

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

GAYNELL GRIER, et al.)
)
v.) Case No. 3:79-3107
) Judge Nixon
C. WARREN NEEL, et al.)
)
and)
)
TENNESSEE ASSOCIATION OF)
HEALTH MAINTENANCE)
ORGANIZATIONS, et al.)

MEMORANDUM ORDER

Pending before the Court is Plaintiffs' Motion for a Finding of Contempt and for Further Injunctive Relief ("Motion for Preliminary Injunction").¹ (Doc. No. 705). Defendant-Intervenor, Tennessee Coordinated Care Network d/b/a Access MedPlus ("TCCN"), has filed a Reply in Opposition, (Doc. No. 713), as well as an Opposition to Plaintiff's Motion, (Doc. No. 721), and a Supplemental Brief with Regard to the Court's Lack of Jurisdiction Pursuant to Rule 62(c), (Doc. No. 722).² In its Order of April 10, 2001, the Court found that it has jurisdiction to entertain Plaintiffs' Motion and to consider its merits. (Doc. No. 732). For the reasons discussed below, a limited form of Plaintiffs' Motion for Preliminary Injunction is GRANTED.

¹ The Motion moves the Court for a finding of contempt and sanctions against Tennessee Coordinated Care Network, however, that was not the subject of the hearings held before the Court in April-May. Neither is that the subject of this Memorandum. Pursuant to a Scheduling Order, any proceedings on the Contempt portion shall be scheduled separately. (Doc. No. 742.)

² Defendant had also filed a Motion for Reconsideration or to Clarify the Relief Sought and a Motion to Strike certain exhibits introduced by Plaintiffs. (Doc. Nos. 744 and 750). These motions were thoroughly considered and decided in an Order entered contemporaneously to this.

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I BACKGROUND

This Court entered an Order implementing the Revised Consent Decree Governing TennCare Appeals (“RCD”) on October 26, 1999. (Doc. No. 492.) The Court subsequently modified the RCD on July 31, 2000, to correct technical errors, clarify its terms, and allow more time for its full implementation. (Doc. No. 630.) Defendant-Intervenors perfected appeals from this Order, and the appeals are pending before the Sixth Circuit as of this date. On March 26, 2001, Plaintiffs filed a Motion for Preliminary Injunction. (Doc. No. 705.) Plaintiffs argue that TCCN “is systematically denying, delaying, reducing and terminating medical care to its enrollees without affording them the procedural protections guaranteed in the Consent Decree.” (*Id.* at 2.) Plaintiffs claim to be entitled to injunctive relief to ensure that these enrollees receive adequate care. (*Id.* at 7-8.) Plaintiffs request that “members who are assigned to Access MedPlus [be] afforded an opportunity to receive prompt services outside of the TCCN provider network.” (Doc. No. 724 at 6.)

In its Response in Opposition, TCCN argued that the pending appeal in the Sixth Circuit divested this Court of jurisdiction over the matter. (Doc. No. 713 at 9-11.) TCCN argued that the relief sought “cannot be viewed as simply enforcing the existing order, maintaining the status quo, or aiding the appeal and, thus, does not fall within the [C]ourt’s limited power under Rule 62(c) [of the Federal Rules of Civil Procedure].” (*Id.* at 11.) In an Order entered on April 10, 2001, the Court decided that it had retained jurisdiction to enforce the provisions of the Decree. (Doc. No. 732.) Pursuant to that Order, the Court heard arguments and witness testimony on the Motion on March 29, 2001, April 2, 2001, April 3, 2001, and May 8, 2001. Both parties have filed Proposed Findings of Fact and Conclusions of Law (“FFCL”). In addition, Plaintiffs have

filed a Post-hearing Brief, (Doc. No. 754), to which Defendant filed a Reply, (Doc. No. 756).

These findings of facts and conclusions of law only address that portion of the Plaintiffs' Motion requesting further injunctive relief.

