No. 19-1244

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

KAREN VAUGHN,

Plaintiff/Appellee,

v.

JENNIFER WALTHALL, in her official capacity as Secretary of the Indiana Family and Social Services Administration, *et al.*,

Defendants/Appellants.

On Appeal from the United States District Court for the Southern District of Indiana, No. 1:16-cv-03257-JMS-DLP
The Honorable Jane Magnus-Stinson, Chief Judge

SUPPLEMENTAL BRIEF OF APPELLANTS

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INTRODUCTION

The challenge in securing home-healthcare services for Karen Vaughn has stemmed from her need for extensive skilled nursing services—up to twenty-four hours per day—and the lack of home-healthcare agencies willing to provide that care at current Medicaid reimbursement rates. ECF 55-3 at 24–25. Tendercare has been the only home-healthcare agency willing to do so, but it has demanded to be paid well in excess of the federal-government-approved Medicaid reimbursement rates. ECF 126; ECF 136-1. The district court agreed with Vaughn that Medicaid reimbursement rates were too low and decided to do something about it: It issued an unlawful outcome-mandating injunction that is not only untethered from the legal violations it purported to find, but is also directly foreclosed by the Supreme Court's and this Court's decisions interpreting the Medicaid Act. Rather than direct Indiana's Family and Social Services Administration (FSSA) to allow Vaughn to self-direct her care or to allow unskilled providers to perform skilled care—the two accommodations on which Vaughn premised her claims—the district court ordered FSSA to do "whatever is necessary" to provide Vaughn home healthcare. Short App. 52. To comply with the injunction and avoid the district court's threatened contempt sanction, FSSA paid Tendercare the rate it demanded—outside Medicaid, entirely with state funds.

Recently, the federal Centers for Medicare and Medicaid Services (CMS) approved an amendment to Indiana's Aged & Disabled Waiver. The amendment authorizes a pilot program (for which Vaughn is eligible) under which participants are given a budget to hire their own providers and pay them at rates of their choosing, so long

as they do not go over budget. The program does not raise Medicaid reimbursement rates. But because the program can be used in conjunction with the traditional Medicaid State Plan, it is possible that the combination of State Plan and pilot program funds can be used to pay Tendercare for Vaughn's care.

Although the pilot program may allow Vaughn to receive care from Tendercare within the confines of Medicaid, that fact neither moots this appeal nor justifies the district court's injunction. The injunction remains as unlawful now as it was when the district court first issued it, for it unjustifiably extends beyond the two ostensible legal violations the district court identified, improperly directs defendants to achieve a particular outcome, and unlawfully usurps the federal and state Medicaid agencies' rate-setting authority. This Court should vacate that injunction.

ARGUMENT

I. Vaughn Is Eligible for the Participant Directed Home Care Service, Which Is Unrelated To the State's Skilled-Nursing Regulations

The Participant Directed Home Care Service (PDHCS) is an approved pilot program under the State's Aged and Disabled Waiver that aims to give participants the flexibility to choose their own providers and direct their own care. It includes both skilled and unskilled care, "is a health-related service that can be performed by either licensed medical personnel or trained non-medical personnel[,] and is provided for the primary purpose of meeting the chronic personal needs of the participant to maintain a level of function that will allow for a participant to avoid unnecessary institutionalization." Request for an Amendment to a §1915(c) Home and Community-Based

Services Waiver (Waiver), at 115, https://www.in.gov/fssa/files/Aged%20and%20Disabled-%20Self%20directed%20care%20amendment.PDF (effective May 26, 2020); *see also id.* at 188. The PDHCS may be used in conjunction with Indiana's Medicaid State Plan and may be used for up to twenty-four hours per day, seven days per week. *Id.* at 14–15, 115, 188.

1. Two principal features distinguish the PDHCS from the traditional Medicaid State Plan and traditional Waiver services—the participant hires the providers, including skilled providers, and pays them from a budget. First, the participant has the authority—and indeed is expected—"to select, schedule, train, supervise, and, if necessary, terminate their own provider." *Id.* at 188. The PDHCS gives participants flexibility regarding whom to hire: Participants may hire "either a licensed professional through a home health agency, an independent, licensed professional, or a non-clinical competency-trained unlicensed professional." *Id.* at 115. And the participant "takes on all of the responsibilities of being an employer," though a fiscal intermediary handles payroll management. *Id.* at 188.

