IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

O.B., *et. al*., individually, and on behalf of a class,	)	
	)	No. 15-CV-10463
Plaintiffs,	)	
vs.	)	Judge: Charles P. Kocoras
	)	
FELICIA F. NORWOOD, in her official capacity as Director of the Illinois Department of Healthcare and Family Services,	)	Magistrate: Michael T. Mason
	)	
Defendant.	)	

DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

NOW COMES Defendant, FELICIA F. NORWOOD, in her official capacity as Director of the Illinois Department of Healthcare and Family Services, by and through her attorney, LISA MADIGAN, Attorney General of Illinois, and hereby responds to Plaintiffs' Motion for Preliminary Injunction, as follows:

I. STATEMENT OF FACTS.

Plaintiffs, O.B., C.F., J.M., and S.M., are Medicaid-eligible children who allege they have various disabling medical conditions. Complaint at ¶¶ 5-10; 21-24; 97-150.[1] All of the named Plaintiffs were approved to participate in the Illinois Department of Healthcare and Family Services' ("HFS") Medically Fragile Technology Dependent ("MFTD") Medicaid Waiver. Complaint at ¶ 99; 113; 125, 139. Each Plaintiff has been approved for Early and Periodic Screening, Diagnostic and Treatment ("EPSDT") in-home shift nursing services. Complaint at ¶¶ 21-24; 99; 113; 125; 139. State law requires that children seeking Medicaid-

[1] On or about January 8, 2016, Sheila Scaro, mother of Plaintiffs, Sa.S. and Sh.S., informed the Division of Specialized Care for Children that the family has permanently relocated to Colorado. The case has been cancelled. Defendant has moved to dismiss these Plaintiffs for want of a case or controversy.

funded in-home nursing services request prior authorization for such services from HFS and demonstrate the medical necessity for the services. Complaint at ¶¶ 74-75. When HFS grants prior approval for in-home shift nursing services it issues a written notice to the participant that either grants prior approval of a specific number of nursing hours per week, or grants approval of a specific monthly budget to enable the family to pay for nursing services. Complaint at ¶ 76.

Each named Plaintiff claims that HFS approved for him or her either a monthly budget for in-home shift nursing services in a certain amount, or approved a specific number of nursing hours per week. Complaint at ¶¶ 21-24; 99; 113; 125; 139. Each named Plaintiff alleges that he or she is unable to staff the full nursing hours that HFS approved. Complaint at ¶¶ 102; 115; 127; 141. All Plaintiffs allege that their inability to obtain nursing services is due to Defendant's systemic failure to comply with the Early and Periodic Screening, Diagnostic and Treatment ("EPSDT") component of the federal Medicaid Act, 42 U.S.C. §§ 1396a(a)(43); 1396d(r), the Defendant's alleged failure to provide in-home shift nursing services with reasonable promptness under 42 U.S.C. 1396a(a)(8), and Defendant's purported violation of the ADA and Rehabilitation Act, 42 U.S.C. § 12132; 29 U.S.C. § 794.

All Plaintiffs seek declaratory and injunctive relief. Complaint at p. 45. As part of this Motion, Plaintiffs seek preliminary and permanent injunctive relief "ordering Defendant . . . to take immediate and affirmative steps to arrange directly or through referral to appropriate agencies, organizations, or individuals, corrective treatment (in-home shift nursing services) to the Plaintiffs and Class . . ." Mot for Preliminary Injunction, p. 6 at ¶ A ("Dkt. No. 6"). This injunctive relief is virtually identical to the relief sought as the final order on the merits. *See* Complaint at p. 45, ¶¶ 4-5.

II. ARGUMENT.

THE MOTION FOR PRELIMINARY INJUNCTION SHOULD BE DENIED.

A preliminary injunction is an exercise of a very far-reaching power, never to be indulged in except in a case clearly demanding it. *Girl Scouts of Manitou Council v. Girl Scouts of the United States*, 549 F.3d 1079, 1085 (7th Cir. 2008) (citations omitted). A party seeking a preliminary injunction must demonstrate that 1) its case has some likelihood of success on the merits, 2) no adequate remedy at law exists, and 3) it will suffer irreparable harm if the injunction is not granted. *Id*. at 1086. If the moving party satisfies the three elements described above, then the court must consider any irreparable harm an injunction would cause the nonmoving party and, finally, must consider any consequences to the public from denying or granting the injunction. *Promatek Industries, Ltd. v. Equitrac Corp*., 300 F.3d 808, 811 (7th Cir. 2002) (citing *Ty Inc. v. Jones Group, Inc.*, 237 F.3d 891, 895 (7th Cir. 2001)). These considerations are weighed according to a sliding scale approach where the more likely the party's chance of success on the merits, the less the balance of harms need weigh in favor and vice-versa. *Id*.

