Case No. 05-3587

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Susan Lavon Lankford; Rachel Ely; Jan Everett,
as next friend of Joseph Everett; Donald
Eugene Brown; Laura Lee Greathouse;
Kimberly Vogelpohl; Adam Daniel Thomason,

Plaintiffs-Appellants,

against

Gary Sherman, Director, Missouri Department
of Social Services, in his official capacity,

Defendant-Appellee.

On appeal from the United States District Court
Western District of Missouri
Judge Dean Whipple

REPLY BRIEF

Jane Perkins
Sarah Somers
National Health Law Program
211 N. Columbia St.
Chapel Hill, NC 27514
Tel.: 919-968-6308
Fax.: 919-968-8855

Joel Ferber
Ann B. Lever
Daniel Claggett
Legal Services of Eastern Missouri
4232 Forest Park Blvd.
St. Louis, MO 63108
Tel.: 314-534-4200
Fax.: 314-534-1028

(other counsel listed inside)

Counsel for Appellants, continued

Michael Finkelstein
Missouri Protection and Advocacy
925 S. Country Club Drive
Jefferson City, MO 65109
Tel.: (573) 893-3333
Fax.: (573) 893-4231

Michael Ferry
Gateway Legal Services, Inc.
200 N. Broadway, Suite 950
St. Louis, Missouri 63102
Tel.: (314) 534-0404
Fax.: (314) 652-8308

Thomas E. Kennedy, III
Deborah S. Greider
Law Offices of Thomas E.
Kennedy, III, L.C. Legal Clinic
2745 E. Broadway, Ste. 101
Alton, IL 62002
Tel.: (618) 474-5326
Fax.: (618) 474-5331

Sidney D. Watson
John J. Ammann
St. Louis University
School of Law
321 North Spring Ave.
St. Louis, Mo. 63108
Tel.: (314) 977-2778
Fax.: (314)-977-3334

Rochelle Bobroff
Dorothy Siemon
AARP Foundation Litigation
601 E. St., NW
Washington, DC 20049
Tel.: (202) 434-2060
Fax.: (202) 434-6424

Lewis Golinker, Esq.
Assistive Tech. Law Center
300 Gateway Center
401 East State Street
Ithaca, NY 14850
Tel.: (607) 277-7286
Fax.: (607) 277-5239

Henry A. Freedman
Welfare Law Center, Inc.
Marc Cohan, Director of Litigation
Petra T. Tasheff, of Counsel,
Mo. Bar # 31719
Cary LaCheen, of Counsel
Brooke Richie, of Counsel
275 Seventh Avenue
New York, New York 10001
Tel.: (212) 633-6967
Fax.: (212) 533-6371

Ed King
Eugene Coffey
Nat'l Senior Citizens Law Ctr.
1101 14th Street NW
Washington, DC 20005
Tel.: (202) 289-6976
Fax.: (202) 289-7224

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Federal Statutes and Regulations

State Statutes and Regulations

Other Authorities

Introduction

On September 1, 2005, the Defendant implemented an emergency regulation, 13 C.S.R. § 70-60.010, that eliminated coverage of most medical equipment, supplies and appliances needed by Medicaid recipients. The district court refused to enjoin the regulation, accepting Defendant's argument that medical equipment is not a required service for the categorically needy. Order at 1, 3; Defendant's Suggestions in Opposition to Motion for Temporary Restraining Order at 7. In his brief, Defendant now concedes what Plaintiffs have argued all along: federal Medicaid law requires states to cover medical supplies, equipment and appliances for all categorically needy recipients. Defendant's Brief at 15 (Def.Br.) Moreover, he acknowledges the fact that the regulation covers medical equipment for some categorically needy recipients but specifically eliminates it for others.

The regulation violates the federal Medicaid comparability requirement because Missouri is covering equipment for the categorically needy blind but denying coverage for categorically needy people who are aged and disabled but not blind. The Defendant requested permission from the federal Centers for Medicare and Medicaid Services (CMS) to be exempted from this requirement; however, CMS recently denied that request as submitted and reminded the

Defendant that a state may only implement changes resulting from a waiver after receiving federal approval.

