing Rates Impact The Delivery of Nursing Services.

6. Defendant is aware that nursing rates do have an impact as to whether nursing services can be delivered to Plaintiffs and Class Members. Defendant applies a two-tiered reimbursement rate structure for in-home shift nursing services, as illustrated in Table A below. (Table A summarizes Defendant’s procedure codes G0299-G0300, *see* Exhibit B at 2-3.)

² The Seventh Circuit Court of Appeal further observed that:

The state’s reference to “many steps already taken” is unsubstantiated in its briefs . . . we want first to note that the state has not told us what “steps” it has taken to provide in-home nursing care for children with the afflictions involved in this case. Has it made active efforts to recruit nurses for such children? There is no indication that it has, and certainly no evidence. It hasn’t told us how many nurses (if any) it has *ever* recruited to provide home nursing care for afflicted children, or even how many nurses there are in Illinois (163,000, according to The Henry J. Kaiser Family Foundation, *State Health Facts*, “Total Number of Professionally Active Nurses,” April 2016 <http://kff.org/other/state-indicator/total-registered-nurses/?currentTimeframe=0%20&sortModel#%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D>). Nor are we told how many nurses in other states might be recruited at reasonable cost to provide care for the children of the plaintiffs and other class members, should it be difficult to recruit Illinois nurses.

ECF No. 94 at 7 (emphasis in original.)

Table A: Defendant’s Fee Schedule for In-Home Shift Nursing Services

Defendant’s Rate Structure	Applicability of Fee Schedule	Services Provided by a RN (Registered Nurse)	Services Provided by an LPN (Licensed Practical Nurse)
“Tier 1” Rates	<ul style="list-style-type: none"> ▪ Fee Schedule for children residing in Cook, DuPage, Kane and Will counties. ▪ (Apparently) authorized on a case-by-case basis for children outside of these counties. 	\$35.03	\$31.14
“Tier 2” Rates	<ul style="list-style-type: none"> ▪ Fee Schedule for children residing outside of Cook, DuPage, Kane and Will counties. 	\$28.75	\$24.78

7. “Tier 1” includes a rate of \$35.03 per hour for services provided by an RN (Registered Nurse) and \$31.14 per hour for services provided by an LPN (Licensed Practical Nurse).

8. “Tier 2” includes a rate of \$28.75 per hour for services provided by an RN (Registered Nurse) and \$24.78 per hour for services provided by an LPN (Licensed Practical Nurse).

9. In an implicit recognition that nursing rates affect the availability of nursing services, Defendant will authorize Tier 1 rates (a rate of \$35.03 for RN and \$31.13 for LPN services) on an individual basis for children outside of Cook, DuPage, Kane and Will counties in attempt to secure in-home shift nursing services. *See* Exhibit “C”, where Defendant authorized “an increase in the hourly nursing rates in order for the Division of Specialized Care for Children (DSCC) to secure in-home skilled nursing services for O.B. . . .” .

10. Plaintiffs and Class Members now seek a mechanism to increase reimbursement rates above the Tier 1 rates (above \$35.03) due to the Defendant's systemic failure to arrange for nursing services under her current fee schedule.

11. For reasons unknown to Plaintiffs and Class, Defendant reports that she reimburses above Tier 1 rates (above \$35.03 per hour) for at least sixteen children who are or were wards of the state.³ Specifically, Defendant reports that she reimburses services provided by an RN and LPN at the following rates:

<u>Child's Initials</u>	<u>RN Rate</u>	<u>LPN Rate</u>
S.C.	\$ 84.00	\$ 53.51
A.NA.	70.00	35.03
E.F.	53.51	53.51
A.F.	53.51	53.51
A.G.	53.51	53.51
T.J.	53.51	53.51
A.P.	53.51	-0-
B.F.	48.65	48.65
C.F.	48.65	48.65
E.H.	48.65	48.65
C.S.	48.65	48.65
A.S.	48.65	48.65
A.Y.	48.65	48.65
J.P.	42.81	42.81
T.P.	42.81	-0-
J.N.	39.89	39.89

³ Plaintiffs obtained reimbursement rate data cited in Paragraph 11 from the Exhibit A to Defendant's Report of September 23, 2016; this Report and Exhibit A to the Report are incorporated by reference herein and are not attached to this filing.

III. There is No Per Se Shortage of Illinois Nurses But a Shortage of Nurses Willing to Accept Medicaid Reimbursement Rates.

12. Since fiscal year 2013, approximately 20,000 more nurses were licensed in Illinois; 11,635 nurses were licensed between fiscal years 2015 and 2016.⁴ The Class size has remained fairly constant for many years. It cannot be argued that the nursing demands of the Class exceed the number of available nurses in Illinois.