II. LEGAL STANDARD

In determining whether to issue a preliminary injunction, the Court must consider (1) whether Plaintiffs have shown a strong or substantial likelihood of success on the merits; (2) whether irreparable harm will result to Plaintiffs if the injunction is not issued; (3) whether the public interest is advanced by granting the injunction; and (4) whether substantial harm will result to others if the injunction is issued. Suster v. Marshall, 149 F.3d 523, 528 (6th Cir. 1998); Thomas by Thomas v. Davidson Academy, 846 F. Supp. 611, 616 (M.D. Tenn. 1994). These four elements are not absolute prerequisites, but are factors to be balanced by the Court. Performance Unlimited v. Questar Pubs., Inc., 52 F.3d 1373, 1381 (6th Cir. 1995) (citing In re DeLorean Motor Co., 755 F.2d 1223, 1229 (6th Cir. 1985)).

III. DISCUSSION

Likelihood of Success

Plaintiffs contend that they have demonstrated a substantial likelihood of success on their Medicaid claims. First, Plaintiffs assert that denial, reduction or termination of Medicaid services by a managed care organization ("MCO"), without affording beneficiaries adequate notice and opportunity to be heard, violates federal Medicaid regulations. (Doc. No. 706 at 7 (citing 42 C.F.R. Part 431, Subpart E; Boatman v. Hammons, 164 F.3d 286, 289 (6th Cir. 1998)(other citations omitted)).) Therefore, Plaintiffs argue that Defendant's actions, which violate the provisions of the RCD, resulting in the delay and denial of needed medical care without notice,

constitute a clear violation of the Medicaid Act. (Id. at 4, 7.) These actions also violate settled constitutional principles. (Id. at 7 (citing Goldberg v. Kelly, 397 U.S. 245 (1970); Davis v. Mansfield Housing Authority, 751 F.2d 180, 187 (6th Cir. 1984)).)

In their Post-Hearing Brief, Defendant alleges that Plaintiffs have presented insufficient proof of significant current violations of the RCD, nor have they proven to be entitled to injunctive relief, because TCCN's network of providers is adequate. (Doc. No. 756.) Furthermore, Defendant argues that the Plaintiffs cannot demonstrated a substantial likelihood of success on the merits, because their Motion is not tied to any claim for final relief on the merits. (Doc. No. 713 at 15.) Plaintiffs' Reply Brief asserts that Rule 65(a)(2) does not state that a trial on the merits must be pending for a court to grant a preliminary injunction. (Doc. No. 724 at 5.)

Irreparable Harm

Plaintiffs assert that the "denial of needed medical care in and of itself justifies a finding of irreparable harm for purposes of a preliminary injunction." (Doc. No. 706 at 7 (citing Beltran v. Myers, 677 F.2d 1317, 1322 (9th Cir. 1982); Henderson v. Bodine, 70 F.3d 958, 962 (8th Cir. 1995)).) In support for their Motion, Plaintiffs submitted several declarations from beneficiaries, their relatives, and care providers. (Doc. Nos. 692-703.) In cases of individuals like Nancy Young, whose husband died while trying to obtain the specialist care and the neurological testing needed, the delay resulted in irreparable harm. (Transcript of the May 8, 2001, hearing, at 92-98, hereinafter "Tr.") And for children, like Ginny who has spina bifida, TCCN's failure to provide her with an urologists treating Access MedPlus children enrollees in her area, would mean driving at least two hours to see the needed specialist. (Pl. Ex. 14.) Therefore, Plaintiffs assert that these declarations and other evidence previously introduced clearly demonstrate the threat of irreparable

harm to members of Plaintiffs' class. (Doc. No. 706 at 7.)

