

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF WEST VIRGINIA

HUNTINGTON DIVISION

BELINDA CYRUS on behalf of
Mildred McSweeney, GEORGE
JEFFERSON, and PAUL ROBERT
BOGERT, on behalf of a class
of individuals similarly situated,

Plaintiffs,

v.

CIVIL ACTION NO. 3:04-0892

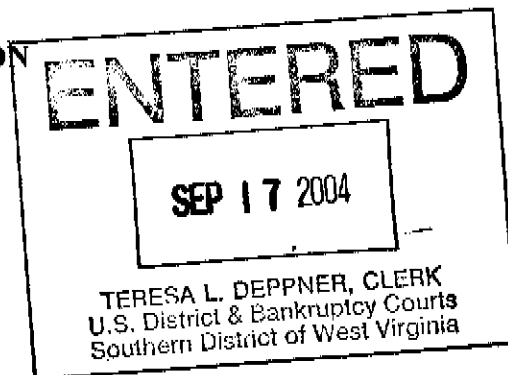
PAUL NUSBAUM, in his capacity as
Secretary, West Virginia Department of
Health and Human Services,

Defendant.

PRELIMINARY INJUNCTION ORDER

On September 2, 2004, Plaintiffs filed an Amended Complaint along with a Motion for a Temporary or Preliminary Injunction Order and a Motion for Class Certification, with supporting memoranda. On September 9, 2004, the parties appeared before the Court for a hearing on Plaintiffs' motion for preliminary injunctive relief. After hearing the evidence and arguments submitted by the parties, the Court orally granted the preliminary injunction, in part, and more fully explains below its rationale and the scope of the preliminary injunction.

In the Amended Complaint, Plaintiffs allege that they were all qualified participating recipients of the Medicaid Home and Community Based Age/Disabled Waiver Program (ADWP),



but they have had their benefits terminated since November of 2003.¹ The program, which is administered by the Bureau of Medical Services (BMS) as part of the West Virginia Department of Health and Human Resources, provides benefits to individuals who qualify for Medicaid nursing home care, but who prefer to stay in their own homes rather than go to a nursing home. ADWP provides eligible recipients with in-home services such as case management, homemaker, and medical adult care. The program is designed, in part, to save money by providing a community based alternative to nursing care.²

Plaintiffs allege that since the inception of the program in 1983 until November of 2003, Defendant conducted annual eligibility determinations using an announced policy. As part of the continued eligibility determination process, a recipient's case management agency³ completed a Pre-Admission Screening Form, referred to as a PAS-2000, in conjunction with the recipient's treating physician's review and signature. According to Plaintiffs, information was typically collected and verified through telephone communications and in-person and home visits. If benefits were terminated following annual reviews, terminated recipients were sent written notifications outlining the specific reasons for the denials and they were provided impartial, fair hearings at which they could confront adverse witnesses.

¹At the hearing, the parties agreed to stipulate that George Jefferson is now receiving benefits. The Court directed the parties to submit an agreed order dismissing Mr. Jefferson from this action.

²The cost of the services the recipient requires may not exceed the statewide average cost of nursing home care.

³Case management agencies are private not-for-profit social service agencies that assists individuals with ADWP.

In November of 2003, however, Defendant changed its policy by contracting with the West Virginia Medical Institute (WVMI) to handle eligibility determinations. Specifically, Plaintiffs assert that the role of treating physicians has been eliminated from the process and replaced by WVMI nurses who go to recipients' homes and conduct reviews, using unannounced standards, and then the nurses complete the PAS-2000 forms. In addition, the contract between BMS and WVMI allows only ten days in which WVMI must make eligibility determinations. Thus, once WVMI gets a referral, nurses must schedule in-home visits on very short notice, which sometimes results in reviews being conducted within hours of calling a recipient and without any of a recipient's assistants being present. In fact, case management agency representatives, who Plaintiffs contend have the greatest knowledge about a recipient's limitations and the services needed, are not given any notice of the day and time of the review.⁴