In addition, the regulation is violating Medicaid's reasonable standards requirement because it is not consistent with Medicaid's primary objective of helping individuals attain or retain self-sufficiency and because it discriminates on the basis of medical condition or diagnosis. The regulation also fails to adhere to the guidelines issued by CMS that are specifically intended to assure that the states' coverage of medical equipment complies with the reasonable standards requirement.

At the time the regulation was implemented, the Defendant stated that 370,000 persons would be affected by the elimination of medical equipment. (Plaintiff-Appellants' Appendix at 064(Pl.App.)). Now, however, he claims that all previously covered items can be obtained through the state Medicaid program's exceptions process. In the alternative, the Defendant claims that medical equipment can be received through the home health service, even though the state agency has placed a number of preconditions on the receipt of medical equipment through the home health benefit that are not authorized by federal law, that greatly restrict access to the benefit, and that CMS has recently instructed the State to remove. As Plaintiffs' described in their Opening Brief

and reiterate here, these alternatives do not cure the ongoing violations of the federal law or alleviate the irreparable harm that Plaintiffs are suffering.

The regulation is causing Plaintiffs and recipients like them to be denied Medicaid coverage of medical equipment and supplies that the federal law mandates be available to them. There is no Missouri statute or regulation that prohibits the Court from enjoining the regulation and ordering the State to comply with the federal law. Nor could there be. A state that participates in the Medicaid program must comply with the provisions of the federal Medicaid Act.[1]

I. Medical supplies, equipment and appliances are a mandatory service under federal law and must be covered for Plaintiffs and other Medicaid beneficiaries in Missouri.

Federal Medicaid law requires states to cover medical supplies, equipment and appliances for all categorically needy recipients, including Plaintiffs. Def.Br. at 15. The district court erred when it found as a matter of law that "[p]rovision of DME is an optional service that Missouri has not elected to provide." (Order at 3.)

[1] On December 6, 2005, Plaintiffs filed a Motion to Supplement the Record. Attached to this Motion were two letters to the Defendant from the federal Centers for Medicare and Medicaid Services, dated November 21, 2005. This motion has been referred to the merits panel. Order, Dec. 30, 2005. In his response, Defendant refers to these letters. Plaintiffs also do so in this Reply.

State Medicaid programs must cover certain groups of poor people designated by the Medicaid Act as the "categorically needy" and may cover additional groups known as the "medically needy." *Compare* 42 U.S.C. § 1396a(a)(10)(A) (describing categorically needy) *with* 42 U.S.C. § 1396a(a)(10)(C) (describing medically needy). Missouri does not cover the medically needy; all Medicaid recipients in Missouri are categorically needy individuals. This distinction is important because the Medicaid statute allows states to provide a more limited set of services to the medically needy than those required for the categorically needy.

Federal law requires states to cover medical supplies, equipment and appliances for all categorically eligible recipients, as follows: The statute provides that one of the mandated services for the categorically needy is "nursing facility services." 42 U.S.C. § 1396d(a)(4)(A). The statute further requires states to provide home health services to all those "entitled to nursing facility services." *Id.* § 1396a(a)(10)(D). Taken together, these provisions require states to cover home health services for all categorically needy recipients, because they are entitled to nursing facility services, but not for the medically needy, because they are not entitled to these services. *Compare* 42 U.S.C. § 1396a(a)(10)(A) (listing nursing facility services as a mandatory

service for the categorically needy) *with* 42 U.S.C. § 1396a(a)(10)(C)(iii) (requiring only limited services for the medically needy). *See also* 42 C.F.R. § 440.210(a)(1) (requiring states to furnish nursing facility and home health services to categorically needy recipients) *with* 42 C.F.R. § 440.220(a) (providing a more limited set of required benefits for the medically needy).

Medical supplies, equipment and appliances are a mandatory, stand alone home health service for the categorically needy. *See* 42 C.F.R. § 440.70(b)(3) (listing medical equipment as a required home health service). In other words, the receipt of medical equipment cannot be conditioned on an individual needing other home health services. Numerous federal courts have ordered states to comply with these provisions of federal Medicaid law and cover medical equipment and supplies for the categorically eligible. *See, e.g. Esteban v Cook*, 77 F. Supp. 2d 1256, 1259 (S.D. Fla. 1999) (noting that "[h]ome health care services are generally a mandatory services for the categorically needy" and requiring coverage of wheelchairs); *Ladd v Thomas*, 962 F. Supp. 284, 288 (D. Conn. 1997) ("Federal law mandates that participating states provide home health services including durable medical equipment . . . where such equipment is medically necessary"); *Hodges v Smith*, 910 F. Supp. 646, 649 (N.D. Ga.

