UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

S.J., by and through her next friend, S.S.; Et al. Plaintiffs. v. JENNIFER TIDBALL, in her official capacity as Acting Director of Missouri Department of Social Services, and MISSOURI DEPARTMENT OF SOCIAL SERVICES, Defendants.	)	Civil Action No. 20-cv-4036

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

Plaintiffs are entitled to a preliminary injunction. They have established that they are suffering irreparable harm from the denial of necessary services, are likely to succeed on the merits, that their harm outweighs any alleged harm to the State, and that an injunction is in the public interest. Doc. 24 at 2-6, 14-15. Plaintiffs seek an order compelling Defendants to ensure that Plaintiffs receive the private duty nursing services in the amount approved by Defendants. Courts have approved nearly identical preliminary injunctions in these circumstances. See O.B. v. Norwood, 838 F.3d 837, 840 (7th Cir. 2016); A.H.R. v. Wash. State Health Care Auth., 2016 WL 98513 (W.D. Wash. Jan. 7, 2016). Defendants have identified no basis for a different outcome here. The Court should grant Plaintiffs' motion.

I. DEFENDANTS OVERSTATE THE REQUIREMENTS FOR A PRELIMINARY INJUNCTION.

Based on a single unpublished district court decision, Defendants assert the preliminary injunction here is "mandatory" and subject to a heightened standard. Defs.' Opp. To Pls.' Mot. for Prelim. Inj., 2-3, Doc. 39 (citing Gerhart v. United States Dep't of Health & Hum. Servs., 2016 WL 8839016 (S.D. Iowa Aug. 12, 2016)). The Eighth Circuit, however, has not established any clear distinction or heightened standard. Under relevant doctrine, the focus of "the inquiry is an equitable one, requiring that [the court] consider whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined." Glenwood Bridge, Inc. v. City of Minneapolis, 940 F.2d 367, 370 (8th Cir. 1991) (quote omitted). The status quo is not the state of affairs when the case was filed, but rather "the status that existed before the violative action occurred." Hill v. Xyquad, Inc., 939 F.2d 627, 631 (8th Cir. 1991). Here, that would be a status where Defendants are providing for Plaintiffs' private duty nursing services. Regardless of the precise description of the "status quo," the primary

question is whether the preliminary injunction will remedy Plaintiffs' irreparable harm. See Ferry-Morse Seed Co. v. Food Corn, Inc., 729 F.2d 589, 593 (8th Cir. 1984) (where status quo's "condition of rest (in this case the refusal to deliver the [nursing services]) will cause irreparable harm, a mandatory preliminary injunction is proper."); See also Chicago United Indus., Ltd. v. City of Chicago, 445 F.3d 940, 944 (7th Cir. 2006) ("Preliminary relief is properly sought only to avert irreparable harm. . . . Whether and in what sense the grant of relief would change or preserve some previous state of affairs is neither here nor there. To worry these questions is merely to fuzz up the legal standard."); United Food & Commercial Workers Union, Local 1099 v. S.W. Ohio Reg'l Transit Auth., 163 F.3d 341, 348 (6th Cir. 1998) ("if the currently existing status quo itself is causing one of the parties irreparable injury, it is necessary to alter the situation so as to prevent the injury.").

Nor would a preliminary injunction of this sort grant Plaintiffs complete relief. Unlike a permanent injunction, any preliminary injunction would be time-limited until a final decision on the merits. Plaintiffs have ongoing needs that will only be fully redressed by a permanent injunction. Cf. Rathmann Grp. v. Tanenbaum, 889 F.2d 787, 790 (8th Cir. 1989) (preliminary injunction granted full relief where it covered the "same one-year period" plaintiff sought at trial). Because the record overwhelmingly shows that Plaintiffs are suffering ongoing irreparable harm that outweighs any harm to Defendants, the Court should issue the preliminary injunction.

