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.	)	

PLAINTIFFS' REPLY IN SUPPORT OF THEIR
MOTION FOR PRELIMINARY INJUNCTION

I. Introduction.

Plaintiffs have demonstrated that they are entitled to a preliminary injunction. Contrary to Defendant's assertions, Plaintiffs have shown that they are likely to succeed on the merits of their claims, are suffering irreparable harm, have no adequate remedy at law, and that the balance of interests is in their favor. Plaintiffs are also entitled to classwide relief. Moreover, the Defendant's argument that the requested injunctive relief does not conform to the requirement of Federal Rule of Civil Procedure 65(d) because it lacks necessary detail is unavailing. Plaintiffs seek an order compelling Defendant to ensure that they receive the in-home nursing services they need in the specific amount approved by Defendant. While the proposed order would leave it to Defendant to determine the specific steps she must take to achieve the required result, this is permissible injunctive relief. The injunction would clearly inform the Defendant what she must do – ensure that Plaintiffs receive the in-home nursing services they need – while leaving it to her to determine how to do it. Issuing such an order is consistent with the requirements of Rule 65(d) and, in fact, shows appropriate deference to state agencies.

II. The injunctive relief requested by Plaintiffs satisfies the requirements of Federal Rule of Civil Procedure 65(d).

A. The requested injunction describes the requested relief in sufficient detail.

Rule 65(d) requires that an injunction "describe in reasonable detail . . . the act or acts restrained or required." Fed. R. Civ. P. 65(d). The injunction that Plaintiffs have requested does so. It would compel Defendant to "take immediate and affirmative steps to arrange directly or through referral . . . corrective treatment of in-home shift nursing services . . . at the level approved by the Defendant." ECF No. 6, Pls. Mot. for Prelim. Inj. at p. 6 (cited herein as Mot. for Prelim. Inj.) Defendant would therefore be ordered to ensure that Plaintiffs receive the specific amount of services the Defendant has already determined that they need.

Moreover, the number of hours of in-home nursing services that each Plaintiff needs is determined through a process devised and operated by Defendant. Initially, the Defendant requires prior approval and the support of a treating physician before authorizing in-home shift nursing services. ECF No. 1, ¶¶ 74-75; 89 Ill. Admin. Code §§ 140.473 (d)-(e). When Defendant approves in-home nursing services, she sends a written notice indicating either the specific number of hours or a monthly budget for nursing services. ECF No. 1, ¶ 76; *see also, e.g.,* ECF No. 6-3, 6-5, 6-7, Exs. B, D, F to Pls. Mot. for Prelim. Inj. At that point, the Division of Specialized Care for Children (DSCC), to which Defendant has delegated care coordination, formulates a service plan for each child that sets forth the number of hours of in-home nursing to which each child is entitled. ECF No. 1, ¶ 83. Thus, the relief that Plaintiffs seek is quite specific – that Defendant ensures that Plaintiffs receive the number of hours that she has determined are medically necessary through her own agency's process.

Defendant complains that the proposed injunction merely quotes part of the Medicaid Early and Periodic Screening, Diagnostic and Treatment (EPSDT) legal requirement, which