1995) (finding that federal Medicaid law makes it clear that medical equipment is a mandatory service for Medicaid recipients).

CMS has long recognized the mandatory nature of coverage of medical equipment for categorically eligible Medicaid recipients. *See, e.g.,* CMS, *Dear State Medicaid Director* (Sept. 4, 1998) ("As you know, [Medicaid's] mandatory home health services benefit . . . includes coverage of medical supplies, equipment, and appliances suitable for use in the home (42 C.F.R. 440.70(b)(3))"). In response to Missouri's request to eliminate coverage of medical equipment from its state Medicaid plan, CMS pointedly notified the state:

> 42 C.F.R. 440.70(b)(3) . . . specifies that 'Medical supplies, equipment, and appliances suitable for use in the home' is one of the three required services that must be provided as home health. *As such, medical supplies, equipment, and appliances must be available to all persons who are categorically eligible under the Medicaid program*.

(Exhibit 3 to Perkins Decl., Plaintiff-Appellants' Motion to Supplement the Record, Letter from James. G. Scott, Associate Regional Administrator, CMS, to Gary Sherman, Regarding Missouri's State Plan Amendment, November 21, 2005, at 2, ("Nov. 21 CMS State Plan Amendment Letter") (emphasis added). The federal agency further advised Missouri that it could not approve its Medicaid State Plan amendment without a provision specifying "Missouri's

intent to provide medical equipment and appliances under Home Health." *Id*. at 3.

Because medical equipment and supplies are required Medicaid services, Missouri may neither eliminate nor unreasonably restrict such services.

II. Defendant is violating Medicaid's comparability requirement

With only a few exceptions that are not relevant here, *see* Pl. Opening Br. 21, the Medicaid Act requires that all categorically needy Medicaid recipients receive services in the same amount, duration and scope. *See* 42 U.S.C. § 1396a(a)(10)(B); 42 C.F.R. § 440.240(b)(1). The challenged regulation eliminates Medicaid coverage of medical equipment for categorically needy recipients who qualify because they are aged or disabled but not blind, while maintaining full coverage of medical equipment for categorically needy recipients who are blind. *See* Mo. Rule 13 C.S.R. § 70-60.010 (effective September 1, 2005). According to the Supreme Court, the comparability requirement was placed in the Medicaid Act to prevent precisely this kind of differential treatment. *Schweiker v. Hogan*, 457 U.S. 569, 573 n. 6 (1982); *see also* Pl. Opening Br. at 13-23.

In his brief, Defendant states that he requested permission from CMS to be exempted from, or waive, the comparability requirement.[2] He then asks the Court to disregard the ongoing violation, arguing that "the decision whether a comparability waiver can and will be granted, and whether Missouri is violating comparability by not having a waiver in place at this time, is not for this court in this proceeding. Rather, that decision is for the Secretary, subject for judicial review." Def.Br. at 21-22.

The Defendant's position is riddled with holes. In a November 21, 2005 letter, CMS denied the waiver request as submitted. *See* Nov. 21 CMS State Plan Amendment Letter. In addition, CMS supported Plaintiffs' rule of law argument that, absent a proper waiver, the comparability requirement must be followed: "[A] state may only implement changes resulting from waiver authority *after* receiving CMS approval." *Id.* *See also*, *e.g.*, *Bryson v Shumway*, 308 F.3d 79, 89 (1st Cir. 2002) ("*Once the waiver plan is created and approved*, it becomes part of the state plan and therefore subject to federal law . . .) (emphasis added).

[2] This request was submitted on August 24, 2005, a week before the challenged rule became effective on September 1, 2005. *See* Pl-Appellants' App. at 82.

The Defendant is violating the federal Medicaid comparability requirement *now*. Denial of coverage of medical equipment needed by the Plaintiffs and other Missouri Medicaid recipients who are aged and disabled but not blind is happening *now*. The appropriate federal permission to violate comparability has not been given and may never be given. Indeed, the Defendant's argument reflects a cavalier attitude toward the force of law, and this Court should find that the Plaintiffs-Appellants are likely to succeed on the merits of their comparability claims.

