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

Susan L. Lankford, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 05-4285-CV-C-DW
	)	
Gary Sherman, Director, Missouri Department of Social Services, in his official capacity,	)	
	)	
Defendant.	)	

DEFENDANT'S SUGGESTIONS IN OPPOSITION TO MOTION FOR TEMPORARY RESTRAINING ORDER

> So long as its judgments are rational, and not invidious, the legislature's efforts to tackle problems of the poor and the needy are not subject to a constitutional straightjacket.

Jefferson v. Hackney, 406 U.S. 535, 546 (1973).

This Court should deny plaintiffs' motion for a temporary restraining order (TRO) and not place the State of Missouri in a constitutional straightjacket because it has attempted to address the complex problem of providing medical care to Missouri's poor while operating with limited funds. A TRO issued by this Court could result in the denial of the provision of the services plaintiffs seek to *all* categorically needy or could result in a *monthly* expenditure of more than $2 million in state funds during a period of severe financial constraint. Therefore, an injunction will not serve the public interest and the balance of the harms does not swing decisively in plaintiffs' favor. The plaintiffs are not likely to suffer irreparable harm as they can seek an "exception," to the elimination of an item or service, as set forth in Department of Social Services Rule 13 CSR

70-2.020. Moreover, plaintiffs have little likelihood of success on the merits because the items sought by plaintiffs are "optional services" that federal law allows, and state law effective August 28, 2005 mandates, be denied. Further, Missouri may address its complex problems of economic and social welfare one step at a time. *Jefferson,* 406 U.S. at 546.

Standard for TRO

In this Circuit, analyzing the plaintiffs' request under Federal Rule of Civil Procedure 65 requires application of the standards enunciated in *Dataphase Sys., Inc. v. C L Sys., Inc.,* 640 F.2d 109 (8th Cir.1981) (en banc). *See United Indus. Corp. v. Clorox Co.,* 140 F.3d 1175, 1178 (8th Cir.1998). The *Dataphase* test is applicable to a motion for a TRO as well as to a motion for a preliminary injunction. *See S.B. McLaughlin & Co. v. Tudor Oaks Condominium Project,* 877 F.2d 707, 708 (8th Cir.1989). The *Dataphase* test involves an 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 interest." *Dataphase Sys., Inc.,* 640 F.2d at 113. The Eighth Circuit has determined that no single *Dataphase* factor is dispositive; all factors must be considered and balanced to determine whether to grant a restraining order. *See International Ass'n of Machinists and Aerospace Workers, AFL-CIO v. Schimmel,* 128 F.3d 689, 691 (8th Cir.1997). The plaintiffs bear the burden of establishing the propriety of a TRO. *Baker Elec. Co-op., Inc. v. Chaske,* 28 F.3d 1466, 1472 (8th Cir.1994) (citing *Modern Computer Sys., Inc. v. Modern Banking Sys., Inc.,* 871 F.2d 734, 737 (8th Cir.1989) (en banc)).

Facts

Medicaid is a program of medical assistance funded in part by the federal government and in part by the state for aged, blind, or disabled individuals, and for families with dependent children, whose income and resources are insufficient to meet the costs of necessary medical services. Medicaid is authorized by Title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq. While state participation is voluntary, any state electing to participate must comply with statutory requirements pertaining to the program. *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 502 (1990). Contrary to what the plaintiffs would have this Court believe, federal Medicaid statutes do not require that all poor people receive all medical services. Participating states must provide certain categories of services (*See* 42 CFR 440.210) which are called mandatory services, but the provision of other services and items, such as durable medical equipment (DME), are optional. *See* 42 USC § 1396a(a)(3)(10), (b)(3), (defining "medical assistance" and describing "optional services"). "The states are given broad discretion to determine the extent of medical services they offer." *McNeil-Terry v. Roling,* 142 S.W.3d 828, 833 (Mo. App. E.D. 2004).

Plaintiffs collectively seek to bar implementation of an emergency regulation 13 CSR 70-60.010 (Def. Ex. A), which limits certain durable medical equipment (DME) to children, pregnant women and the blind. This emergency rule, filed August 11, 2005, is to take effect September 1, 2005, and is identical to a proposed rule filed with Missouri's Secretary of State and published in the Missouri Register July 15, 2005 (Def. Ex. B). While the Department of Social Services (DSS) invited public comment on this rule for a 30 day period (Def. Ex. B), none were received. As plaintiffs have admitted, the emergency regulation was filed only after the Missouri General Assembly passed and the Governor signed legislation mandating the

elimination of certain DME provisions, except to categorically needy children, pregnant women and to persons who are blind (Plaintiffs' suggest. p. 7). The emergency regulation seeks to preserve the provision of durable medical equipment services for these three groups of needy persons.