leaves her without direction as to what steps she must take to follow the law. ECF No. 25, Def. Resp. in Opp. to Pls. Mot. for Prelim. Inj. at p. 5 (cited herein as Def. Resp.). This is not true. Defendant's legal obligation is clear. As explained in the previous pleadings, under Medicaid's EPSDT requirements, Plaintiffs are entitled to all services "necessary to correct or ameliorate" their physical or mental conditions, including in-home shift nursing, and are entitled to receive those services with reasonable promptness. ECF No. 1, ¶¶ 56-57, 67; ECF No. 7, Pls. Memo in Support of Prelim. Inj. at pp. 6-8 (cited herein as Pls.' Memo); *see* 42 U.S.C. §§ 1396a(a)(8), 1396da(a)(10)(A), 1396d(r)(5). The specific statutory provisions at issue here have been interpreted and applied many times by the federal agency and the courts. *See* Pls.' Memo at pp. 6-11. Indeed, Judge Lefkow of the Northern District of Illinois has explained that EPSDT requires that states assure that necessary services are "actually provided to children on Medicaid in a timely and effective manner." *Memisovski v. Maram,* No. 92 C 1982, 2004 WL 187833, *50 (N.D. Ill. Aug. 23, 2004). Moreover, the Seventh Circuit has held that the integration mandate of the ADA and Section 504 may be violated when a state agency fails to provide Medicaid services in the community. *See Radaszewski v. Maram,* 383 F.3d 599, 611 (7th Cir. 2004). *See also Doe v. Chiles,* 136 F.3d 709, 717 (11th Cir. 2003) (holding the reasonable promptness requirement is violated by long delays in receipt of approved services). Accordingly, Defendant cannot claim to be ignorant of the requirements of the statutory provisions at issue here or how to implement them.

Defendant argues that an injunction ordering her to take "immediate and affirmative steps," without describing those steps, is not permissible. ECF No., 25, Def. Resp. at p. 5. It is, however, common for courts to issue injunctions prescribing a specific result while allowing the enjoined party to determine the specific steps that must be taken to achieve it. For example,

A.H.R. v. Wash. State Health Care Auth., a case that mirrors this one, the plaintiffs are children with complex medical needs. *A.H.R. v. Wash. State Health Care Auth.*, Case No. C15-5701JLR, 2016 WL 98513 (W.D. Wash. Jan. 7, 2016). There was no dispute that the *A.H.R*. plaintiffs needed at least 16 hours per day of in-home nursing services and, indeed, the defendant Medicaid agency had approved those amounts. *A.H.R.*, 2016 WL 98513 at *13. However, none of the *A.H.R*. plaintiffs were receiving the number of hours authorized. *Id*. The agency claimed that it was unable to recruit nurses for the rates that the agency paid for in-home nursing. *Id*.

As in this case, the *A.H.R*. plaintiffs alleged that the defendant was violating Medicaid's EPSDT and reasonable promptness requirements and the integration mandate of the Americans with Disabilities Act and Section 504. *Id.* at *11. They requested that the court order the defendant to "arrange and pay for" in-home nursing care. *Id.* Ultimately, the court held that the defendants were violating these requirements and ordered them to "take all actions within their power necessary for Plaintiffs to receive 16 hours per day of private duty nursing, as previously authorized by Defendants." *Id.* at *19. *See also Harris v. Hamos*, No. 12-7105 (N.D. Ill.) (TRO, Sept. 18, 2012), ECF No. 7-7) (ordering defendant to maintain the plaintiff's skilled nursing services and "take all steps necessary to effectuate [the] order so as not to interrupt the services."); *P.G. v. Hamos*, No. 13–3020, 2013 WL 393233 (C.D. Ill. Jan. 31, 2013) (ordering defendants to "take immediate and affirmative steps to arrange and fund Plaintiffs' medically necessary treatment as required by the EPSDT provisions of the Medicaid Act"); *Hunter v. Medows*, No. 1:08–CV–2930–TWT, 2008 WL 8874314 (N.D. Ga. Nov. 3, 2008) (ordering defendant to provide private duty nursing hours as set forth in treating providers' order).[1]

[1] The cases Defendant cites in support of her argument do not help her. In *Lineback v. Spurlino Materials*, the defendant attacked an injunction on the grounds that it was overbroad. 546 F.3d 491, 504 (7th Cir. 2008). The court rejected the argument, holding the injunction was proper because it did not merely require general compliance with a statute but rather prohibited actions similar to the