A. Plaintiffs Will Not Succeed On The Merits Of Their Claims.

1. The Preliminary Injunction Sought Fails To Give Defendant Adequate Notice Of The Acts Prohibited Or Required.

Plaintiffs seek the following injunction from this Court:

> A) Enter a Temporary Restraining Order and Preliminary Injunction ordering the Defendant, Felicia F. Norwood, to take immediate and affirmative steps to arrange directly or through referral to appropriate agencies, organizations, or individuals, corrective treatment of in-home shift nursing services to the Plaintiffs and Class at the level approved by the Defendant, as required by the Medicaid Act, the ADA, and the federal Rehabilitation Act pending final judgment in this action or until further order of Court.

Dkt. No. 6 at p. 6, ¶ A; Dkt. No. 7 at p. 16, ¶ A; *and see* Complaint at p. 45, ¶¶ 4-5.

Federal Rule of Civil Procedure 65(d) requires that injunctions be stated specifically and "describe in reasonable detail . . . the act or acts restrained or required." An injunction that merely instructs the enjoined party not to violate a statute is generally overbroad and increases the likelihood of unwarranted contempt proceedings for acts that are unrelated to what was originally contemplated as unlawful. *Lineback v. Spurlino Materials*, 546 F.3d 491, 504 (7th Cir. 2008) (citing *International Rectifier Corp. v. IXYS Corp.*, 383 F.3d 1312, 1315 (D.C. Cir. 2004)). Rule 65 was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders to avoid a contempt citation on an order too vague to be understood. *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974) (footnotes and citations omitted). Since an injunction prohibits or commands conduct under threat of judicial sanction, basic fairness requires that the party enjoined receive explicit notice of what conduct is outlawed or required. *Schmidt*, *Id.* These are no mere technical requirements. *Schmidt*, *Id.* The specificity requirement, thus, also has a constitutional dimension. An injunction must be more specific than a simple command that the defendant obey the law. *City of New York v. Mickalis Pawn Shop*, 645 F.3d 114, 144 (2nd Cir. 2011). An injunction, like the one sought here, that directs the defendant to undertake "immediate and affirmative steps" does not comport with Rule 65(d)(1) or *Schmidt*. *Mickalis*, *Id.*

Applying these authorities leads to two conclusions: 1) that the Court cannot enter the preliminary injunction Plaintiffs seek; and 2) Defendant has not been furnished fair notice how to respond to the Motion for Preliminary Injunction. Plaintiffs furnished no reasonable detail describing the acts or acts prohibited or affirmatively required of Defendant. An order to that effect by this Court would run afoul of Fed. R. Civ. P. 65(d)(1) for the following reasons. First,

Defendant provides in-home shift nursing services to children who qualify and Plaintiffs admit this. Complaint at *passim*. Second, the proposed injunction quotes verbatim a substantial portion of 42 U.S.C. § 1396a(a)(43)(C). This statute is a part of the Social Security Act that sets forth the EPSDT requirements for the State Medicaid plan. See 42 U.S.C. § 1396a(a). In other words, Plaintiffs want to enjoin Defendant to "follow the law." Further evidence of this is found in the portion of the proposed injunction that relates the acts that are being enjoined to what is "required by the Medicaid Act, the ADA and the federal Rehabilitation Act" without specifying what obligations those federal laws impose. Third, the injunction sought would require Defendant "to take immediate and affirmative steps" to follow the law without any description of what immediate and affirmative steps should be taken to follow the law. Fourth, Defendant presumes that since the ultimate relief Plaintiffs seek on the merits is virtually identical to the order sought here, Plaintiffs will, likewise, shift all responsibility to determine how to comply to Defendant as alleged in Paragraph 17 of the Complaint. Complaint at ¶ 17 ([i]t will be up to the Defendant to determine the manner in which to implement the Order). Finally, by simply parroting an Act of Congress, the proposed injunction builds in conclusions as to what Defendant's ultimate legal duties are respecting the provision of EPSDT services to Medicaid-eligible children. Stated another way, the proposed injunction builds in a requirement that each child's case is staffed at 100% of the approved hours with no corresponding description of what Defendant must do in order to reach that requirement. This injunction, if entered by the Court, permits Plaintiffs to play a game of "gotcha" with Defendant. This is clearly contrary to the letter and spirit of Rule 65(d) and *Schmidt v. Lessard*, 414 U.S. 473 (1974). The Motion for Preliminary Injunction should be denied without more.