III. The denial of coverage for medical equipment violates Medicaid's reasonable standards requirements and neither the Defendant's exceptions process for non-covered services nor the narrow home health exception cures these violations.

The Court should reject Defendant's argument that he complies with the "reasonable standards" provisions of the Medicaid Act.

A. Defendant's regulation violates the reasonable standards requirements by denying medically necessary equipment, failing to comply with amount, duration and scope requirements, and discriminating based on diagnosis and condition.

Defendant argues that Plaintiffs are merely relabeling their comparability argument when they claim that Defendant is violating the reasonable standards

requirements. Def.Br. at 25. This argument reflects a fundamental misunderstanding of Plaintiffs' claims and Medicaid law.

Plaintiffs are alleging violations of two different provisions of the Medicaid Act. Regardless of whether Defendant eventually receives a waiver of the comparability requirement, Missouri will continue to violate Medicaid's reasonable standards requirements. Separate and apart from comparability, the reasonable standards provisions require states' policies to be consistent with the Medicaid Act's objective of helping individuals attain and retain capability for independence or self care and prohibit discrimination based upon diagnosis. *See* Pl. Opening Br. at 24-30 and cases cited therein. Defendant violates this provision by denying necessary medical equipment to individuals whose diagnoses include cerebral palsy, traumatic brain or spinal cord injury, multiple sclerosis, or cardiopulmonary disease while allowing these services for individuals whose diagnosis is blindness.

Next, Defendant suggests that the reasonable standards requirements do not apply because he has "opted out" of providing medical equipment. Def.Br. at 17-19, 24-25. This argument is erroneous for several reasons. First, as indicated previously, because medical equipment and supplies are a mandatory home health service, Defendant has no authority to opt out of providing the

service. Second, Defendant has not in fact opted out of also providing medical equipment as an optional service because his regulation requires the provision of *some* equipment and supplies for the aged and disabled persons who are not blind. *See* 13 C.S.R. § 70-60.010 (listing as covered equipment, prosthetics (excluding an artificial larynx); diabetic and ostomy supplies; oxygen and respiratory supplies (excluding nebulizers, suction pumps, and a number of machines which assist with breathing); and wheelchairs (excluding wheelchair accessories and scooters)).[3] Moreover, Defendant continues to provide the *full range* of equipment and supplies to Medicaid recipients who are blind. *Id.*; Mo. Rev. Stat. § 208.152.2(4) (Pl.App. -161) (requiring the State to cover orthopedic devices and wheelchairs for people who are blind). Thus, the Defendant continues to cover medical equipment but simply fails to meet the legal requirements for reasonableness when providing this service. *See* Pl. Opening Br. at 23-42.

[3] The Defendant is trying to have it both ways. He says that the Missouri General Assembly opted out of providing medical equipment to the elderly and disabled when it repealed the statute that covered medical equipment, or "prosthetics," Def.Br at 10, 18, and thus eliminated coverage of such equipment as "electric wheelchairs." *Id.* 6, 32-33. On the other hand, he acknowledges that the Director "exercised his statutory authority" to enact the challenged regulation, which covers some medical equipment for these otherwise excluded categorically needy groups. Notably, the covered equipment specifically includes "prosthetics" and "electric wheelchairs, excluding wheelchair accessories." *Id.* at 10.

B. Defendant's exceptions process for non-covered services does not cure the violations of the reasonable standards requirements

When he implemented the challenged regulation, the Defendant said 370,000 disabled and aged Missourians would be affected by the elimination of medical equipment. (Pl. App.-064) Now, the Defendant argues that he complies with Medicaid's reasonable standards provisions because "all previously covered items can be obtained through the exceptions process." Def.Br. at 33.[4] He claims that anyone can get an exception for any item of medical equipment when the physician says the service is medically necessary, and the physician's statement of necessity will never be challenged. Def.Br. at 31-37. If true, this argument would raise the question of why the regulation was implemented in the first place. But the court does not have to reach that question because counsel's argument is unsupported by the law and the facts.