II. PLAINTIFFS HAVE ESTABLISHED THAT THEY SUFFER IRREPARABLE HARM FROM THE DENIAL OF MEDICALLY NCESSARY SERVICES.

Defendants disregard the overwhelming record evidence and the applicable case law to make the incredible assertion that there is no irreparable harm here. Contrary to Defendants' assertion, a loss of Medicaid services (to which Plaintiffs are legally entitled) is itself irreparable harm. Doc. 24 at 3, 6 (and citations therein). See also J.D. v. Sherman, 2006 WL 3163053, at *10

(W.D. Mo. 2006) (finding irreparable harm where Missouri Medicaid agency failed to provide medically necessary transplant services required by EPSDT); Hiltibran v. Levy, 2010 WL 6825306, at *6 (W.D. Mo. Dec. 27, 2010) (finding irreparable harm from Missouri Medicaid's failure to cover medically necessary incontinence supplies). Furthermore, Defendants disregard the risk of injuries, serious health complications, and death from lack of medically necessary private duty nursing services. Docs. 24-9, Cole Decl. ¶ 13; 24-15, Foster Decl. ¶ 7; 24-10, Batiste Decl. ¶ 11. That risk is itself more than sufficient to establish irreparable harm. Doc. 24, at 3-4 (and cases cited therein). The cases Defendants cite in rebuttal are inapposite. S.J.W. involved a student claiming harm from failing to receive a sufficiently challenging education and inability to try out for the school band. 696 F.3d 771 (8th Cir. 2012). Hestdalen v. Corizon Corrections Health Care involved a pro se prisoner claiming a self-diagnosed medical problem. 2018 WL 6199570, *2 (E.D. Mo. 2018). These situations are quite different from this case, which involves denials of essential and in many cases, life-saving services that Defendants have already approved as medically necessary.

The risk of unnecessary institutionalization also constitutes irreparable harm. As explained in Plaintiffs' Response to the Motion to Dismiss, Olmstead requires that people with disabilities receive services in the most integrated settings appropriate to their needs, which in this case means in their own homes with their families, not in hospitals, pediatric bridge facilities, or other such institutions. See Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 591-92 (1999); Pls.' Resp. to Mot. to Dismiss at 2-3, 14-15. The type of institution does not change the analysis. Plaintiffs are facing the very same the harm identified in Olmstead and subsequent cases: psychological harm, shorter life expectancy or death, and inability to participate in everyday activities. See Docs. 24-9, Cole Dec. ¶¶ 16-24 (for a detailed discussion of the harm to medically complex children from

prolonged institutionalization in a hospital); 24-1, G.T. Decl. ¶¶ 5-6 (Plaintiff C.T. became depressed and was prescribed psychiatric medication while she spent over a year in the hospital waiting for Defendants to arrange private duty nursing services). Further, because the Plaintiffs are children, unnecessary hospitalization also causes developmental harm, which can be lifelong. Doc. 24-9, Cole Decl. ¶ 22. Defendants ask the Court to disregard these harms because Plaintiffs are sometimes hospitalized to treat their conditions. Doc. 39 at 10. This misses the point. The expert testimony of Dr. Cole and the experience of the Plaintiffs themselves establish an increased risk of *unnecessary* hospitalization—or unnecessarily prolonged hospitalization—because they lack in-home nursing. Docs. 24-9, Cole Decl. ¶¶ 10-31; 24-1, G.T. Decl. ¶¶ 5-6; 24-4, A.B. Decl. ¶ 5. That risk constitutes irreparable harm.

Defendants next attempt to distinguish cases cited by Plaintiffs because they involve "budget cuts and other administrative matters" and are "not related to PDN issues." Doc. 39 at 12. First, that is inaccurate. Plaintiffs cite, and Defendants ignore, O.B. and A.H.R., which address the very same issues litigated here. Doc. 24 at 1, 9, 10, 12, 14 (and citations therein). Moreover, Defendants raise a distinction without a difference: there is "no difference in the irreparable harm to Plaintiffs or the balance of the equities regardless of whether the State overtly denies services that are due, eliminates or reduces funding for such services, or authorizes such services but then fails in its duty to provide services." A.H.R., 2016 WL 98513 at *17, n.17. Plaintiffs are irreparably harmed by Defendants' failure to provide the medically necessary private duty nursing services the Defendants themselves have approved.