B. Allowing the Defendant discretion in how to comply with the injunction shows proper respect for federalism.

Defendant complains that Plaintiffs would "shift all responsibility to determine how to comply [with the order] to Defendant . . . ." ECF No. 25, Def. Resp. at p. 5. However, as other courts have recognized, it is proper for the Court, in the first instance, to give Defendant the discretion to determine the precise actions she must take to ensure that Plaintiffs receive services. In *Katie A. v. Bontá,* for example, the Ninth Circuit held that the federal district court showed appropriate respect for federalism principles when it allowed the state agency defendant to participate in formulating a remedial order requiring "only that defendants supply the [Medicaid EPSDT] services that the court found to be required under federal law [and] did not mandate detailed or burdensome procedures for compliance." 481 F.3d 1150, 1157 (9th Cir. 2007). *See also A.H.R.,* 2016 WL 98513 at *19. It is appropriate to do so in this case as well.

III. Plaintiffs have no adequate remedy at law.

Plaintiffs have no adequate remedy at law because the injury of which they claim – denial of medically necessary services and unjustified institutionalization and unfair treatment – cannot be remedied by monetary damages or other legal remedy. *See McMillan v. McCrimon*, 807 F. Supp. 475, 479 (C.D. Ill. 1992); *see also Fisher v. Maram,* No. 06 C 4405, 2006 WL 250583 (N.D. Ill Aug. 28, 206) (Doc. #7-3) (holding that unjustified institutionalization is irreparable

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statutory violations that had been committed by the defendant. *Id.* at 504. Similarly here, Plaintiffs do not ask for a general order that Defendant follow the Medicaid statute, as Defendant suggests. Rather, they ask that Defendant stop violating the EPSDT and reasonable promptness requirements, and the integration mandate of the ADA and Section 504. *City of New York v. Mickalis Pawn Shop* concerns an injunction found to be overly broad because it prohibited unidentified actions that were not the subject of the case and ordered the defendant to take "appropriate measures" to comply with unspecified firearms laws. 645 F.3d 114, 145 (2d Cir. 2011). While the court faulted the order for failing to specify what measures were appropriate, its concern was inextricably tied to the failure of the order to identify which laws were applicable. Here, the specific statutory provisions with which Defendant must comply are identified.

harm); ECF No. 7, Pls. Memo at p. 4, n. 1 (citing cases holding that unjustified institutionalization is irreparable harm).

Defendants suggest that Plaintiffs' proper remedy is to seek redress from or against the U.S. Department of Health and Human Services (HHS). ECF No. 25, Def. Resp. at p. 10. But Plaintiffs' grievance is not with HHS. HHS has not given the Defendant permission to ignore Medicaid's EPSDT and reasonable promptness requirements that are set forth at 42 U.S.C. §§ 1396a(a)(8), 1396a(a)(43). Moreover, as explained in Plaintiffs' Response to the Motion to Dismiss, Plaintiffs are not seeking to enforce § 1396a(a)(30)(A). *See* Pls. Memo. Opposing Def. Norwood's Mot. to Dismiss the Compl., pp. 6-9. Thus, an action against HHS would be pointless and fail to provide the relief that the Plaintiffs seek.

IV. Plaintiffs will suffer irreparable injury if an injunction is not granted.

As set forth in the Memo in Support of Preliminary Injunction, Plaintiffs are suffering and will continue to suffer irreparable harm. All are being denied medically necessary in-home nursing services to which they are entitled, putting them at risk of illness, injury, medical complications and institutionalization. *See* ECF No. 7, Pls.' Memo at pp. 4-5; ECF No. 7-12 to 7-16, Exs. K-O to Pls. Memo; ECF No. 6-14, 6-15, Exs. M, N to Pls. Mot. for Prelim. Inj. No remedies at final judgment could fully rectify these injuries. *See Ill. League of Advocs. v. Ill. Dep't of Human Servs.,* 60 F. Supp. 3d 856, 886-887 (N.D. Ill. 2014). *See also A.H.R.,* 2016 WL 98513 at * 16 (noting that "numerous federal courts have recognized that the reduction or elimination of public medical benefits irreparably harms the participants in the programs being cut") (citations omitted).