13. Advantage Nursing Services, one of the agencies that provides in-home shift nursing services to the Class, notes that Illinois Medicaid reimbursement rates have not increased in over 14 years. *See* Exhibit “E” at 4, Sec. 3. Advantage Nursing Services has difficulty recruiting nurses to serve the Class when the base pay rates for a RN working in a hospital in Chicago is between \$32.00 and \$38.00 per hours, and Advantage’s current average RN pay rate for in-home shift nursing services in the Chicago area is \$24.00 per hour. *Id.* at 3, Sec. 2.

IV. Defendant has not Demonstrated that She can Arrange for In-Home Nursing Services without an Increase to Reimbursement Rates.

14. While Plaintiffs and Class support Defendant’s policy revision that allows newly licensed nurses to serve Plaintiffs and Class Members, Plaintiffs and Class contend that Defendant must take additional and substantial steps to comply with the Preliminary Injunction Order and to the Order they seek as to Counts III and IV.

15. However, Defendant has not committed to any take additional non-economic or economic step that may improve access to nursing services.

⁴ At <http://nursing.illinois.gov> the Illinois Department of Financial and Professional Regulation (Illinois state agency responsible for nurse licensure) states that there are 218,459 registered nurses and licensed practical nurses who have active nurse licenses as of June 30 in fiscal year 2016, which is an increase of 11,635 nurses from the prior year. In fiscal year 2013, there were 198,873 RNs and LPNs licensed in Illinois, which means that approximately 20,000 more nurses are now licensed today than in 2013. Exhibit “D”.

V. Plaintiffs' Supplement To Plaintiffs' Motion For Preliminary Injunction.

16. Plaintiffs and Class have also filed a Motion for Leave to Supplement the Plaintiffs' Motion and Memorandum of Law in Support of a Preliminary Injunction. Attached as Exhibit A to that motion, the supplement clearly outlines this Court's authority under the Americans with Disability Act and Section 504 Rehabilitation Act of 1973 to require Defendant to arrange for the delivery of in-home shift nursing services through an increase to her current reimbursement rates. As further discussed in the supplement, an increase to reimbursement rates is a reasonable modification that Defendant can undertake without fundamentally altering her in-home shift nursing program.

VI. Receivership Of The Defendant's In-Home Nursing Services Program.

17. Plaintiffs propose that Defendant Norwood be summoned to appear before this Court to present evidence of compliance with the Preliminary Injunction Order within sixty (60) days.

18. As a last resort, if Defendant Norwood cannot demonstrate compliance with this Court's Preliminary Injunction Order within sixty (60) days, the Plaintiffs further propose that this Court place the in-home shift nursing services program in receivership.

19. Receiverships are a recognized tool for taking over governmental agencies that could not or would not comply with the law. *See Morgan v. McDonough*, 540 F.2d 527, 532-34 (1st Cir. 1976) (appointing temporary receivership of South Boston High School); *Dixon v. Barry*, 967 F. Supp. 535 (D.D.C. 1997) (appointing receiver for Commission on Mental Health Services); *Gary W. v. Louisiana*, Civ. A. No. 74-2412, 1990 WL 17537, at *28-33 (E.D. La. Feb. 26, 1990) (appointing receiver to oversee state children's services agencies where court's mandates were met with "a dismal record of non-compliance and management by crisis"); *Turner v. Goosby*,

255 F. Supp. 724, 730 (S.D. Ga. 1966) (appointing state superintendent as receiver for county school system).

20. The use of receivers to reform public institutions has spread to analogous contexts in the civil rights arena. *See Shaw v. Allen*, 771 F. Supp. 760, 762 (S.D.W.Va. 1990) (“Where more traditional remedies, such as contempt proceedings or injunctions, are inadequate under the circumstances, a court acting with its equitable power is justified, particularly in aid of an outstanding injunction, in implementing less common remedies, such as a receivership, so as to achieve compliance with a constitutional mandate.”); *Newman v. State of Ala.*, 466 F. Supp. 628, 635-36 (1979) (appointing receiver for Alabama State Prisons, stating: “The extraordinary circumstances of this case dictate that the only alternative to non-compliance with the Court’s orders is the appointment of a receiver for the Alabama prisons.”).

VII. Conclusion.

For the foregoing reasons, Plaintiffs respectfully request that this Court enter the following relief:

- A. Order Defendant Felicia F. Norwood to appear before this Court to present evidence of compliance with the Preliminary Injunction Order within sixty (60) days or Defendant’s In-Home Nursing Services Program will be placed into receivership.
- B. Award such other relief as the Court deems just and appropriate.

Respectfully submitted,

/s/ Robert H. Farley, Jr.
One of the Attorneys for
the Plaintiffs

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CERTIFICATE OF SERVICE

I, Robert H. Farley, Jr., one of the Attorneys for the Plaintiffs, deposes and states that he caused the foregoing Plaintiffs' Second Motion to Enforce and/or Modify Preliminary Injunction Order to be served by electronically filing said document with the Clerk of the Court using the CM/ECF system, this 4th day of January, 2017.

/s/ Robert H. Farley, Jr.
One of the Attorneys for
the Plaintiffs