Finally, Defendants claim that there is no imminent threat of harm because the families of the Plaintiffs have been "coping without the PDN and keeping their families together for years." Doc. 39 at 12. This heartless assertion ignores the ongoing harm to the family caregivers who are

suffering from anxiety, loss of sleep, loss of employment and other stressors. Docs. 24-6, M.D. Decl. ¶¶ 10-11; 24-7, C.B. Decl. ¶¶ 39, 45, 47; 27, S.S. Decl. ¶¶ 18-21; 24-8, C.W. Decl. ¶¶ 8-11; 24-1, G.T. Decl. ¶¶ 15-17; 24-5, M.S. Decl. ¶ 11; 24-4, A.B. Decl. ¶ 14; 24-3, M.A. Decl. ¶¶ 15-16, 19; 24-2, J.L-S. Decl. ¶¶ 19-23; see also Docs. 24-15, Foster Decl. ¶¶ 11-13; 24-9, Cole Decl. ¶¶ 25-30. The physical and mental toll on family caregivers has a direct impact on the health of the Plaintiff children. Doc. 24-15, Foster Decl. ¶¶ 10-13. Further, many of the families have not been able to keep the Children at home. Plaintiffs I.B. and R.R. came home for the first time late last year after the families struggled to find enough private duty nursing to maintain care at home. Docs. 24-6, M.D. Decl. ¶ 2; 24-4 A.B. Decl. ¶ 4. Plaintiff B.B. has never been home for longer than six months without a hospitalization. Doc. 24-7, C.B. Decl. ¶ 24. Plaintiffs P.W. and C.T. have already unnecessarily spent months of their teenaged years in hospitals away from their homes and the social opportunities they want and need. Docs. 24-8, C.W. Decl. ¶ 6; 24-1 G.T., Decl. ¶ 6. In short, Plaintiffs are suffering irreparable harm.

III. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS.

A. Plaintiffs have demonstrated standing.

As explained in Plaintiffs' Response to the Motion to Dismiss, Plaintiffs' ongoing injuries support Plaintiffs' standing. See Pls.' Resp. to Mot. to Dismiss at 4-6. The Defendants' conclusory declarations do not alter the Court's analysis for purposes of the preliminary injunction. The record demonstrates that Plaintiffs' injuries are traceable to the Defendants' policies and practices. First, nothing in these generalized statements contradicts Plaintiffs' testimony that DSS has failed to arrange for Plaintiffs' services. Defendants' inaction is therefore causally related to Plaintiffs' injuries. Moreover, Defendants' testimony confirms Plaintiffs' testimony that all Defendants do to ensure Plaintiffs receive services is provide a list of potential agencies and direct families to

identify a provider. Compare Docs. 39 at 8; 39-2, Darr Decl. ¶¶ 17, 22 with Docs. 24-2, J.L-S. Decl. ¶ 13; 24-2, A.B. Decl. ¶ 5; 24-8, C.W. Decl. ¶ 7.

There are many more steps Defendants could take to arrange for Plaintiffs' services. Defendants have authority to, among other things, provide additional case management, allow for self-directed care with the families choosing their own nurse, create on-call nurse teams for crises staffing, and adjust reimbursement rates as needed (which Defendant Tidball acknowledges is one reason there are insufficient nurses accepting Medicaid). See 42 C.F.R. §440.169(d) (1)-(4); Doc. 39-7, Tidball Decl. ¶ 12. Defendants have taken none of these steps, and that inaction is causing Plaintiffs' injuries.

Yet, Defendants protest that there is nothing they can do. But the record reveals many factors within Defendants' control. Guidance from the Centers for Medicare & Medicaid Services emphasizes that Defendants have an "affirmative obligation to connect children with necessary treatment," and "must . . . take advantage of all resources available to provide a broad base of providers who treat children. Some states may find it necessary to recruit new providers to meet children's needs." See CMS, *EPSDT Guide*, Doc. 24-12 at 5, 28 (quotes omitted). Furthermore, Defendants own proposed regulation shows that Defendants can take additional actions to "enlarge the group of individuals who may render care." Doc. 39-3, Kremer Decl. ¶ 17. See also Doc. 39-6, Dresner Decl. ¶ 14 (proposed changes "will allow for a greater pool of staff able to provide private duty nursing," in Missouri's Medicaid program "than the current regulation."). The proposed regulation includes allowing a Medicaid enrollee's licensed family member to become employed by a Medicaid PDN provider to provide care for their family member and allowing graduate RNs and LPNs to provide private duty nursing. Doc. 39 at 13-14; Doc. 1, Compl. ¶¶ 83-84 (describing similar actions Defendants could take).