Contrary to Defendant's assertions, Plaintiffs have done much more than speculate to show that they will suffer irreparable harm. O.B. is currently suffering severe harm; he lives in a

hospital, separated from his family.[2] ECF No. 6-12, Ex. K to Pls. Mot. for Prelim. Inj. at ¶¶ 8,13. C.F. needs 84 hours per week of nursing services; his physician has approved a medical plan of care ordering 84 hours, provided a sworn statement that those hours are medically necessary, and stated definitively that C.F. will be institutionalized or likely suffer a life threatening episode if he does not receive those services.[3] ECF No. 6-13, Ex. L to Pls. Mot. for Prelim. Inj. at ¶ ¶ 2-7; *See also*, ECF No. 6-4, Ex. C to Pls. Mot. for Prelim. Inj. at ¶¶ 4,7,11-12. Plaintiff J.M. is dependent on a g-tube and tracheostomy. ECF No. 6-4, Ex. C to Pls. Mot. for Prelim. Inj. at ¶ 6. He needs to be suctioned four times per day and receives vest treatments two to four times per day to keep his lungs clear. *Id*. He is paralyzed from the nose down and is nonverbal. He has been determined by his treating provider and Defendant's agency to need 120 hours of nursing services per week. *Id*. He lives with parents in their late 50s and 60s and S.M., a sister with severe disabilities. *Id*. at ¶3. His parents are "wearing out." *Id.* ¶15. Moreover, Defendant's own agent, DSCC, has suggested that J.M. and S.M. move to an institution. *Id.* It is therefore hardly

[2] Defendant hints that O.B. may not be safely cared for in his parents' home with any amount of nursing. Def. Resp. at 11. But, Defendant has already determined that 18 hours per day of nursing services would meet his medical needs at home and approved him to receive those services. *See* ECF No. 6-2, Pls. Mot. for Prelim. Inj., Ex. A (stating that O.B. has a budget of $19,178 per month); 89 Ill. Admin. Code 120.530 (describing the process for determining the number of hours of in-home nursing services based on the budget.). If the Defendant believes that O.B. cannot be cared for safely at home, she needs to return to her own eligibility process to reassess that.

[3] Defendant claims that Dr. Becker's declaration is conclusory and does not identify any acts of Defendant that may cause C.F.'s health to deteriorate. Def. Resp. at p. 11. Dr. Becker details C.F.'s severe disabilities, states he has found 84 hours per week to be medically necessary, and asserts that "if C. receives in-home shift nursing services at a level which is substantially less that the approved level of 84 hours per week, then C. will be forced to be either institutionalized in a hospital or if he remains at home and receives in-home shift nursing at a level which is substantially less than 84 hours per week, then he faces the strong possibility of a life threatening episode." ECF No. 6-13, Ex. L to Pls. Mot. for Prelim. Inj. at ¶ 7. Dr. Becker is a provider licensed by Defendant's agency whose qualifications expressly entitle him to determine what services are medically necessary. He is qualified to state the likely ultimate result of a deprivation of these services without detailing each step of C.F.'s potential deterioration or injury. As for determining Defendant's part in the deterioration, that is the factual and legal determination to be made by the Court in this case, not a conclusion to be reached by the doctor.

speculation to predict that reduced and interrupted nursing services will put C.F., J.M., and S.M. in danger of harm, but simply the rational conclusion to draw.

Finally, Plaintiffs have been found to need a certain number of hours of in-home nursing care pursuant to Defendant's own Medicaid policies and procedures. *See, e.g.,* ECF No., 6-3, Mot. for Prelim. Inj., Ex. B (Notice of Defendant's decision approving 84 hours per week of nursing services for C.F.); ECF No., 6-5, Mot. for Prelim. Inj., Ex. D (Notice of Defendant's decision approving 120 hours of nursing services for J.M.). Each Plaintiff has an approved service plan authorizing a specific number of nursing hours per week based on a determination that the services approved are "medically necessary and appropriate to meet the participant's medical needs." 89 Ill. Admin. Code §§ 140.473(d)-(e). If these services are not medically necessary, they are not covered by Medicaid.