If it is recommended following the review that services be discontinued, the PAS-2000 is given to a non-treating medical doctor, also employed by WVMI, to review.⁵ If the recommendation stands, a notice is sent informing the recipient that benefits are being terminated. The notices, however, do not state the specific reasons for the termination, nor explain the PAS-2000 findings. Instead, such information is only provided to those recipients who request a fair hearing. If a hearing is held, Plaintiffs further assert that the name of the non-treating reviewing doctor is never revealed and, often, a nurse supervisor, rather than the nurse who completed the PAS-2000,

⁴During the hearing, Defendant explained that the case management agency makes referrals for annual reviews, but they are not informed of the date and time that those reviews will occur.

⁵At the hearing, Defendant represented that a letter is sent out in which recipients have forty-eight hours to produce additional medical evidence.

testifies as to the content of the PAS. Therefore, Plaintiffs contend that this process violates their rights to confront adverse witnesses.

At the hearing, Plaintiffs' evidence focused solely on the claims of Plaintiff Paul Bogert. Through the testimony of Plaintiff Bogert and other witnesses with knowledge of his ADWP benefits claim, the Court reached a number of factual conclusions which support the grant of injunctive relief pending trial. Mr. Bogert's overall medical condition is poor as he suffers from recurring pneumonia from asbestosis, diabetes, heart disease, hearing loss, and a speech impediment. Mr. Bogert testified at the hearing that he suffered from a heart attack and a stroke and he is confined to a wheelchair and is incontinent. As a result of his displeasure with living in a nursing home, he applied for ADWP benefits and was determined eligible. For about a year, Mr. Bogert had a home health worker in his home, four hours a day, five days a week. These services included, inter alia, making sure his medication was organized, cleaning his house, and assisting him with personal hygiene matters. Mr. Bogert also relied upon a friend, Chelena McCoy, to help him periodically. Among other things, Ms. McCoy would read and explain important mail to him. She had helped him gain his ADWP benefits initially and appeared at a hearing as his representative. Mr. Bogert also maintained contact with case workers and a case manager from the Lincoln County Opportunity Company, a social service agency.

Near the beginning of this year, Mr. Bogert apparently received some notice that his eligibility would be reviewed. He spoke with the case manager who encouraged him to be cooperative. Then, on February 6, 2004, a nurse with WVM telephoned Mr. Bogert to arrange a

visit to his home. She asked to come out that day, and he agreed, so she arrived a short time later. The nurse apparently conducted an evaluation of Mr. Bogert utilizing the PAS-2000 assessment form. From her observations of and discussion with Mr. Bogert, she completed the assessment. On February 17, 2004, a Notice of Decision was sent to Mr. Bogert advising him that he was no longer eligible for ADWP benefits. In the interim, a letter dated February 12, 2004, from the State agency, may have been sent out to Mr. Bogert or his case manager requesting additional information.⁶ Even if this letter was received within two or three days of being sent, however, it provided a very short period of time to gather such information because the denial ensued just five days later.

Mr. Bogert, with the assistance of Ms. McCoy and his case workers, appealed. A Notice of Hearing was issued on April 21, 2004, setting a hearing date of June 8, 2004. The Notice also stated that one or more witnesses might testify by telephone. Mr. Bogert does not recall receiving the Notice, and may not have because it did not include his apartment number in the address. Nevertheless, at some point, he was informed of the hearing date and spoke with his case manager about obtaining legal counsel. Mr. Bogert believed he would be represented by counsel at the hearing but, as result of misunderstanding or miscommunication and to his surprise, no counsel appeared at the hearing. Instead, Mr. Bogert was accompanied by Ms. McCoy, his case manager, his homemaker caregiver, and a registered nurse who worked with the caregiver. When Mr. Bogert and those with him requested a postponement to obtain counsel, the hearing officer refused and proceeded to take testimony. Two witnesses testified by telephone conferencing on behalf of the

⁶The letter and decision of the State Board of Review dated August 24, 2004, refers to this request in its list of hearing exhibits, but no one offered any testimony about it. However, Defendant's counsel in argument described the agency's practice of sending such requests.

agency and in support of the denial. A supervisor with the BMS testified as to the ADWP program eligibility policies. The other witness was the WVMI supervisor who reviewed the PAS-2000 assessment actually performed by a nurse identified as Ms. Baker in the PAS-2000. Nurse Baker did not testify. Although the hearing officer found that Mr. Bogert met additional criteria beyond those identified in the PAS-2000 assessment, he concluded that Mr. Bogert was nonetheless medically ineligible and sustained the denial.