As a result, any shortage of nurses is particular to the Medicaid program. See Doc. 24-9, Cole Decl. ¶¶ 10, 14. In fact, Defendant Tidball's declaration speaks only to the availability of nurses in the Medicaid program and, thus, supports Plaintiffs' position. Doc. 39-7, Tidball Decl. ¶ 11 ("I am aware there is currently a shortage of private duty nurses in Missouri willing to work for enrolled Medicaid providers."); See also Doc. 39 at 13 (describing "shortage of private duty nurses . . . who are willing to work for Medicaid providers."). Defendants' policies and practices have, at the very least, contributed to the gaps in Plaintiffs' services. While there may be additional factors at play, "standing doctrine does not require sole or direct causation." Church v. City of St. Michael, 205 F. Supp. 3d 1014, 1029 (D. Minn. 2016); see also Dep't of Commerce v. New York, 139 S. Ct. 2551, 2566 (2019) (traceability and redressability satisfied where plaintiffs rely "on the predictable effect of Government action on the decisions of third parties."). Plaintiffs have established that their injuries are traceable to Defendants and redressable by a favorable ruling.

B. Plaintiffs are likely to succeed on their EPSDT claim because Defendant Tidball is not meeting her obligation to "arrange for" corrective treatment.

Defendant Tidball relies on a cramped reading of the EPSDT provision. As explained in Plaintiffs' Response to the Motion to Dismiss and incorporated by reference here, that reading is not supported by the statutory text, the legislative history, or CMS guidance. Pls.' Resp. to Mot. to Dismiss at 12-14. Nor does Defendant address the ample case law describing her affirmative obligation to ensure that Plaintiff Children actually receive services. See Doc. 24 at 9-10.

The record confirms that Defendant Tidball is not meeting this obligation. Defendant concedes that the State simply provides Plaintiffs with a list of agencies and leaves parents to fend for themselves, even when the State is or should be aware of discrepancies between the number of hours authorized and those actually used. See Docs. 39 at 8; 39-2, Darr Decl. ¶¶ 17, 22. This does

not satisfy the EPSDT requirements.[1] See O.B., 838 F.3d at 841 (where state Medicaid agency "left the search to parents," it "has violated the Medicaid Act."). Defendant must do more, notwithstanding the "variables" at play. Doc. 39 at 9. Defendants in O.B. and AHR similarly complained of the "'sheer complexity' of the issue of access to Medicaid providers" or complications with specific plaintiffs, but these factors did not abrogate their EPSDT obligations and defeat the need for injunctive relief. See 170 F. Supp. 3d at 1199; 2016 WL 98513 at *13.

C. Plaintiffs are likely to succeed on their claim of disability discrimination under Olmstead based on risk of institutionalization.

Plaintiffs address Defendants' flawed interpretation of the ADA and Rehabilitation Act in their Response to the Motion to Dismiss. Plaintiffs incorporate that briefing here. For those reasons, Plaintiffs are likely to succeed on their claims under the ADA and Rehabilitation Act.

IV. PLAINTIFFS MEET THE REMAINING FACTORS FOR A PRELIMINARY INJUNCTION.

The severe irreparable harm to Plaintiffs outweighs any purported harm to Defendants. Doc. 24 at 6. Defendants, for their part, identify no harm to the State from an order requiring them to comply with federal law and ignore the cases holding that enforcing federal law is in the public interest. See id. at 14 (collecting cases). Instead, Defendants again repeat their merits arguments, asserting that the "plan" they have in place is sufficient and that any further improvements are beyond their control. As demonstrated above, that is not so.

Defendants cite a proposed rule to assert that a preliminary injunction would have no benefit. See Doc. 39 at 13-14. But that proposed rule actually tips the balance of the equities in

[1] Nor is Defendant's inaction excused by § 1396a(a)(23). See Doc. 39 at 9. That provision states Plaintiffs may choose among a range of qualified providers. There is no conflict between this provision and the EPSDT requirements. Defendant can simultaneously ensure Plaintiffs are receiving necessary services and that they can choose among a range of qualified providers. See Doc. 24-12, CMS, *EPSDT Guide* at 28 (describing freedom of choice provision).