Absent the emergency regulation, § 205.152.2 within the newly enacted Senate Bill 539, will still require that DME be denied to all other categorically needy individuals. Plaintiffs have not challenged Senate Bill 539, which became effective August 28, 2005. Plaintiffs focus solely on the implementation of the emergency regulation, contending that it will violate certain provisions of federal statutes and regulations and their rights. They seek equitable remedies for the alleged violations pursuant to 42 U.S.C. § 1983, including a TRO to bar the proposed amendment from taking effect.

No Threat of Irreparable Harm

Plaintiffs recognize that they can receive their medical supplies, equipment, and appliances suitable for use in the home if they qualify for home health services under 13 CSR 70-90.010 (Plaintiffs' suggest. p. 9; ¶ 33; Def. Ex. F - regulation). Plaintiffs also recognize that to be eligible for home health services, Missouri's Home Health Provider Manual provides that the recipient be confined to his or her home (Plaintiffs' suggest. p. 9; ¶ 33). Plaintiffs suggest that this violates the official policy of Department of Health and Human Services (HHS) Center for Medicare and Medicaid Services (CMS) (Plaintiffs' suggest. p. 6; ¶ 25). But what plaintiffs have failed to advise the Court is that Missouri has specifically received an approval of its Home Health Policy from HHS/CMS effective July 1, 2000 (Def. Ex. E). Thus, if plaintiffs' physicians certify that the plaintiffs are homebound and it is medically necessary for these

plaintiffs to receive home health services, by their own admission, plaintiffs can be eligible for their desired DME and have no threat of irreparable harm.

For those plaintiffs who are not homebound and seek optional DME services, Missouri can make an exception. The criteria, again, is set forth in regulation 13 CSR 70-2.100, and the applications are reviewed on a case by case basis. For instance, if the plaintiffs' physicians certify that the loss of the provision of certain DME services is life threatening or would result in the recipient being placed in a higher level of care, the DME was lost by natural causes, or the individual has a terminal illness and provision would provide comfort, Missouri can make a exception for the plaintiff (Def. Ex. C - Affidavit of George L. Oestreich, with attachments).

Defendants also have notified all Medicaid providers that their patients, including plaintiffs, will not be deprived of the continuing use of CPAPs or BiPAP machines and nebulizers if the plaintiffs' medical providers seek an exception (Def. Ex. C - Affidavit, attach. C). Any allegation that plaintiffs are in a life threatening situation because of the loss of these optional DME is untrue.

Specifically with respect to the allegations pertaining to Joseph Everett, nothing in Missouri's Medicaid *current* regulations at this time allows for the provision of the DME that Ms. Everett seeks for her son, now that he is an adult. All of the DME she seeks for her son can only be provided through the exception process (Def. Ex. C). The Division has requested additional information required to make a decision on Joseph Everett's exception application. (Def. Ex. C, p. 5). No other plaintiff has sought an exception. There is no threat of irreparable harm.

Balance Of Harm

It is no secret that Missouri has financial problems and the Missouri General Assembly sought to stop the hemorrhaging of state expenditures by cutting $600 million from the State Medicaid program (Plaintiffs' Complaint ¶ 26). One rational avenue of saving money was to make adjustments in optional services. While Courts may look to which party is better able to absorb the financial difficulty posed by a challenged state law or regulation in determining whether to issue a TRO, *see e.g. Kansas Hosp. Ass'n v. Whiteman,* 835 F.Supp. 1548 (D.C. Ks. 1993) (balancing the irreparable harm to the plaintiffs against the impact on the state's budget), Defendant Sherman asks this Court to look at the potential impact that a Court Order may have on other persons receiving Medicaid services. If this Court finds that the emergency regulation improperly differentiates between three groups of individuals (children, pregnant women, and the blind) and all other categorically needy, then by Missouri law effective August 28, 2005, no individual is entitled to the optional DME. That is because the Missouri General Assembly has dictated that optional DME will not be provided to any other group of categorically needy. SB 539. And nowhere in plaintiffs' complaint have they challenged the new statute.

Even if this Court were to fashion a remedy specifically for these defendants so that they continue to receive their optional DME, despite the new statute, it will not necessarily aid other Medicaid recipients, each of whom are in unique situations and do not necessarily share any commonality with respect to their medical and equipment needs.

No Probability of Success on Merits

Federal Regulation 42 C.F.R. 440.230 gives states the authority to define the

amount, duration, and scope of Medicaid benefits – including required services. While 42 U.S.C. § 1396a(a)(10)(B) contains a comparability requirement, Missouri's emergency regulation 13 CSR 70-60.010, is consistent with the federal comparability provision for three reasons. First, the provision of DME is an optional service that Missouri may elect not to provide, or to provide with limitations. *See* 42 C.F.R. 440.210 (relating to required services) and 42 C.F.R. 440.225 (relating to optional services). Second, federal Medicaid regulations allow for the provision of more services to children (42 C.F.R. 440.250(b)) and to pregnant women (42 C.F.R. 440.250(p)) than to other categorically needy persons. Third, Missouri has filed with the HHS /CMS, a comparability waiver to permit it to provide more DME services or items to the blind than to other categorically needy persons (Defendant's Ex. D. - State Plan p. 7-8). Such waiver is authorized by 1915(b) of the Social Security Act, 42 U.S.C. § 1396n.

