UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

Susan Lavin Lankford; Rachel Ely; Jane Everett, as next friend of Joseph Everett; Donald Eugene Brown; Laura Lee Greathouse; Kimberly Vogelpohl; Adam Daniel Thomason,	)	
Plaintiffs,	)	No. 05-4285-CV-C-DW
v.	)	
Gary Sherman, Director, Missouri Department of Social Services, in his official capacity,	)	
Defendant.	)	

PLAINTIFFS' REPLY TO DEFENDANT'S SUGGESTIONS IN OPPOSITION TO MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Plaintiffs reply to the Defendant's suggestions in opposition as follows:

I. A Preliminary Injunction Should be Entered Because the Defendant has Admitted that the Comparability Mandate is Being Violated.

The Medicaid Act requires that all categorically needy recipients receive covered services in an equal amount, duration and scope. This rule applies to both mandatory and optional Medicaid services. *See* 42 U.S.C. § 1396a(a)(10)(B); 42 C.F.R. § 440.240(a). Missouri Rule 13 C.S.R. § 70-60.010 violates this law because it covers durable medical equipment (DME) for the blind but eliminates coverage of most DME for Plaintiffs and other categorically needy adults who, like them, are aged, disabled, or caretakers.

Defendant argues that the DME service is optional and that this fact has legal significance. Neither assertion is correct. *See, e.g.,* 42 C.F.R. § 440.210(a)(1) (listing medical equipment as a

"required service" for all categorically needy recipients); § 440.70(b) (requiring medical equipment and supplies). However, for purposes of this motion, it does not matter whether DME is a mandatory service. The Medicaid comparability and reasonable standards statutes and regulations apply to the Defendant's coverage of DME, whether the service is categorized as mandatory or optional. *See, e.g., Weaver v. Reagan*, 886 F.2d 194, 197 (8th Cir. 1989) (stating that Missouri "must comply with federal statutory and regulatory requirements" in a case applying the reasonable standards requirements to an optional Medicaid service).

Moreover, Defendant's submissions to the Court admit that the state regulations at issue in this lawsuit violate the comparability mandate. The federal Centers for Medicare and Medicaid Services (CMS) will, under specific statutory conditions, authorize states to operate Medicaid programs that violate the comparability mandate. This authorization to violate the law is termed a "waiver." In an August 24, 2005 letter to CMS, Defendant Sherman, in requesting a waiver of the Medicaid statute's comparability requirement, admits he does not have the legal authority to enact Missouri Rule 13 C.S.R. § 70-60.010 providing more services to blind recipients than to other recipients. Defendant's letter states:

> [W]e believe that a waiver of comparability is necessary to enable the state to continue services for the blind and to exempt the blind from cost sharing.

See Defendant's Suggestions Opposing Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction (Def. Sugg.), Exhibit D-3, D-7. As Defendant acknowledges in his brief, the Missouri Department of Social Services has required that CMS waiver the comparability requirement "to permit it to provide more DME services or items to the blind than to other categorically needy persons." (Def. Sugg. at 7.)

CMS has not granted the State a waiver of the comparability mandate. (Def. Sugg. At 7.) Moreover, it is highly speculative whether such a waiver can be approved. Defendant is seeking the waiver as part of the State's "1915(b)" managed care waiver. (Def. Sugg. at 7.) Section 1915(b) of the Social Security Act, 42 U.S.C. § 1396n(b), allows waivers of comparability in order for states to implement managed care programs. By contrast, the Defendant's request concerns blind, aged and disabled individuals who receive their health care in the *fee for service* system. (*See* Missouri Dep't of Social Services, *1915(b) Waiver Amendment* (Exh. A, hereto).)

A waiver under § 1396n(b) is not meant to allow a state to cut benefits by waiving comparability for recipients who receive their services in the fee for service system Section § 1396n(b) allows CMS to waive comparability for only four reasons: (1) to allow a state to implement a primary care case management system that requires Medicaid recipients to obtain care from certain providers; (2) to allow a locality to act as a centralized broker in assisting individuals to select among competing managed care plans; (3) to share cost savings with Medicaid recipients, "through the provision of *additional* services;" (4) to restrict the provider from whom a recipient can obtain services. *Id.* (Emphasis added);[1] (*See* CMS, *1915(b) Freedom of Choice Waivers*, *at* http://www.cms.hhs.gov/medicaid/1915b/default.asp (describing the purposes of § 1915(b) as to enroll recipients into managed care programs); (*See also* Decl. of Timothy M. Westmoreland (Exh. B, hereto) (former Director of the CMS Center for Medicaid and State Operations stating that, to his knowledge, the federal Medicaid agency has never used § 1396n(b) to allow a state to waive comparability in the fee for service context as Missouri

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[1] The MC+ managed care waiver is authorized by 42 U.S.C. §§ 1396n(b)(1), (2) and (4). *See* CMS, *National Summary of State Medicaid Managed Care Programs-Missouri MC+ Managed Care/1915b*, *at* http://www.cms.gov.medicaid/managed care/mmcns604.asp.

requests).) Section 1396(b) does not authorize the waiver that the Defendant seeks.