Plaintiffs also contend that TCCN's lack of an adequate provider network, combined with the violation of the notice and appeal protections guaranteed by the Decree, contributes to this denial of essential care. (Doc. No. 754 at 14.) Plaintiffs observe that TCCN has invoked network adequacy as an excuse for noncompliance with the RCD's requirements in the past. (*Id.* at 15.) Thus, evidence of continuing inadequacy would be relevant to an assessment of the likelihood of future harm. Defendant claims to have remedied network problems, and to be in compliance with all requirements of the RCD. (Tr. at 76-79) Plaintiffs deny these assertions. To support their allegations, Plaintiffs' cross-examination of Glen Watson, CEO of Medical Care Management Company, questioned the accuracy of the primary care network and specialist directory, and the survey methodology used to map available providers. (Doc. 754 at 16-17); (Tr. 79-91.)

In the Reply in Opposition, TCCN concedes that the situations presented by declarants are disturbing. However, Defendant asserts that no injunction is required to move members facing such difficulties to other MCOs, because the State currently has authority to do so. (Doc. No. 713 at 15 (citing Contractor Risk Agreement § 2-9.A.12).) Defendant further alleges that its network inadequacies have been resolved, and this assertion is supported by the implementation of a new back-up network through U.S.A. Healthcare. (Ex. 8, TCCN Motion in Opposition at 19; Doc. No. 756 at 7.) Additionally, TCCN asserts that improvements to its claims processing system also show that relief is unnecessary. (*Id.* at 7; Tr. at 78.) Refuting these assertions, Plaintiffs point to the limitations of this back-up network, given the fact that U.S.A. providers need not take any Access enrollees unless they wish to do so. (Doc. 754 at 19.) Plaintiffs have also shown that full implementation of the system would take a couple of months. (Tr. at 87-89.)

Risk of Harm to Others

Plaintiffs assert that granting the requested preliminary injunction poses little risk of harm to others. Plaintiffs concede that the relief sought may cause Defendant to incur additional costs. (Doc. No. 706 at 7.) However, Plaintiffs argue that mere economic loss does not constitute irreparable harm. (Id. (citing Jeffreys v. My Friend's Place, 719 F.Supp. 639 (M.D.Tenn. 1989)).) Plaintiffs argue that the requested "relief would do no more than meet a need which, through its contract with USA Healthcare, Access MedPlus has itself conceded, yet has failed to meet." (Doc. No. 754 at 30.) Plaintiffs further assert that it is an obligation of TennCare contractors to pay for the enrollees to receive service out-of-plan, if the MCO cannot provide the covered services within its own network. Thus, the requested relief "does not create a new obligation, but merely makes it possible [...] to implement that requirement." (Id.) Finally, Plaintiffs observe that the threat of irreparable harm to individuals when public benefits are peremptorily terminated, outweighs the government's economic stake. (Doc. No. 706 at 7-8 (citing Goldberg, see supra)). Therefore, Plaintiffs assert that the risk of economic injury to the MCO is clearly outweighed by the irreparable harm faced by Plaintiffs if the injunction is denied.

Defendant asserts that the risk of harm to others outweighs the benefit of granting the requested preliminary injunction. (Doc. No. 713 at 16.) Defendant directs the Court's attention to several non-economic risks of harm. Defendant has presented proof showing TCCN's progress "in addressing computer problems and in retaining and recruiting providers." (Id.) Defendant contends that the requested relief "would almost certainly trigger an unjustified crisis of confidence and forfeit the hard-won credibility of the plan." (Id.) It further argues that it could endanger the plan's ability to provide the necessary services to its 350,000 members. (Id.)

Public Interest

Plaintiffs aver that the multi-billion dollar annual financial commitment by federal and state tax payers to the TennCare program reflects a strong public interest in ensuring that appropriate health services are delivered to those in need. (Doc. No. 706 at 8.) Indeed, federal law explicitly requires that programs like TennCare be administered in the best interest of their intended beneficiaries. (Id.) Plaintiffs argue that it is clearly in the public's interest to ensure that TennCare beneficiaries receive a timely, fair and effective opportunity to be heard when they are threatened with the erroneous impairment or loss of their health care" benefits. (Id.)