Defendant dismisses some of the abundant evidence of irreparable harm as parental complaints of "inconvenience." Def. Resp. at p. 11. The stress on these children's parents is enormous. C.F.'s mother, who works full time, sleeps in two hour shifts when nurses are not available at night. ECF No. 6-4, Ex. C to Pls. Mot. for Prelim. Inj., at ¶ 12. J.M. and S.M.'s parents, who are 59 and 67, each stay up half the night to cover nursing hours for J.M. and S.M. ECF No. 6-6, Ex. E to Pls. Mot. for Prelim. Inj., at ¶¶ 3, 12-13; ECF No. 6-8, Ex. G to Pls. Mot. for Prelim. Inj., at ¶¶ 3, 13-14. His mother cannot physically lift J.M., even with equipment. ECF No. 6-6, Ex. E to Pls. Mot. for Prelim. Inj., at ¶14. O.B.'s mother testified that the stress is "unbearable [and] . . . tearing our family apart." ECF No. 7-12, Ex. K to Pls. Mot. for Prelim. Inj., at ¶ 20. These severe challenges are much more than inconveniences.[4]

[4] Defendant suggests that the requested injunction would harm the public interest because Plaintiffs will not succeed on the merits of their claims. Def. Resp. at p. 12. As discussed above, Plaintiffs are likely to succeed on the merits of their claims and the Court would not grant the injunction if it concluded

V. Plaintiff class is entitled to relief.

As set forth in Plaintiffs' Memo in Support of Preliminary Injunction, this Court has the authority to issue class-wide preliminary injunctive relief. *Lee v. Orr,* No. 13-cv-8719, 2013 WL 6490577, *2 (N.D. Ill. Dec. 10, 2013); *M.A. v. Norwood,* No. 15-3116 (N.D. Ill. Apr. 22, 2015). Defendant does not argue that the Court lacks this authority, but rather argues that that these Plaintiffs do not meet the criteria of Fed. R. Civ. P. 23(a). As set forth in Plaintiffs' Memorandum in Support of Motion for Class Certification, this is not correct. Moreover, Plaintiffs will respond further to Defendant's arguments in his Reply in support of class certification.

Defendant argues that she does not know who the class members are. This is not true. The proposed class is defined as Medicaid-eligible children under 21 who are approved for, but not receiving, in-home shift nursing services at the level approved by Defendant, including those enrolled in waivers. ECF No. 4, Pls. Mot. for Class Cert. at p. 1, ¶ 2. Defendant need only review her own records to determine who these children are and where they live. She claims that there is no way to tell whether the inability to staff nursing hours results from a violation of federal law. However, this is not one of the characteristics of the class. All individuals who are not receiving the services are included.

VI. Plaintiffs will succeed on the merits of their claims.

As set forth in their response to Defendant's Motion to Dismiss the Complaint, Plaintiffs have shown that they are likely to succeed on the merits of their claims. *See* Pls.' Memo. Opposing Def. Norwood's Mot. to Dismiss the Compl.

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otherwise. Moreover, it does not harm the public to compel the Defendant to provide in-home nursing services in the amount already determined medically necessary by her own agency.

VII. Conclusion.

Plaintiffs have satisfied the standards necessary for granting a preliminary injunction. Therefore, Plaintiffs respectfully request that this Court enter a preliminary injunction requiring Defendant to ensure that they receive the full number of hours of in-home nursing services for which they have been authorized by Defendant.

Dated: February 9, 2016

Respectfully submitted,

/s/ Sarah Somers
One of the Attorneys for
the Plaintiffs

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CERTIFICATE OF SERVICE

I, Thomas Yates, one of the attorneys representing the plaintiffs, certify that on February 9, 2016, I served Defendant Norwood with the foregoing Plaintiffs' Reply in Support of their Motion for Preliminary Injunction by filing said document with the Clerk of the Court using the CM/ECF system.

/s/ Thomas Yates