As noted in Plaintiffs' Opening Brief, Missouri's exception regulation allows coverage of an otherwise non-covered service in only four very narrow circumstances–if the item or service is required to: (1) sustain the recipient's

[4] The Defendant argues that the exceptions regulation only prohibits coverage of services that are "specifically prohibited by state or federal law" and, citing Dr. Oestreich's testimony, concludes that the "regulation is intended only not to cover services that are outlawed." Def.Br. at 35-36. In fact, the regulation prohibits coverage of services that are "*restricted or* specifically prohibited by state or federal law." 13 C.S.R. § 70-2.100(1) (emphasis added). This is significant because the challenged state law restricts coverage of medical equipment.

life; (2) substantially improve the quality of life for a terminally ill patient; (3) replace equipment due to an act occasioned by violence of nature without human interference, such as a tornado or flood; or (4) prevent a higher level of care. *See* Pl. Opening Br.at 32 (discussing 13 C.S.R. § 70-2.100.(2)(J)). The Defendant misstates the policy by alleging that "reduced health status" or "immediate harm" is sufficient grounds to receive an exception. Def.Br. at 32-33. Neither of these factors are among the four criteria for establishing an exception.

Defendant argues that the "bare words of the regulation" do not shed any light on the restriction. In other words, the exceptions regulation does not mean what it says, and the strict limitations of the written policy are irrelevant. Def.Br. at 32-3. This notion finds no support in law. As with statutes, the words of regulations establish official government policy. Post-hoc arguments of counsel do not. *See Bowen v. Georgetown Univ. Hosp*, 488 U.S. 204, 212-213 (1988) (rejecting the *post-hoc* rationalization of agency's appellate counsel as a "convenient litigating position").

Moreover, if there were a blanket exceptions process along the lines testified to by Dr. Oestreich, then Defendant would have to enact a rule or regulation codifying this process. *See, e.g., NME Hospitals v. Department of*

Social Services, 850 S.W.2d 71, 74 (Mo. Banc 1992) (holding that disallowance of costs of psychiatric services other than electric shock therapy constituted a policy change requiring promulgation of a rule pursuant to state Administrative Procedure Act); *Missouri State Division of Family Services v. Barclay*, 705 S.W.2d 518 (Mo. App. W.D. 1985) (holding Division's Income Maintenance Manual setting forth method for computing Medicaid recipient's income was a "rule" which had no controlling force due to the Division's failure to satisfy publication and filing requirements). Hence, while Dr. Oestreich may pay lip service to a broad all-encompassing exceptions process, it is not contained in the current rule, therefore, no such exceptions process exists. In fact, Dr. Oestreich's testimony is inconsistent with Defendant's regulation, Medicaid manual, and official notices that implement the challenged regulation and do not refer to or set forth the process that Dr. Oestriech has described. (Pl.App.-106-110, 207, 217, 227-28) "Generalized, conclusory, unsupported opinion testimony does not compel respect or demand weight, at least in the presence of contrary evidence of an objective nature." *Northridge Electronics, Inc. v. U.S.*, 444 F.2d 1124, 1129 (Ct. Cl. 1971).

It is clear that the Defendant's exceptions regulation, the Medicaid Manual (attached to Dr. Oestreich's declaration), Dr. Oestreich's sworn

affidavit, and even his "live" testimony all establish that services are not available to Plaintiffs and others like them *unless* restrictive exceptions criteria are met. (Pl.App.-207, 217, 221, 227-228, 232-237.) For instance, the Defendant's own written memorandum establishes that exceptions could be available for breathing equipment only, and the August 29, 2005 notice to *all Medicaid providers* indicates that the exception process may only be used for limited categories of breathing equipment and nothing else. Plaintiffs' Opening Brief at 34-35 (Pl. App.-209-210, 221, 232-233).

By contrast, recipients who are children, pregnant women and blind - for whom medical equipment remains a *covered* Medicaid service - do *not* have to satisfy restrictive criteria. (Pl. App.-227-228.) Because the exceptions process imposes additional, more stringent conditions on some recipients' eligibility, it does not "cure" the Defendant's violation of the reasonable standards requirement of the Medicaid Act. [5]

[5] *See Deluca v. Hammons*, 927 F. Supp. 132 (S.D. N.Y. 1996), where the court rejected a similar attempt to justify a policy that limited home health services to some categorically eligible individuals based on an administrative process whereby individuals initially denied coverage under the state policy could potentially receive the eliminated services if certain pre-conditions were met. As in *Deluca*, the Defendant here has eliminated coverage of medical equipment and supplies for some categorically eligible Medicaid recipients (those who are not blind) and is asking the Court to accept a "back door" administrative process as a "cure" for the otherwise illegal elimination of those services. *Id.* at 136.