Mr. Bogert received a letter dated August 24, 2004, with a copy of the hearing officer's decision and attachments explaining his right to such further review. One page of the attachment explained that Mr. Bogert could seek reconsideration before implementation of the decision. He reasonably believed that he could ask for reconsideration and retain his ADWP benefits until the decision was reviewed. When contacted, the Chairperson of the State Board of Review initially verified the continuation of benefits but later informed Mr. Bogert that the benefits could not be continued pending reconsideration. Mr. Bogert was informed that his benefits could cease on September 3, 2004. Mr. Bogert, together with the other named Plaintiffs, now brings this case on behalf of themselves and others similarly situated seeking a temporary or preliminary injunction to restore benefits which have been terminated since November of 2003 and enjoin Defendant from terminating the benefits of other recipients who have requested a hearing appealing an initial termination decision.

In order to determine whether a preliminary injunction should be awarded in this case, the Court must use the familiar hardship-balancing test set forth by the Fourth Circuit in *Blackwelder*

Furniture Co. of Statesville, v. Seilig Manufacturing, Co., 550 F.2d 189 (4th Cir. 1977). Under *Blackwelder*, the four factors which must be considered include:

- (1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied,
- (2) the likelihood of harm to the defendant if the requested relief is granted,
- (3) the likelihood that the plaintiff will succeed on the merits, and
- (4) the public interest.

The irreparable harm to the plaintiff and the harm to the defendant are the two most important factors. If, after balancing those two factors, the balance "tips decidedly" in favor of the plaintiff, a preliminary injunction will be granted if "the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation." As the balance tips away from the plaintiff, a stronger showing on the merits is required.

Rum Creek Coal Sales, Inc. v. Caperton, 926 F.2d 353, 359 (4th Cir. 1991) (citations omitted).

Applying this standard to the facts before the Court, the Court finds that Plaintiffs will suffer irreparable harm if a preliminary injunction is not granted. Plaintiffs are low income, disabled individuals who have depended upon the services provided by ADWP. The wrongful termination of those benefits will have a significant, if not devastating, impact on the lives of such recipients. Although it is conceded that Plaintiffs may reapply for benefits, there is often a long delay before benefits can be restored. In the meantime, eligible recipients will forego necessary services. The evidence established that these services include making sure medications are properly taken and recipients are kept clean and bathed. If services are terminated, these individuals may have no choice but to move into a nursing home, a result the program is designed to avoid. Thus, the inability to

receive these services, which may include necessary medical care, will undoubtedly cause irreparable harm. See *Massachusetts Assoc. of Older Americans v. Sharp*, 700 F.2d 749, 753 (1st Cir. 1983) (stating that "[t]ermination of benefits that causes individuals to forgo . . . necessary medical care is clearly irreparable injury" (citation omitted)); *Ward v. Thomas*, 895 F. Supp. 406, 412 (D. Conn. 1995) (stating that "courts have consistently found that reductions in welfare benefits, even by small amounts, constitute irreparable harm" (citations omitted)).

On the flip side of this argument, counsel for Defendant presented no witnesses at the hearing to testify as to the impact restoring benefits will have on the Department. Although counsel argued that restoration of benefits would have an economic impact, the parties seemingly agreed at the hearing that a ruling from this Court will impact less than 158 individuals whose benefits were terminated since November of 2003.⁷ Weighing, as this Court must, this consideration against the harm suffered by Plaintiffs, the Court finds the balance "tips decidedly" in Plaintiffs' favor.