This Court should issue a preliminary injunction because the Defendant is violating the comparability requirements. When addressing comparability violations similar to the one at issue here, the courts have consistently enjoined the defendant to refrain from excluding recipients from the benefit rather than to eliminate the service for everyone. (*See* Plaintiffs' Suggestions in Support of Temporary Restraining Order and Preliminary Injunction (Pl. Sugg.) and cases cited therein at 8-9.) This Court should do the same and not, as the Defendant suggests, exclude everyone from the service. (*See* Def. Sugg. at 4.)

II. SB 539 Does Not Require the Elimination of the DME Plaintiffs and Other Medicaid Beneficiaries Need.

Contrary to the Department's argument, Senate Bill 539 does not proscribe coverage of DME for Plaintiffs or other categorically needy individuals like them. (*See* Senate Bill 539 (Exh. C, hereto).) The legislation simply removes DME from the statutory list of required services. (*Id.*, at ¶ 15 (brackets indicating that paragraph was removed).) Significantly, the statute contains no provision that would prevent the Department from covering DME for those categorically needy elderly and disabled individuals who are not blind. (*See* Complaint, ¶¶ 28-30.)[2]

III. Missouri's Medicaid Exceptions Process is not a Reasonable DME Standard.

The Court can and should enjoin Mo. Rule 13 C.S.R. § 70-60.010 based on the comparability violation alone. Nevertheless, Plaintiffs briefly reply to Defendant's arguments in

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[2] The Defendant's own conduct illustrates. The Department, in Rule 13 C.S.R. § 70-60.010(6), covers wheelchairs and prosthetics for elderly and disabled individuals; yet, Senate Bill 539 deleted those very items from the required coverage list. If the legislation automatically prohibited coverage of this DME, the Defendant would not have been able to adopt this regulation.

response to Plaintiffs' claim that his policies violate the "reasonable standards" requirements of the Medicaid Act. 42 U.S.C. § 1396a(a)(17).

First, Defendant argues that his DME policy is reasonable because Plaintiffs can receive DME through Missouri's exceptions process. (Def. Sugg. at 4-5.) However, on its face, that process fails to bring the DME policy into conformity with the requirements of 42 C.F.R. § 440.230(b) (requiring coverage of a sufficient amount, duration, and scope of the service) and § 440.230(c) (prohibiting discrimination on the basis of medical condition), as further implemented for DME by CMS, *Dear State Medicaid Director* (Sept. 4, 1998), *at* http://www.cms.hhs.gov/states/letters/smd90498.asp (Exh. D, hereto) (quoted extensively at Pl. Sugg. at 10-11). The Missouri policy falls short in a number of respects:

- The exceptions process must be specific to requests for coverage of DME. Defendant's process is a general one for any provider seeking coverage of any service in excess of the benefit limit.
- Medicaid beneficiaries must be informed of the process. Defendant has only informed providers about the process.
- The process be available to all beneficiaries. Defendant's process can only be used by providers.
- The process cannot be limited to a sub-class of the population. Defendant only makes its process available to people with respiratory conditions who seek a "CPAP, BiPAP, CPAP or nebulizer machine." Exh. C-16, Def. Sugg. It is not available to individuals whose medical conditions require other forms of DME, such as feeding tubes, catheters, crutches, hospital beds, and wheel chair batteries.[3]

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[3] Defendant's argument that the exceptions process is now available for other forms of DME is not supported by the Defendant's written policies. The Defendant's policy states: "*[n]o exception can be made where requested items or services are restricted or specifically prohibited by state or federal law or regulation.*" Def. Ex. C.-2 and C-6 (Emphasis added). Mo. Rule 13 C.S.R. § 70-60.010 specifically prohibits coverage of the DME Plaintiffs need. In fact, on September 2, 2005, Defendant sent a memorandum to county Family Support Division offices to guide staff in answering questions from Medicaid recipients. That memorandum indicates that recipients using

- The process must inform Medicaid recipients of their right to a fair hearing when the DME exception is denied. Defendant's process does not address these notice and hearing rights.[4]