Defendant also argues that the exception process meets the reasonableness requirements as explained by CMS in its September 4, 1998 Guidance, which specifies the components of a reasonable exceptions process for covering medical equipment that is not on a state's list of covered services.[6] Def.Br. at 33-37. Defendant's process falls short of the Guidance in several respects which will not be reiterated here.[7] *See* Pl. Opening Br. at 26-37.

[6] While acknowledging CMS' transmittals of Sept. 4, 1998 and July 25, 2000, the Defendant argues their "value is small." Def. Br. at 28, 32. To the contrary, these letters "warrant respectful consideration." *Wis. Dep't of Health & Fam. Services v. Blumer*, 534 U.S. 473, 497 (2002) (citation omitted). Notably, the Supreme Court cited the September 4th letter as the basis for its decision to vacate and remand in *Slekis v. Thomas*, 525 U.S. 1098 (1999), *cert. granted vacating and remanding*, *DeSario v. Thomas*, 139 F.3d 80 (2d Cir. 1998). Decided before the issuance of the September 4th letter, the Second Circuit's decision had allowed the Connecticut Medicaid program to exclude coverage of necessary medical equipment not listed on the state's coverage list. Other courts have also relied on the September 4th transmittal to invalidate state policies that restrict access to medical equipment. *See Esteban v. Cook*, 77 F. Supp. 2d 1256, 1260 (S.D. Fla. 1999); *Bell v. Agency for Health Care Admin.*, 768 So.2d 1203, 1204 (Fla. Ct. App. 2000).

[7] According to the CMS Guidance, states must have an exceptions processes specific to medical equipment and make the criteria for obtaining the equipment available to recipients, and inform recipients of their fair hearing rights. Pl. Opening Br. At 33 (Pl.App.-87-88). Defendant argues that he meets the Guidance's requirement because one of the Plaintiffs, Joey Everett, applied for an exception and then received a notice of his rights when services were ultimately denied. Defendant ignores that fact that a notice was mailed to 370,000 Missouri Medicaid recipients informing them that medical equipment and supplies *were being eliminated*, and no mention has ever been made to them of any ability to continue to receive these services through an exceptions process. In addition,

Defendant, through selective use of Dr. Oestreich's testimony, argues that all non-covered items of equipment can be obtained through the exceptions process when the Department's own written policies and notices prove otherwise. (Pl. App.-106-110, 221, 232-237.) Defendant's argument boils down to the claim that an exceptions policy for "non-covered" services ensures that all medically necessary medical equipment and supplies are still available to anyone who needs them. However, the purpose of a Medicaid exceptions process is to provide exceptions for services that are *not normally covered* by Medicaid *in exceptional* circumstances–not to continue coverage of *all* items for which coverage has been eliminated.

C. Defendant's coverage of the home health benefit does not cure the violations of the reasonable standards requirement.

Defendant's coverage of medical equipment through the home health service is equally ineffective to cure the violation of the reasonable standards

---

Defendant erroneously implies that Joey Everett received all the services that he requested, Def. Br. at 34, but this is false.

The notice provided him was inadequate , and was approved for only some of the services his physician requested. (Pl. App. at 222-225). Thus, contrary to Dr. Oestreich's testimony, the physician's statement of medical necessity was not accepted. *See* Pl. Opening Br. at 37 n.13.

provisions because the Defendant imposes a number of illegal conditions on the receipt of those health services.[8] *See* Plaintiffs' Opening Brief at 39-44.

Most important for this case, the Defendant conditions the receipt of medical equipment through the home health service on the individual being homebound and requiring the concurrent services of a skilled nurse or therapist. 13 C.S.R. § 70-90.010(1)(A), (B). Defendant is correct when he points out that the home health regulation does not require that a Medicaid recipient be bedridden to meet the "homebound" requirement. (Def.Br. at 27; 13 C.S.R. § 70-90.010(3).) However, he fails to quote the remainder of the regulatory section that explains the restrictive nature of the homebound requirement and how it excludes the Plaintiffs from home health coverage:

> Further, a recipient may be considered homebound even if s/he occasionally leaves the home for nonmedical purposes, as long as these absences are infrequent, of relatively short duration, and do not indicate that the recipient has the capacity to obtain the needed care on an outpatient basis in a physician's office, outpatient clinic or other health-care facility.