Second, the participant receives a budget, calculated based on an actuarial rate and her care needs, from which to pay her chosen providers. *Id.* at 14, 188, 191, 200. Once the budget is set, the participant "decides . . . the actual rate and how many hours will actually be reimbursed within the total amount of the budget." *Id.* at 200.

By conferring on participants "both employer and budget authority," the PDHCS affords each participant "[a]n opportunity to exercise self-control, to arrange the care conveniently for the participant, and to work with provider(s) who are chosen

by the participant." *Id.* at 188. The program also "[a]llows the participant the opportunity to arrange for services from more than one provider or from a combination of agency-based care and self-directed skilled care." *Id.* at 188. In exchange for the flexibility afforded by the PDHCS, the "[p]articipant must be willing to accept risks and responsibilities associated with employing their caregiver and directing their own care," and the participant must also "sign a waiver liability form." *Id.* at 115; *see also id.* at 192 ("If the participant chooses to self-direct home care providers they assume the responsibility to direct the home care service, and exercise judgment regarding the manner in which those services are delivered, including the decision to employ, train, and dismiss a home care provider.").

2. The PDHCS has a host of eligibility criteria. First, to be eligible a prospective participant must "be diagnosed with a chronic medical condition that may require up to twenty-four . . . continuous hours of care, as evidenced through a physician's order," and the participant's chronic medical condition must be "stable." *Id.* at 115. Second, home care service must be ordered by a physician or nurse practitioner. *Id.* at 115. Third, the participant must already "receive home health State Plan services" and be enrolled on the State's A&D Waiver. *Id.* at 115. Fourth, the participant must live alone and not in a congregate setting or with informal, unpaid caregivers. *Id.* at 115, 189. Fifth, the participant must be able to direct her care and be twenty-one years old or older. *Id.* at 115. And sixth, to limit the initial size of the pilot program, the participant must reside in either postal code 46202 or postal code 46204. *Id.* at 6, 15, 115. Vaughn satisfies these eligibility criteria. *See* ECF 116-1; ECF 36-1.

3. Finally, while the hallmark of the PDHCS is flexibility, the program does *not* eliminate Indiana's skilled-nursing regulations. As explained in the defendants' earlier briefing, those regulations are administered by state agencies *other than* FSSA and generally prohibit unlicensed individuals from providing skilled nursing care. *See* Ind. Code §§ 25-23-1-27(3), 25-23-1-1.1(b)(5), 16-27-1-15, 16-27-1-2, 16-27-1-5. FSSA does require each participant's care manager to check in with the participant a minimum of every thirty-one days and to "file an incident report to the State to report any quality-of-care issues or lapses in participant/employer responsibilities." Waiver at 190; *see also id.* at 195. And the participant has an incentive not to entrust skilled care to unskilled providers because the occurrence of any "immediate health and safety risks associated with participant-direction" results in the participant's involuntary termination from the PDHCS for at least twenty-four months. *Id.* at 197. But under the PDHCS, the participant—not FSSA—hires and trains her providers; FSSA plays *no role* in enforcing the State's licensure rules. *Id.* at 115, 188.

II. Vaughn May Be Able To Receive the Home-Healthcare Services That She Is Currently Receiving from Tendercare Via a Combination of the Participant Directed Home Care Service and State Plan Services

Not only is Vaughn already eligible for the PDHCS pilot program, but she may also be able to use this program, in conjunction with traditional Medicaid State Plan services, to obtain the home-healthcare services she currently receives from Tendercare—all in a manner that complies with state and federal Medicaid regulations and allows the State to obtain federal Medicaid funding.

First, as the defendants explained in their earlier briefing, Vaughn is eligible for up to sixteen hours of home-healthcare services under Indiana's traditional Medicaid State Plan, which pays $43.34 per hour for skilled care provided by registered nurses (with an additional $34.50 per day per patient for overhead). *See* Appellant Br. 4–9; ECF 36-3 at 142–44; ECF 136-3 at 23; http://provider.indianamedicaid.com/ihcp/Bulletins/BT201828.pdf.