Second, the Defendant's exceptions process for DME is inconsistent with Eighth Circuit Court of Appeals precedent. The Eighth Circuit has clearly established that Medicaid services, whether they be optional or mandatory, must be provided when they are medically necessary and has struck down state rules that categorically exclude coverage of medically necessary treatment. *Weaver v. Reagen*, 886 F.2d 194 (8th Cir. 1989); *Pinneke v. Preisser*, 623 F.2d 546 (8th Cir. 1980); *see also Ellis v. Patterson*, 859 F.2d 52, 54 (8th Cir. 1988). The *Weaver* Court invalidated Missouri's attempt to exclude Medicaid coverage of the drug AZT for all recipients with AIDS who did not meet certain narrow criteria because the policy denied medically necessary treatment that fell outside of those specified criteria. *Id.* at 197-200 (citing 42 C.F.R. §§ 440.230(b) and (c)). The Missouri's policy is similarly problematic: The requested service or item must be required to sustain the recipient's life, needed to improve the quality of life if the recipient is terminally ill, a necessary placement due to an act of nature, or necessary to prevent a

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breathing equipment can possibly continue to receive such equipment, presumably through the exception process. Memorandum from Janel R. Luck to all County Offices, Frequently Asked Questions Regarding Medicaid Changes (Sept. 2, 2005) (Exh. E, hereto) . However, in discussing other forms of DME, such as hospital beds and wheelchair batteries and accessories, no exception process is mentioned. These services are simply "not covered" for adults who are not blind, pregnant or residing in a nursing home. *Id.*

[4]The only notice that Medicaid recipients received simply states that DME is being eliminated, including but not limited to "wheel chair accessories and batteries, three wheel scooters, decubitis care cushions and commodes, catheters, canes, crutches, walkers, BiPAP, CPAP and nebulizers, parenteral and enteral nutrition, artificial larynx, and augmentative communication devices." Division of Medical Services, "Important Notice Regarding Services for Medicaid and MC+ Adults" (Aug. 1, 2005), *at* http://www.dss.mo.gov/dms/dated/msreductrecip.htm; *see also, e.g.* "Important Notice," to Joey Everett (Aug. 1, 2005) (Exh. F, hereto).

higher level of care. (*See* Def. Exh. C-2.; Def. Sugg. at 5.) The imposition of these pre-conditions on the receipt of medically necessary services violates the Eighth Circuit law and federal law. *See also Comacho v. Texas Workforce Comm'n*, 408 F.3d 229, 235 (5th Cir. 2005) (holding state could not add additional requirements for Medicaid eligibility).[5]

IV. Budgetary Constraints are No Excuse and Do not Shift the Balancing of Harm From the Plaintiffs.

Plaintiffs will suffer more medical harm through the loss of DME coverage than Missouri might experience in financial harm in providing that coverage. (Pl. Sugg. at 12-14.) Moreover, it is in the public interest to have the Defendant comply with his obligations under federal law. (*Id.* at 14-15.) Defendant, however, does not seriously challenge Plaintiffs' arguments on these points. Indeed, the two cases cited by Defendant are *both* fully supportive of Plaintiffs' position. (*See* Def. Supp. at 6, 10 (citing *Kansas Hosp. Ass'n v. Whiteman*, 835 F. Supp. 1548 (D. Kan. 1993); *AMISUB (PSL), Inc. v. State of Colo. Dep't of Social Services*, 879 F.2d 789, 800-01 (10th Cir.1989).) *See also Alabama Nursing Home Ass'n v. Harris,* 617 F. 2d 388, 396 (5th Cir. 1980) (holding that "inadequate state appropriations do not excuse noncompliance").

Defendant asks the court, for purposes of balancing the hardships, to look beyond relevant case law and consider the potential impact that a finding of illegal conduct on the Defendant's part will allegedly have on other third parties. (*Id.* at 6.) The harm identified by the Defendant,

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[5] The Defendant's home health policy is also problematic because it includes a requirement that individuals be "homebound" in order to receive DME. As CMS has pointed out, a homebound requirement is an improper restriction on the receipt of *any* home health services. *See* Dear State Medicaid Director Letter (July 25, 2000), *at* http://www.cms.hhs.gov/states/letters/smd725a.asp. However, even if being "homebound" were a permissible limitation on other types of home health services, it is clearly not a prerequisite for receipt of DME under the applicable federal law, which only requires that medical supplies and equipment be "*suitable* for use in the home," not that an individual be *confined* to his or her home. 42 C.F.R. § 440.70(b)(3).

however, is the potential loss of Medicaid coverage by other beneficiaries, something that, as explained above, the Defendant erroneously argues would be automatically triggered by state law if the court ruled in Plaintiff's favor.

With respect to evaluating the public interest, Defendant concedes that a state's desire to cut spending is not a better service to the public interest than a state's compliance with federal law. (*Id.* at 9 ("[W]hile state may consider budgetary constraints, such constraints may not excuse noncompliance with federal Medicaid law," referencing *AMISUB*, 879 F.2d at 800-01).) To overcome the unfriendliness of this principle, Defendant flatly asserts that Missouri is in compliance with federal law, thereby rendering the principle essentially meaningless in any situation where a state officials makes such an assertion. Such an assertion should not undermine the conclusive support provided by Plaintiffs showing that both the balance of hardship and public interest tests fall in their favor.