In addition, the Court finds that the ten-day time period in which to conduct a PAS evaluation and make eligibility determinations is insufficient⁸ and, if a determination is made from

⁷Some of these 158 individuals may have had their benefits restored following successful appeals and, therefore, the number of affected individuals could be considerably less than 158.

⁸Encompassed within this ten-day time period is the forty-eight hours a recipient has to submit additional information in support of benefits. At the hearing, defense counsel stated that the Department recognized that these compressed time periods presented problems, but that contract issues needed to be worked out with WVMi to resolve these issues. Defendant seemed amenable at the hearing to rectify these problems, and the Court deferred to the parties to reach an agreed order on how much notice should be given before an evaluation is done and how the time frames for evaluations can be reworked.

the review that benefits are to be terminated, that the Notice of Decision which thereafter is issued is flawed and inadequate as it does not set forth the reasons for a termination. Given these problems, the Court finds that Plaintiffs have "raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation" and have shown a likelihood of success on the merits. *Rum Creek Coal Sales, Inc.*, 926 F.2d at 359 (citation and internal quotation marks omitted). Moreover, given the undeniable necessity of these services to ADWP recipients, the Court finds that there is a strong public interest in ensuring that benefits are not wrongfully terminated. Accordingly, as Plaintiff has met the four factors outlined in *Blackwelder*, the Court **GRANTS**, in part, the Motion for a Preliminary Injunction.

In deciding the parameters of the injunction, however, the Court finds it necessary to briefly address Plaintiffs' Motion for Class Certification. Plaintiffs filed their Motion for Class Certification on September 2, 2004, and the period for Defendant to file its response has not yet expired. Therefore, the Court believes it inappropriate to issue a final determination as to class status. Nonetheless, for purposes of this Order, the Court finds that the injunction should apply to more than the individually named Plaintiffs. Under Rule 23(a) of the Federal Rules of Civil Procedure, a class action can be maintained if: "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." *Fed. R. Civ. P.*

23(a). For purposes of this Order, the Court makes a preliminary finding that Plaintiff has met its burden under Rule 23.⁹

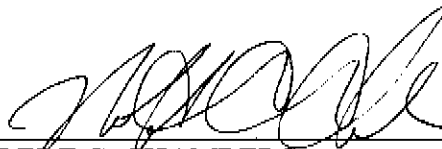
Accordingly, for the reasons stated above and at the hearing, the Court **GRANTS**, in part, the preliminary injunction as to all persons who already were recipients of ADWP benefits as of November 1, 2003, and who later received a notice of termination. The Court **DIRECTS** Defendant to send those individuals new notices, detailing the specific reasons for the termination of benefits and the source of the information relied upon in making that decision. Defendant also must disclose any supplemental information. In addition, the new notice must inform those individuals that they have a right to a fair hearing at which they may examine, if requested, the persons who were the source of the information identified in the notice. With regard to benefits, the Court **ORDERS** Defendant to restore benefits to those individuals who fall within the class and who either have not appealed or have not sought reconsideration such that their benefits have continued, subject, of course, to a later determination that the benefits should be terminated. Similarly, the Court **ORDERS** Defendant to continue providing benefits to those individuals who have a pending appeal or motion for reconsideration until a decision on those cases is made.¹⁰

⁹The Court declines, however, to make a final ruling on class status until after the matter has been fully briefed. After the matter is fully briefed, the Court will make a final determination and give a more detailed explanation as to its rationale.

¹⁰As Plaintiffs are low-income, the Court finds that they do not have the ability to pay a bond, and, therefore, the Court waives the bond requirement under Rule 65(c) of the Federal Rules of Civil Procedure.

The Court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented parties.

ENTER: September 17, 2004

A handwritten signature in black ink, appearing to read 'R. Chambers', is written over a horizontal line.

ROBERT C. CHAMBERS
UNITED STATES DISTRICT JUDGE