Defendant argues that the public interest will not be served by issuing a preliminary injunction, because of a current open enrollment period during which TennCare members will be able to select an MCO. (Doc. No. 713 at 16.) Plaintiffs order could only confuse this process and further stigmatize the program. (Id.)

Post Adequate Security

Defendant finally asserts that the posting of security is mandatory in this action. This Court had already determined that such posting was unnecessary at the time it decided it had jurisdiction to hear the claim, back in April. (Doc. No. 732 at 5.) However, Defendant insists that under Rule 65 (c), even if a preliminary injunction was appropriate, Plaintiffs would have to post adequate security to secure payment of the enjoined party's costs in the event the relief was later found to have been entered in error. (Doc. No. 713 at 17.) TCCN further estimates these costs will exceed \$ 1 million. Plaintiffs argue that the security need not be posted at the time the relief is applied for and alternatively, the Court has discretion whether to require the posting of a bond or not. (Doc. No. 724 at 5-6.)

IV. FINDINGS

This Court finds that this preliminary injunction is linked to Plaintiffs Contempt claim. (Doc. No. 705.) The Court finds that, for the purposes of the current Motion, Plaintiffs have demonstrated a substantial likelihood of success on the merits of their Contempt claim. Suster, 149 F.3d at 528. Even if the Court agrees with TCCN that Plaintiffs have not shown a “systematic violation” as defined in the Decree, they have set forth enough evidence to support a finding of widespread non-compliance. (RCD at 33.) The evidence favors Plaintiffs allegations regarding specific violations fo the Decree. Furthermore, when the Court balances the potential harm (even if it only affects a discrete number of Access enrollees) and the strong public interest in favor of effective governmentally funded health services, against any potential harm to TCCN, the scales weigh in favor of granting some relief. Performance Unlimited, 52 F.3d at 1381.

Additionally, as it relates to the posting of adequate security under Rule 65 (c), this Court rejects Defendant’s request for a bond. In this Circuit, the rule “has long been that the district court possesses discretion over whether to require the posting of security.” Moltan Co. v. Eagle-Picher Indus., 55 F.3d 1171, 1176 (6th Cir. 1995) (quoting Roth v. Bank of the Commonwealth, 583 F.2d 527, 539 (6th Cir. 1978)). In its discretion, this Court finds that given the strong public interest in ensuring that health services are obtained, the narrow scope of the relief granted, and further accounting for Plaintiffs limited financial resources, the posting of a bond is not appropriate in this case.

In conclusion, from the briefs, the evidence presented at the hearing, and all relevant records before the Court, it appears that a limited form of relief is necessary to protect Plaintiffs from irreparable harm, in the form of delay or denial of emergency medical care. Therefore, the

Court hereby enjoins Defendant State officials to immediately establish a process which affords members of the Plaintiff class who are assigned to Access MedPlus and who are experiencing delay in accessing emergency medical services an opportunity to request TennCare covered services outside of the provider network managed by TCCN and within the limits of the RCD.

V. RELIEF GRANTED

In granting the relief sought, however, some procedural requirements must be considered. Rule 65 (d) provides that an order granting an injunction “shall set forth the reasons for the issuance; shall be specific in terms; shall describe [the relief] in reasonable detail....” FED.R.CIV.P. R. 65(d) (West 2001). As stated by this Court in its April 10th Order, the Court is not required to adopt the proposed order if it decides to grant the requested injunction. (Doc. No. 732 at 6.) This Court must cautiously craft its injunctive relief so as to enforce the RCD, without modifying it or expanding its scope. See NLRB v. Cincinnati Bronze, Inc., 829 F.2d 585, 588 (6th Cir. 1987) (distinguishing court’s power to alter or enlarge as opposed to enforce judgments pending appeal); see also Sarabia v. Toledo Police Patrolman’s Assoc., 601 F.2d 914, 917 (6th Cir. 1979).