2. The Court Will Not Reach The Merits Of The Case.

Plaintiffs, C.F., J.M. and S.M., allege that they do not receive in-home shift nursing services at 100% of the amount Defendant authorized. Complaint at ¶¶ 102; 115; 127; 141. The reasons are not clearly alleged but rest, rather, on "information and belief," anecdotal evidence, opinion and speculation that their cases would be fully staffed if Defendant paid higher Medicaid reimbursement to private duty nurses. *See, e.g.*, Complaint at ¶¶ 5(g); 8(a); 13-16; 129; 143. Plaintiff O.B. alleges that he has been unable to leave the hospital because "no nursing agency has been able to provide" the approximately 18 hours per day he alleges he needs to be at home. Complaint at ¶ 5. O.B. alleges that one interested nurse balked when she found out that the rate of pay for O.B.'s case was lower than her current employment. *Id*. at ¶ 5(g).

The Court will not reach the merits of the claims advanced by O.B., C.F., J.M. and S.M. because the Defendant has raised meritorious arguments in support of her Fed. R. Civ. P. 12(b)(6) Motion to Dismiss the Complaint, as follows. First, to the extent Plaintiffs allege, imply, offer information and belief or anecdotal evidence that Defendant's Medicaid reimbursement rates for private duty nursing are illegally low, their Complaint failed to invoke the proper statutory basis on which to seek an adjudication of Defendant's purported liability. The statute Plaintiffs had to invoke in order to assert such claims here is 42 U.S.C. § 1396a(a)(30)(A).

Second, perhaps Plaintiffs pussyfoot around Medicaid rates because they cannot privately enforce Section 1396a(a)(30)(A) in federal court after *Armstrong v. Exceptional Child Center*, __ U.S. __, 135 S. Ct. 1378 (2015). *Armstrong* held that the Supremacy Clause does not create a cause of action by which to enforce Section 1396a(a)(30)(A). *Armstrong*, 135 S. Ct. at 1283-84. *Armstrong* also held that private parties cannot enforce Section 1396a(a)(30)(A) through *Ex*

parte Young, 209 U.S. 123 (1908). *Armstrong*, *Id*. at 1385-87. The federal court's general equity power is not available because, among other reasons, Congress created the exclusive remedy in 42 U.S.C. § 1396c. *Id*. Section 1396c permits the Secretary of the U. S. Department of Health and Human Services ("HHS") to withhold the federal Medicaid funds to a state it finds in noncompliance with federal Medicaid requirements. *Armstrong*, *Id*. at 1385. *Armstrong* also strongly suggests that private parties cannot enforce Section 1396a(a)(30)(A) through 42 U.S.C. § 1983. *Armstrong, Id.* at 1396, footnote.

Third, according to *Armstrong*, federal courts should not be engaging in Medicaid rate-setting or any other rate-setting. *Armstrong*, *Id*. at 1385, 1388-89. Federal courts should confine themselves to review of the record of federal agencies' rate-making decisions. *Id*. at 1388-1390 (Breyer, J. concurring). Similarly, Defendant asserts that *Armstrong* prohibits the Court from entering any order that rules on the substantive merits or Medicaid reimbursement rates or that orders an adjustment to Medicaid reimbursement rates as part of the remedy through any vehicle, including the ADA and Rehabilitation Act.

Fourth, the Complaint fails to state claims for relief pursuant to the ADA and Rehabilitation Act for the following reasons. The claims asserted by Plaintiffs C.F., J.M. and S.M. are insufficient as a matter of law under *Amundson ex rel. Amundson v. Wisconsin Department of Health Services*, 721 F.3d 871 (7th Cir. 2013). In *Amundson*, Wisconsin reduced rates in its Medicaid program that funded group homes for disabled persons such that the providers of these services were paid less than before. *Amundson*, 721 F.3d at 872-74. No plaintiff alleged that he or she had been required to move from a group home to institutional care because of the rate reduction. *Id*. at 883-84. *Amundson* holds that there is no legal injury for

ADA and Rehabilitation Act purposes when the Defendant's provision of fewer services does not force an individual into a less integrated setting. *Id*. at 884.

There are no allegations that Defendant made any changes in any policies that affected the services these Plaintiffs were receiving. Complaint at *passim*. Second, and more importantly, there has been no change in the setting in which Plaintiffs, C.F., J.M. and S.M., receive their in-home private duty services. Complaint, *Id*. Under *Amundson*, since the setting in which these Plaintiffs receive their nursing services, *i.e*., their own homes, has not changed, they have no claim under the integration mandates regardless of the purported inconvenience to family members.