[8] Defendant argues that Missouri has merely shifted medical equipment services coverage to home health and that Plaintiffs have never asked for medical equipment to be covered under that option. Def.Br. at 12, 31, 42-42. This is a new position fashioned for the purposes of litigation. Defendant sent a notice to 370,000 Missourians indicating that medical supplies were being eliminated without any suggestion that beneficiaries could try to receive them under home health. Because medical equipment and supplies are mandatory, Defendant simply has no authority to eliminate the service for all but pregnant women and children. No requirement that they request it under a new name exists, nor has Defendant created any process to do so.

13 C.S.R. § 70-90.010(3); *see also* Missouri State Plan Amendment TN# 00-09 (Pl.App.-073). The federal regulation contains no such pre-conditions. *See* 42 C.F.R. § 440.70(b)(3). The illegality of these requirements are discussed in Plaintiffs' Opening Brief at 41-42. With regard to this issue specifically, CMS has instructed Missouri to amend its state Medicaid plan to remove these requirements that an individual "require the services of a skilled nurse or therapist" and be "confined to his home" in order to access medical equipment and supplies under the home health benefit. *See* Plaintiffs-Appellants' Motion to Supplement the Record at 5-6 (citing Exhibit 3 to Declaration of Jane Perkins). CMS's actions confirm what Plaintiffs have long argued: the Defendant is violating the Medicaid's Act's requirement that he provide medically necessary equipment and supplies to eligible Missourians. The narrow exception for coverage of equipment that Defendant purports to provide under home health does not cure this violation.[9]

[9] Defendant confuses the law and facts by asserting that these additional conditions for home health services do not apply when medical equipment and supplies are not related to "patient care visits." Def.Br. at 29. Apparently, the Defendant is relying on the State plan provision and regulation that was in effect *prior to* the most recent round of cuts, under which medical equipment and supplies were provided independently under the "Durable Medical Equipment Program" without regard to whether Missouri's "home health" requirements were met. 13 C.S.R. § 70-90.010 (4) (repealed) (Pl. App at 75, 131, Defendant's Appendix at 73, 85).

IV. Plaintiffs have shown irreparable harm

In this circuit, the loss of Medicaid benefits constitutes irreparable harm. *See, e.g., Kai v. Ross*, 336 F.3d 650, 656 (8th Cir. 2003); *see also Massachusetts Ass'n of Older Americans v. Sharp*, 700 F.2d 749, 753 (1st Cir. 1983) (holding that "termination of benefits that causes individuals to forego such necessary medical care is clearly irreparable injury"). On September 1, 2005, the Defendant implemented a regulation which, by his own statement, "eliminated" Medicaid coverage of medical equipment for 370,000 aged and disabled Missourians who are not also blind. (Pl.App-064.) Plaintiffs are among those whose coverage was eliminated. Their Complaint details the consequences of this reduction in services, which affected the equipment and supplies they need to, among other things, obtain air and food through sterile, safe tubing and filters and maintain their mobility by being able to move from place to place with wheelchairs that work. Complaint at 10-16 (Pl. App.-016-022).

Defendant's home health regulation, that is now in effect, eliminates any such reference to the ability to receive medical equipment and supplies as part of a separate Durable Medical Equipment Program and makes it very clear that an individual must meet all of Missouri's other "home health" pre-conditions (e.g., must be confined to the home and must require skilled nursing care or therapy) in order to receive medical equipment and supplies. 13 C.S.R. § 70-90.010(1)(A),(B) and (4). *See* Plaintiffs-Appellants' Motion to Supplement the Record at 5-6 (citing Exhibit 3 to Perkins Declaration).

The district court found, and the Defendant argues on appeal, that the Defendant's exceptions process and home health coverage eliminate the risk of irreparable harm. The record clearly indicates the contrary. The general exceptions regulation and the home health benefit are quite restrictive and, on their face, unavailable to the Plaintiffs and others like them, as set forth above and in Plaintiffs' Opening Brief. The Defendant knows this. As acknowledged by the Defendant "Missouri's calculations [that 370,000 will lose coverage] . . . do take into account the number of persons that would shift to home health care and the exceptions process relief." Def. Br. at 36. The elimination of medical equipment for 370,000 Missouri residents is causing irreparable harm. It was clear error and abuse of discretion for the district court to find otherwise.