Second, as noted, Vaughn is also eligible for PDHCS. And unlike the Medicaid State Plan, PDHCS does not fix provider reimbursement rates, but instead provides a Medicaid participant with an aggregate sum to allocate as the participant wishes; PDHCS allows participants to pay providers any rate they choose, so long as their total PDHCS spending stays within the aggregate budgeted amount. *See* Waiver at 14; *id.* at 200. Under PDHCS, FSSA and the care manager determine the aggregate amount for which a particular participant is eligible by first assigning the participant a particular number of PDHCS hours in light of the participant's circumstances and care needs. *See id.* at 14 (explaining that the number of hours approved will depend on many factors, such as the participant's plan of care, needs, preferences, and informal supports); *id.* at 200 ("[A]nnual cost per participant is determined by an algorithm established by the Division of Aging. The care manager will develop a person-centered plan to meet those needs and service request, and a dollar amount will be assigned to the plan using the Division of Aging's algorithm. The annual budget is determined by the number of hours assigned by the care manager . . . ."). The ap-

proved number of hours is then multiplied by $41.80 per hour. *See id.* at 14 (explaining that PDHCS allocates $10.45 per 15-minute increment, equivalent to $41.80 per hour); *id.* at 200, 267. For example, if Vaughn were assigned twenty-four hours of PDHCS services, she would be authorized to spend up to an aggregate sum of $1,003.20 per day.

Importantly, the number of PDHCS hours assigned to a particular participant is used to calculate the aggregate amount of funds available to that participant, but does *not* limit the participant's use of those funds; the participant remains free to direct the PDHCS funds as the participant chooses. If, for example, the participant is assigned twenty-four PDHCS hours per day, the participant is under no obligation to actually obtain twenty-four hours of care and may instead choose to use the aggregate amount to pay a higher rate for fewer hours of care.

Third—and critically—FSSA understands the Waiver Amendment and federal regulations to allow participants to use PDHCS services in conjunction with Medicaid State Plan services, because while the two services are similar, they have distinct methods of service delivery (the State directly hires and pays providers under the Medicaid State Plan, while participants hire and pay providers under PDHCS). Notably, the Waiver Amendment specifically says that participants in the PDHCS program will also be able to use Medicaid State Plan services. *See id.* at 14 ("Will participants be able to access participant directed home care services if they cannot fill authorized state plan services? If so, what standards or processes would be used? Yes

to both of these questions. This service does not bar other services being utilized. . . ."). In approving the Waiver Amendment, the federal government endorsed this approach. *See id.* at 188 ("In conjunction with State Plan services, PDHCS can be provided twenty-four (24) hours per day, seven (7) days a week.").

Of course, a provider may not bill *both* the traditional Medicaid State Plan *and* a PDHCS participant for a single service provided in a single hour; for example, a home-healthcare agency that provides services from noon to 1:00 p.m. cannot bill the Medicaid State Plan $43.34 for that hour *and* bill the PDHCS participant for that hour as well. Such a bill would constitute a "duplicate" claim for payment, which federal Medicaid regulations prohibit. *See* 42 C.F.R. § 447.45(f)(1) (requiring state Medicaid agencies to verify that a claim submitted for payment "does not duplicate or conflict with one reviewed previously or currently being reviewed"). Nevertheless, participants may avail themselves of the Medicaid State Plan and PDHCS so long as a provider is not issuing duplicate bills for the same hour of service. Accordingly, a participant can obtain home-healthcare services for part of the day via the Medicaid State Plan and then pay for home-healthcare services for the rest of the day via PDHCS.

For example, Vaughn could obtain twelve hours of home-healthcare services each day from the Medicaid State Plan (for which, as noted, the State would pay $43.34 per hour) and then pay for twelve additional hours of home-healthcare services each day via PDHCS. And if the care manager were to assign Vaughn twenty-four hours of PDHCS services, and if Vaughn thus had $1,003.20 per day of aggregate

PDHCS funds available, Vaughn conceivably could pay up to approximately $83.33 per hour for those additional twelve hours. And because PDHCS affords participants flexibility, Vaughn could hire the same agency that provides the first twelve hours to provide the additional twelve hours as well; or she could hire an entirely different provider (an agency or an individual) to provide the additional twelve hours. *See* Waiver at 116–17 (listing both individuals and agencies as permissible providers under PDHCS).

By way of example, the State conceivably could pay Tendercare $43.34 per hour for twelve hours of home-healthcare services under the Medicaid State Plan, and Vaughn could pay Tendercare $83.33 per hour for twelve hours under PDHCS. Under this scenario, for these twenty-four hours of care Tendercare would receive a total of $1,520.04 each day, or approximately $63 a hour.