If plaintiffs are successful in thwarting the implementation of Missouri's emergency regulation relating to the provision of DME based on an allegation of comparability, it will not result in more services *to them*. Because Missouri has opted out of providing optional DME services by *statute*, a TRO may mean that the DME services plaintiffs seek will be provided to no one. This is what distinguishes the instant case from *McNeil-Terry v. Roling*. In that case, the Department of Social Services attempted to restrict dental services by regulation without modifying the state statute. The appellate court determined that Missouri had opted to provide an optional dental service by virtue of its state statute § 208.152.1(7), RSMo, and because of the statute, Missouri was bound to act in compliance with the Medicaid Act and applicable regulations in the implementation of those services. 142 S.W.3d at 833. In the instant case, however, Missouri is not attempting to change an optional service solely by regulation. The

Missouri General Assembly enacted and the Governor signed Senate Bill 539, which precludes the provision of certain optional DME except to children, pregnant women, and the blind. Thus, 42 U.S.C. § 1983 does not even permit plaintiffs to bring this particular cause of action because it is not clear that plaintiffs have any "right" under 42 U.S.C. § 1396 or its implementing regulations.

Moreover, as explained above (Def. Ex. C, with attach.), Missouri has provided plaintiffs with an exception process by which they can have their continuing medical needs for DME reviewed. This administrative process promulgated in 13 CSR 70-2.100, and published on the Department's website, should be exhausted, first. While plaintiffs are not always precluded from bringing their § 1983 claims before exhausting all administrative remedies, *Boyle v. Braddock,* 128 Fed.Appx. 573, 576 (9th Cir. 2005), the district court has discretion to require administrative exhaustion in a proper case. *Id.* Defendant submits that this is a proper case since only one of the plaintiffs have sought an exception through their physician, and that exception application remains pending (Defendant's Exhibit C - affidavit of George Oestriech). Granting of the exceptions will moot this lawsuit as to these plaintiffs and any other potential plaintiffs. Moreover, unless plaintiffs have exhausted all administrative remedies available to them, query how they have yet been deprived of any rights, privileges, or immunities secured by the Constitution and laws of the United States. 42 U.S.C. § 1983.

Further, with respect to the allegations raised in plaintiffs' Complaint (Counts II and Counts IV) regarding federal preemption, the Supremacy Clause does not create rights enforceable under 42 U.S.C § 1983. *Golden State Transit Corp. v. City of Los Angeles,* 493 U.S. 103, 105 (1989). Thus, plaintiffs have no likelihood of success on the merits based on these allegations.

Public Interest

Missouri is not hard-hearted. As plaintiffs have recognized, the General Assembly did appropriate through House Bill 11 appropriate funds for some DME for non-blind recipients including wheelchairs, prosthetics, oxygen, respiratory equipment and ostomy supplies (Complaint ¶ 29). The remaining cuts in the optional DME as prescribed in Missouri's emergency regulation will reduce the State's expenditures by more than $24.9 million over a period of 12 months ($2 million per month) (Def. Ex. A - fiscal note). Achieving budgetary savings is also in the public interest of state and federal taxpayers. *See AMISUB, (PSL), Inc. v. State of Colo. Dep't of Social Services*, 879 F.2d 789, 800-01 (10th Cir.1989) (while state may consider budgetary constraints, such constraints may not excuse noncompliance with federal Medicaid law), *cert. denied*,496 U.S. 935 (1990). Here, Missouri is in compliance with federal law.

Conclusion

WHEREFORE, based on the foregoing reasons, Defendant Sherman respectfully requests that this Court deny the motion for a temporary restraining order.

Respectfully submitted,

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List of Exhibits

Exhibit A - Emergency Rule 13 CSR 70-60.010

Exhibit B - Proposed Rule 70-60.010

Exhibit C - Affidavit of George L. Oestreich with attachments

Exhibit D - State Plan Dated August 15, 2005

Exhibit E - State Plan Waiver for Home Health Care Services

Exhibit F - Rule 13-70-90.010 Home Health Care Services

CERTIFICATE OF SERVICE

I hereby certify that on this 31th day of August, 2005, I electronically filed a true and correct copy of the foregoing with the Clerk of the Court using the CM/ECF system, which sent notification to the following persons. I also mailed a true copy of the foregoing to those same persons:

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