V. The Balance of Harms Favors Plaintiffs

Plaintiffs are suffering severe, ongoing harm because they cannot obtain the medical equipment that they need. This harm far outweighs any that Defendant would suffer. Defendant's implication that the striking down of the offending regulation would not mitigate this harm is simply erroneous. Def.Br. at 37-39.

If the regulation is enjoined, there will be no barrier to Plaintiffs' receipt of medical equipment. First, as discussed above, federal law makes home health services, including medical supplies, equipment and appliances, mandatory for the categorically needy. Missouri is required to adhere to federal Medicaid requirements in the operation of its Medicaid program. *See, e.g.*, *Schweiker v. Hogan,* 453 U.S. at 37; Mo. Rev. Stat. § 208.151. Moreover, a Missouri statute specifically mandates "Benefit payments for medical assistance for...[h]ome health care services" and thus, on its face, provides for coverage of the service as required by federal law, including coverage of medical supplies, equipment and appliances. *See* Mo. Rev. Stat. § 208.152.1(10) (recodified by SB. 539).[10]

Moreover, contrary to Defendant's implications, Def.Br. at 17-19, 37-40, the recent changes in state law that amended the statute mandating coverage of prosthetics do not prevent the state from covering medical equipment. In any case, even if state law posed some obstacle (and it does not), the court has the power to order Defendant to provide necessary medical equipment If the Court strikes down the Defendant's regulation, then the proper remedy would

[10] Defendant does not deny this, Def.Br. at 16. However, as discussed, he has imposed preconditions on the receipt of medical equipment through the home health benefit are improper that are illegally restrictive.

be to compel Defendant to adopt a medical equipment regulation or policy that complies with federal law, not to allow him compound the evasion of the law by providing no medical equipment to anyone. *See, e.g., Kai v. Ross ,* 336 F.3d 650 (finding recently enacted state law terminating Medicaid benefits to be inconsistent with federal Medicaid Act and issuing preliminary injunction for state to continue benefits).

VI. Enjoining Missouri's illegal regulation is in the public interest

The parties may disagree about the amount of money that would allegedly be saved by Defendant's decision to eliminate coverage of medical equipment for individuals who are not blind. However, this is not the issue. Rather, the district court clearly erred when it determined that Defendant is not violating federal law. (Order at 4.) As discussed above, there are multiple ongoing violations. Enjoining the Defendant is clearly in the public interest and budgetary constraints are no excuse for these violations.

Conclusion

Plaintiffs accordingly request that this Court reverse the decision of the district court, grant the injunction and order Defendant to provide Plaintiffs with medical equipment as required by the federal Medicaid Act.

Susan Lavon Lankford, Rachel Ely, Jan Everett as next friend of Joseph Everett, Donald Eugene Brown, Laura Lee Greathouse, Kimberly Vogehpohl, Adam Daniel Thomason, Plaintiffs-Appellants

Dated: Jan. 13, 2006 By: _____

Jane Perkins
Sarah Somers
National Health Law Program
211 N. Columbia St
Chapel Hill, NC 27514
Tel.: 919-968-6308
Fax.: 919-968-8855

Joel Ferber
Ann B. Lever
Daniel Claggett
Legal Services of Eastern Missouri
4232 Forest Park Blvd.
St. Louis, MO 63108
Tel.: 314-534-4200
Fax.: 314-534-1028

Certificate of Compliance

Pursuant to Federal Rules of Appellate P. 28 and 32(a)(B), Plaintiffs certify that this brief was prepared with WordPerfect Office 11, using 14 point type, and that it contains 5247 words, according to the word count of the word processing system in which it is typed.

_____

Sarah Somers

Certificate of Service

I hereby certify that two copies of Plaintiff-Appellant's Reply Brief was served via Federal Express upon:

Gary L. Gardner
Assistant Attorney General
207 W. High St.
Jefferson City, MO 65103
(573) 751-3321

Dated: January 13, 2006

_____
Sarah Somers