Plaintiffs' favor. First, theoretical future improvements do not alleviate the harm Plaintiffs are experiencing now. See Lankford v. Sherman, 2007 WL 689749, at *2 (W.D. Mo. Mar. 2, 2007) (issuing a preliminary injunction, and finding that proposed amendments to the Missouri Medicaid program had "no relevance" until they became law); See also Docs. 39 at 14 (rule will take "several months" to be finalized); 39-6, ¶ 12 (same). Second, the rule underscores Defendants' awareness that the current system does not provide for the in-home services that children with medically complex conditions, such as Plaintiffs, need. See also Doc. 39-7, Tidball Decl. ¶ 11. Third, it undercuts any claim of harm from the preliminary injunction.

Defendants' assertion that a preliminary injunction would be "vague and indefinite" is equally misplaced. At least two federal courts have granted similar preliminary relief. In O.B., the district court ordered the state defendant to take "immediate and affirmative steps to arrange directly or through referral to appropriate agencies, organizations or individuals, corrective treatment of in-home nursing services at the level approved by the State." O.B. v. Norwood, 838 F.3d at 840. Similarly, in A.H.R., the court directed the defendant to take all actions within its power necessary for the plaintiffs to receive the private duty nursing previously authorized by the state and ordered the parties to meet to develop a plan for implementing the preliminary injunction. 2016 WL 98513 at *20. In neither case did a court prescribe specific steps the defendants were to take to achieve compliance, and in both cases the parties reached court-approved settlements in which the state agencies adopted various steps to come into compliance with EPSDT and the ADA.[2] Consent Decree, O.B. v. Norwood, No. 15-10463 (N.D. Ill. August 14, 2019), E.C.F. No.

[2] Other states have also reached settlements in cases involving challenges to states' compliance with private duty nursing requirements, demonstrating that policy changes to ensure compliance with these federal laws are feasible. See Settlement Agreement, I.N. v. Kent, No. 18-03099 (N.D. Cal. May 24, 2018), E.C.F. No. 120-1 (Exh. 19); Settlement Agreement, A.J. v. Gee, No. 19-324 (M.D. La. October 21, 2019), E.C.F. No. 24-2 (Exh. 20).

182 (Exh. 17); Settlement Agreement, A.H.R. v. Wash. State Health Care Auth., No. 15-05701 (W.D. Wash. December 21, 2016), E.C.F. No. 65 (Exh. 18). These results belie Defendants' argument that there is nothing that can be achieved through a preliminary injunction.

Finally, the Court should reject Defendants' claim that they are "harmed" because Plaintiffs seek preliminary injunctive relief that is the "same relief they seek at the trial." Doc. 39 at 13. Plaintiffs only seek compliance with federal law under the applicable standards for preliminary relief, including that they are likely to succeed on the merits. Courts can and do grant preliminary relief requiring state defendants to provide Medicaid services pending a final resolution of the litigation. See, e.g., Kai v. Ross, 336 F.3d 650 (8th Cir. 2003) (preliminarily enjoining state to continue benefits after finding state law inconsistent with Medicaid Act); Hiltibran, 2010 WL 6825306, at *6 (preliminarily enjoining Missouri Medicaid's to cover medically necessary incontinence supplies); Lankford, 2007 WL 689749, at *1 (preliminarily enjoining Missouri Medicaid agency from continuing to deny medically necessary medical equipment); J.D. v. Sherman, No. 06-4153-CV-C-NKL, 2006 U.S. Dist. LEXIS 78446, at *10 (W.D. Mo. 2006) (preliminarily enjoining Missouri Medicaid agency to cover medically necessary transplant services); McNeil-Terry v. Roling, 142 S.W.3d 828, 834 (Mo. Ct. App. 2004) (preliminarily enjoining Missouri Medicaid agency from reducing scope of necessary dental services); White v. Martin, 2002 WL 32596017, at *7-9 (W.D. Mo. 2002) (preliminarily enjoining Missouri to provide transitional Medicaid benefits); Nemnich v. Stangler, 1992 WL 178963 (W.D. Mo. 1991) (preliminarily enjoining Missouri from denying Medicaid coverage of dental services).

CONCLUSION

Plaintiffs respectfully ask the Court to grant their motion for a preliminary injunction.

Date: May 8, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Reply in Support of Plaintiffs' Motion for Preliminary Injunction and the attached exhibits were served by means of the Court's electronic filing system upon Defendants' Counsel of Record on May 8, 2020.

/s/ Joel Ferber
Joel Ferber