Plaintiff O.B. does not state an integration mandate claim under *Bruggeman ex rel. Bruggeman v. Blagojevich*, 324 F.3d 906 (7th Cir. 2003) or *Radaszewski v. Maram*, 383 F.3d 599 (7th Cir. 2004). In *Bruggeman*, the Seventh Circuit found that the integration mandate allows disabled persons "care in the least restrictive possible environment" and reasoned that a residential institution might be more integrated than living at home. *Bruggeman*, 324 F.3d at 911-12. The Seventh Circuit did not reach the issue whether defendants violated the integration mandate by failing to offer an alternative to plaintiff's current living arrangement. *Id*. at 912. In *Radaszewski*, plaintiff's claim was allowed to proceed because plaintiff could potentially prove that the services sought were only available to adults in an institutional setting. *Radaszewski*, 383 F.3d at 607-615. Unlike *Bruggeman* and *Radaszewski*, Defendant has neither refused an alternative to O.B's current setting, nor made private duty shift nursing services available only in institutional settings. Complaint at ¶¶ 5-6.

Finally, respecting the merits of Plaintiffs' claims, HHS approved the rates that Defendant pays to private duty nursing agencies that provide in-home shift duty services to

Medicaid-eligible children as set forth in Defendant's Exhibit A to this Response. Defendant is in compliance with federal law. *Cf. Bertrand v. Maram*, 495 F.3d 452, 459 (7th Cir. 2007) (the State does not violate 42 U.S.C. § 1396a(a)(8) by using the criteria that the federal government approved for its Medicaid waiver population).

3. No Injunctive Relief Is Warranted On Behalf Of The Proposed Class.

For all the reasons set forth above, injunctive relief on behalf of a Proposed Class is unwarranted. In addition, Defendant filed, contemporaneously with this Response, a Response in Opposition to Plaintiffs' Motion for Class Certification. Defendant vigorously opposes any order certifying class for the following reasons. First, Defendant does not know who the members of the class as defined may be. The class is defined around individuals who are unknown and who remain unknown. There are no criteria that define membership in the class and no reasonable assurances that the class would consist of individuals whose alleged in ability to staff their authorized nursing hours was a result of Defendant's purported violation of federal law.

Second, Defendant asserted that Plaintiffs failed to meet any of the criteria of Fed. R. Civ. P. 23(a)(1)-(4). Plaintiffs identified no common questions of fact. Plaintiffs' Motion for Class Certification at ¶ 7. According to Plaintiffs, the common factual questions include "what policies or practices were instituted or permitted by Defendant . . ." to cause Plaintiffs to experience short-staffing. *Id.* Plaintiffs cannot identify any common questions of fact.

Finally, Defendant asserts that because the Court could not remediate the alleged short-staffing through one indivisible injunction, the Plaintiffs have not satisfied Fed. R. Civ. P. 23(b)(2). On the one hand, each named Plaintiff and class member seeks individualized relief. On the other hand, Defendant also asserted the points made here that the proposed injunction is

not specific enough to enable Defendant to know what immediate and affirmative steps to take "to follow the law."

B. Plaintiffs Have Adequate Remedies At Law.

Prior to *Armstrong v. Exceptional Child Center*, ___ U.S. ___, 135 S. Ct. 1378 (2015), the dissenting opinion in *Douglas v. Independent Living Center*, ___ U.S. ___, 132 S. Ct. 1204, 1211-12 (2012) stated that the Medicaid Act did not allow for private enforcement of 42 U.S.C. § 1396a(a)(30)(A) by providers or beneficiaries. The *Douglas* dissenters also stated that Congress vested valid enforcement authority of Section 1396a(a)(30)(A) to a federal agency, HHS. *Douglas*, 132 S. Ct. at 1211-12 (citing *Sanchez v. Johnson*, 416 F.3d 1051, 1058-1062 (9th Cir. 2005) (the flexible administrative standards embodied in Section 1396a(a)(30)(A) do not reflect Congress' intent to provide a private remedy for their violation)).