V. Exhaustion of an Administrative Remedy is Not Required.

The Defendant argues that this court lacks jurisdiction because Plaintiffs should be required to exhaust administrative remedies by using its "exception process." Def. Sugg. at 8. This argument fails factually and legally. First, as explained above, there is no exception process for Plaintiffs; the process is one that physicians may choose to use. Second, there is no precedent for requiring the Medicaid beneficiaries to exhaust this exception process as a prerequisite for bringing an action under 42 U.S.C. § 1983. *See Patsy v. Bd. of Regents,* 457 U.S. 496, 516 (1982); see also *Wilder v. Virginia Hosp. Ass'n,* 496 U.S. 498, 523 (1990) (exhaustion not required in Medicaid Act case); *Planned Parenthood of Greater Iowa, Inc. v. Atchison,* 126 F.3d 1042, 1047 (8th Cir. 1997) (same); *Heartland Hosp. v. Stangler,* 792 F. Supp. 670, 671 (W.D.

Mo. 1992) ("[A]vailability, and the potential primacy, of administrative review does not divest this court of jurisdiction to hear [a] § 1983 claim.").[6]

VI. The Preemption Claim is Independent of the Section 1983 Claim.

The Defendant's only response to Plaintiffs' preemption claim is that "the Supremacy Clause does not create rights enforceable under 42 U.S.C. §1983." (Def. Sugg. at 8). That is true, but beside the point, because preemption claims are not brought under Section 1983. "Given the variety of situations in which preemption claims may be asserted, in state court and federal court, it would obviously be incorrect to assume that a federal right of action pursuant to Section 1983 exists every time a federal rule of law pre-empts state regulatory authority." *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107 (1989). Preemption claims under the Supremacy Clause are "not limit[ed] to those who can show the deprivation of a right, privilege, or immunity secured by federal law within the meaning of §1983." *Id.* at 119 (Kennedy, J., dissenting on other grounds); *accord Planned Parenthood v. Sanchez*, 403 F.3d 324, 335 (5th Cir. 2005) (Medicaid Act); *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 314-15 (2d Cir. 2005); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1266 (10th Cir. 2004); *St. Thomas-St. John Hotel & Tourism Ass'n v. Virgin Islands*, 218 F.3d 232, 241 (3d Cir. 2000); *Indian Oasis-Baboquivari Unified Sch. Dist. v. Kirk*, 91 F.3d 1240, 1256 (9th Cir. 1996) (Reinhardt, J.,

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[6] Moreover, exhaustion would be futile. The DME rule on its face specifically prohibits coverage of most items of DME unless the recipient is blind, pregnant or a child. *See* 13 C.S.R. § 70-60.010 (6). And, as Defendant's policies clearly indicate, no exception will be granted to providers when "requested items or services are restricted or specifically prohibited by state or federal regulations." *See* DME Manual, *Exception Process* (Exh. A to Def. Sugg.). *See also, e.g., White v. Martin,* No. 02-4154-CV-C-NKL, (W.D. Mo. Oct. 3, 2002) (holding that administrative remedies would be futile because they could not gain the relief they sought through the administrative process).

dissenting on other grounds). *See also, e.g., Wright Elec. Inc. v. Minn. State Bd. of Election*, 322 F.3d 1025, 1028-29 (8th Cir. 2003) (finding jurisdiction and considering on the merits preemption claim not within ERISA's right of action).

VII. Plaintiffs have Shown Irreparable Harm.

In the Exhibits attached to Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction, the Plaintiffs discussed the harm that they will experience as the result of the Missouri regulation. The declarations of Dr. Will Ross; Peggy Bishop; Dr. David B.Gray, and Mark Andrew Yearian (Exhs. G, H, I, & J, hereto), further establish that Plaintiffs and others like them will experience irreparable harm. And, as shown above and in their opening suggestions, the Defendant's exception process does not eliminate the irreparable harm.

Conclusion

Based on the foregoing and the pleadings submitted by the Plaintiffs in this case, Plaintiffs ask the Court to enter a preliminary injunction enjoining the Defendant from implementing Mo. Rule 13 C.S.R. § 70-60.010.

Dated: Sept. 6, 2005

Respectfully submitted,

Missouri Protection & Advocacy Serv.
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Legal Services of Eastern Missouri, Inc.
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National Heath Law Program
AARP Foundation Litigation
Welfare Law Center
National Senior Citizens Law Center
Assistive Technology Law Center

By /S/ MICHAEL H. FINKELSTEIN # 25468

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Plaintiffs' Reply to Defendants' Suggestions in Opposition to Motion for Temporary Restraining Order and Preliminary Injunction* was forwarded via electronic notification to the party of record at the address set out below, on this 6th day of September, 2005, to:

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