III. This Case Is Not Moot and the Injunction Should Be Vacated

Because Vaughn is already eligible for the PDHCS and can probably receive her home-healthcare services under that pilot program, the Court need not engage in any accommodation analysis at all. Moreover, that Vaughn can take part in the pilot program, does not render this appeal moot or in any way support the injunction's validity. The pilot program merely affords one possible additional means of trying to comply with the injunction—and not a foolproof one at that. And if for some reason it does not work—if, say, Vaughn were to choose not to enroll in the PDHCS or if Ten-

dercare were unwilling to provide *any* services at Medicaid State Plan rates—the injunction would still require defendants to ensure Vaughn receives care at home, no matter what.

1. Compliance with an injunction does not moot an appeal if the effects of the injunction can be undone, if compliance is only partial, or if the injunction controls future conduct. *McDonough Assocs., Inc. v. Grunloh*, 722 F.3d 1043, 1048 (7th Cir. 2013); 13B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3533.2.2 (3d ed. 2020). Defendants remain subject to an unqualified order requiring them to ensure Vaughn receives home healthcare. The injunction directs defendants "to arrange for Ms. Vaughn, within 21 days, the provision of the home health and attendant care services"—period. Short App. 54–55. The injunction does not have an expiration date, so if for some reason Vaughn is institutionalized against her wishes, the defendants will continue to face the possibility of contempt sanctions.

And the injunction has the effect of limiting the defendants' discretion in administering Indiana's Medicaid program: Whatever decisions defendants make with regard to the Medicaid State Plan and Waivers, they must ensure—on pain of contempt—that Vaughn continues to receive home-healthcare services, no matter what. The coercive effects of the injunction and its limits on defendants' policymaking authority suffice to keep this appeal a live controversy, even if the PDHCS ultimately proves a successful mechanism for defendants to comply with the district court's outcome-mandating order.

2. Nor does Vaughn's eligibility for the PDHCS pilot program somehow retroactively validate the district court's injunction. Even if defendants may be able to comply with the injunction within the bounds of the Medicaid program, the injunction remains far "broader than the legal justification for its entry." *Henderson v. Box*, 947 F.3d 482, 487 (7th Cir. 2020). The district court's conclusion that federal law required FSSA to grant the two particular modifications Vaughn requested—to self-direct her care and allow unskilled providers to offer skilled care, Short App. 20—cannot justify its injunction, which requires FSSA to make "*whatever*" modification "is necessary" to provide Vaughn home healthcare, *id.* at 52 (emphasis added).

Nor does the PDHCS pilot program justify the district court's unlawful refusal to specify precisely what defendants need to do to comply with the injunction. The injunction simply mandates a "defined result," and Rule 65(d)(1)(C) prohibits such "detail-free" injunctions. *O.B. v. Norwood*, 838 F.3d 837, 843–44 (7th Cir. 2016) (Easterbrook, J., concurring); *see also Patriot Homes, Inc. v. Forest River Hous., Inc.*, 512 F.3d 412, 415 (7th Cir. 2008).

Finally, because the district court's injunction in effect improperly obligates the State to raise its reimbursement rates to whatever level necessary to keep Vaughn home, vacating the injunction is especially important. In *O.B.*, this Court properly recognized that the Medicaid Act places the responsibility for setting Medicaid reimbursement rates in the hands of CMS and state Medicaid agencies—not courts. *See* 838 F.3d at 842; *id.* at 844 (Easterbrook, J., concurring). By in effect or-

dering FSSA to pay Tendercare whatever rate it demands, the district court's injunction unlawfully usurps the State's and federal government's rate-setting authority and places FSSA in an untenable negotiating position.

The easiest way to resolve this appeal would be to vacate the injunction on these grounds and remand to give Vaughn an opportunity to enroll in the PDHCS and secure her home-healthcare services that way. There is no need (or basis) for the Court to consider whether allowing Vaughn into that program would represent a reasonable accommodation under the Americans with Disabilities Act because Vaughn already satisfies the eligibility criteria for the program. As explained above, through a combination of Medicaid State Plan and PDHCS Vaughn may be able to receive necessary care within the confines of the Medicaid program and its rate structures. The only way to know for sure is for Vaughn to enroll in PDHCS and try to obtain the care she needs. The district court's unlawful injunction does nothing to encourage that outcome. It should be vacated.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court reverse the district court and vacate the permanent injunction.

Respectfully submitted,

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Dated: July 21, 2020

CERTIFICATE OF WORD COUNT

I verify that this brief contains 3,098 words according to the word-count function of Microsoft Word, the word-processing program used to prepare this brief.

By: *s/ Thomas M. Fisher*
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CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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