Without repeating the holding of *Armstrong*, summarized above, it suffices to say here that the *Douglas* dissenters together with Justice Breyer now comprise the majority in *Armstrong*. The *Armstrong* majority explicitly directed the providers to pursue their administrative remedies before the agency through the federal Administrative Procedure Act, 5 U.S.C. § 500 *et seq*. *Armstrong* suggested a variety of remedies before HHS including: 1) asking the federal agency to interpret its rules to the plaintiffs' satisfaction, to modify rules or promulgate new rules (citing 5 U.S.C. § 553(e)); 2) seeking judicial review of HHS' refusal to act as arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law (citing 5 U.S.C. §§ 702; 706(1)); and 3) suggesting that plaintiffs can bring an APA action whenever a waiver program is renewed (citing *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221, 230 n.4, 231 (1986)). *Armstrong*, *Id*. at 1388.

Under *Armstrong*, injunctive relief must be denied. Plaintiffs have adequate remedies at law as described above.

C. Plaintiffs Failed To Establish That They Will Suffer Irreparable Injury If An Injunction Is Not Granted.

A plaintiff can only receive preliminary injunctive relief if he establishes that he will suffer irreparable harm that cannot be prevented or fully rectified by the final judgment after trial. *Illinois League of Advocates v. Illinois Department of Human Services*, 60 F. Supp. 3d 856, 886-87 (N.D. 2014) (citations omitted) *affirmed* 803 F.3d 872 (7th Cir. 2015). As previously stated, the injunction sought here is virtually identical to the final relief Plaintiffs seek on the merits. *Compare* Dkt. No. 6 at p. 6, ¶ A *with* Complaint at p. 45, ¶¶ 4-5.

All Plaintiffs predicate their arguments about irreparable injury on speculation. Complaint at *passim*. Several of the Declarations in support of the Motion for Preliminary Injunction consist of the opinions of parents/caregivers who are complaining about inconvenience to them. Dkt. No. 6 at Exhibits E; G; K. Defendant was able to locate only one physician's opinion for one Plaintiff, C.F. Dkt. No. 6 at Exhibit L; Dkt. No. 7 at Exhibit M. Dr. Becker describes C.F.'s medical conditions, the reasons why the physician prescribed the number of nursing hours, and opines that the nursing hours he prescribed are medically necessary. *Id.* Dr. Becker has furnished conclusions and not facts that showing that any discrete act or acts on Defendant's part may cause C.F.'s health to deteriorate. As previously stated, Plaintiffs C.F., J.M. and S.M. do not allege that any act on Defendant's part has caused a change from the home setting to an institutional setting. Complaint at *passim*. Plaintiff, O.B., given his medical history and his medical complexity, has not shown that he could be safely cared for in his parents' home with any amount of nursing.

Since Plaintiffs failed to meet the three threshold criteria of Rule 65, it is not necessary for the court to consider whether the grant of a preliminary injunction will cause any irreparable harm to Defendant or whether any untoward consequences will befall the public by granting or denying a preliminary injunction. *Promatek Industries, Ltd. v. Equitrac Corp*., 300 F.3d 808, 811 (7th Cir. 2002). If this court believes that it is necessary to weigh the balance of hardships, then under the *Promatek* sliding scale, the following factors weigh much more heavily in Defendant's favor because Plaintiffs are not likely to succeed on the merits. Defendant believes that the concept of irreparable injury to the Defendant and the public interest are related. First, if this court were to grant the preliminary injunction requested, Defendant would certainly not be able to recover from Plaintiffs any of the funds it would have to expend under the injunction, if Defendant were to prevail after a trial on the merits. Second, if an order granting or denying injunctive relief will have consequences beyond the private parties to the suit, that interest, called the "public interest," must be reckoned into the court's decision. *Roland Machinery Co. v. Dresser Industries, Inc*., 749 F.2d 380, 388 (7th Cir. 1984). When, as here, the nonmoving party establishes that the injunction asked would adversely affect a public interest for whose impairment an injunction bond cannot compensate, the injunction must be denied, no matter how inconvenienced the Plaintiff is. *Yakus v. United States*, 321 U.S. 414, 440 (1944). An injunction order would interfere with the authority of the responsible federal actors to determine Illinois' compliance with Medicaid-rate-setting requirements and to enforce Acts of Congress.

III. CONCLUSION.

WHEREFORE, for the foregoing reason, Defendant respectfully requests that Plaintiffs' Motion for Preliminary Injunction be denied.

Respectfully submitted,

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DATED: January 26, 2016

CERTIFICATE OF SERVICE

KAREN KONIECZNY, one of the attorneys of record for Defendant, hereby certifies that on January 26, 2016, I caused a copy of the foregoing **DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** to be served by the Court's ECF/electronic mailing system upon ECF filing users, and that I shall comply with LR 5.5 as to any party who is not a filing user or represented by a filing user.

/s/ Karen Konieczny