Under the RCD of July 2000, if the State verifies that there have been delays or terminations without the required notice, it is authorized to take the “corrective actions” listed in the Decree. (RCD at 13-14.)³ The State “shall immediately provide, or require their contractor to provide that service in the quantity and for the duration prescribed, [and] [i]n the case of a delay of access to a physician to secure the requested medical assistance, the defendants shall provide such access as soon as practicable.” (Id.) Thus, the limited injunctive relief hereby

³ The Decree also defines delays, terminations, and other relevant terms that the parties shall consider in complying with this Court Order.

granted is aimed to enforcing rather than enlarging this Court's Decree.

This Court understands Defendant-Intervenor's concerns that a massive migration of beneficiaries would undermine past efforts to improve TCCN services and endanger its capability to provide for its existing members. Balancing the potential harm to TCCN, and the entire TennCare system if a crisis of confidence arises against the demonstrated harm to Access MedPlus beneficiaries in urgent need of medical care, relief will only target the neediest members. The RCD defines "time-sensitive care" as "care which requires a prompt medical response in light of the beneficiary's condition and the urgency of her need, as defined by a prudent lay person; provided, however, that a case may be treated as non-time-sensitive upon the written certification of the beneficiary's treating physician." (Id. at 7.) The RCD further directs the State and MCOs to make "individualized determination[s] of medical necessity based upon the needs of each TennCare beneficiary and his or her medical history." (Id. at 14.)

During the open enrollment period, State officials shall establish an accelerated process for TCCN members requiring time-sensitive care who want to switch from Access MedPlus to another MCO. This process will make the change effective within two days of the original request, provided that the beneficiary's treating physician faxes a written document certifying the urgency of the situation. A process shall also be established for individuals who are experiencing delays in the treatment of time-sensitive ailments, who do not want to change their MCO, to allow them to temporarily⁴ obtain service outside the provider network managed by TCCN. This process will also be available to beneficiaries that meet the certification requirement above

⁴ Access MedPlus' members who receive service from outside the provider network may do so for as long as it may be necessary to obtain the needed time-sensitive care or until TCCN is able to adequately provide the required service, depending whichever requirement is met first.

mentioned, who are appealing an adverse action related to currently needed emergency care.

The process shall be accessible to Access MedPlus enrollees and their providers by toll-free telephone 24 hours per day, seven days per week and it shall include a second toll-free number for physicians to fax their written certification regarding the urgency of the care required. To prevent a massive exodus of TCCN beneficiaries and to avoid confusion during the open enrollment period, only physicians and hospital providers within the TCCN network shall receive notices advising them of the availability of this process for patients experiencing delays or denials of time-sensitive treatment. However, those TCCN beneficiaries who are appealing an emergency care denial, should also be sent notices advising them of the existence of an accelerated appeal process, provided they get the above mentioned certification from the physician. Finally, State Defendants shall ensure their compliance with federal Medicaid fiscal integrity requirements. In order to prevent duplicate public expenditures for the same service, the State shall ensure that TCCN does not receive payment for medical services that are provided by other MCOs pursuant to this Order.

The State shall report to the Court on the implementation of this Order at a status conference to be held once the open enrollment period is over, and after the enrollment changes have become effective. The parties shall contact the Court thirty days after the end of the enrollment period to set a date for such conference. Following this status conference, the Court will evaluate the need to continue to enforce the injunctive relief set forth in this Order.


According to the Agreed Scheduling Order entered on April 25, 2001, (Doc. No. 742), a hearing on the portion of Plaintiffs' Motion seeking a Finding of Contempt is set at 10:00 a.m. on the 20th day of August, 2001.

VI. CONCLUSION

For the foregoing reasons, Plaintiffs' Motion is hereby GRANTED. The continued need for the relief granted will be re-evaluated at a status conference TO BE HELD in the future. And finally, the portion of Plaintiffs' Motion seeking a Finding of Contempt is HELD IN ABEYANCE pending further proceedings on that issue.

It is so ORDERED.

Entered this the 20th day of June, 2001.



JOHN T. NIXON, SENIOR JUDGE
UNITED STATES DISTRICT COURT