

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION OF THE SUPREME COURT

Karen W., Edward M., Richard S., Susan E., Rob L.,
Peter B., Ann J., Corrie D. and Robyn P.,

Petitioners,

Marshall C. Sanford, Individually and in his Official Capacity as the Governor of South Carolina and Member of the South Carolina Budget and Control Board; Converse A. Chellis, III and Richard Eckstrom, Individually and in their Official Capacities as Members of the South Carolina Budget and Control Board; Daniel Cooper and Hugh Leatherman, in their Official Capacities as Members of the South Carolina Budget and Control Board, Emma Forkner, Individually and in Her Official Capacity as the Director Of the South Carolina Department of Health and Human Services, Kelly Hansen Floyd, Individually and in her Official Capacity as the Chairman of the South Carolina Department of Disabilities and Special Needs, W. Robert Harrell, Individually and In his Official Capacity as former Chairman and Current Commissioner of the South Carolina Department of Disabilities and Special Needs; Otis Speight, Richard Huntress, Susan Lait, Deborah McPherson and Nancy Banov, In their Official Capacities as Commissioners of the South Carolina Department of Disabilities and Special Needs; and Thomas Waring; Individually and in his Official Capacity as Budget Analyst for the South Carolina Department of Disabilities and Special Needs, and David Goodell, Individually and in his Official Capacity as Associate State Director of the South Carolina Department of Disabilities and Special Needs,

Defendants.

**RETURN OF DEFENDANTS FORKNER, ET AL., TO PETITIONERS' MOTION FOR
PRELIMINARY INJUNCTION**

STATEMENT

Plaintiffs have requested, on unnecessarily short notice, i.e., by motion filed less than 48 hours prior to the alleged need for relief, that the Court enjoin the Defendants from “reduc[ing] or terminat[ing] Petitioners’ DDSN services on January 1, 2010.” Petitioners also seek mandatory preliminary injunctive relief from the Court, such relief to include an order to restore services in effect on July 1, 2008, and an order to use funds contained in the Health Care Annualization and Maintenance of Effort Fund to pay for those services. This Return is filed on behalf of the Defendants listed in the footnote,¹ some of whom have not been served with the Petition for Injunction, and none of whom have been properly served with anything else.² These Defendants oppose the granting of preliminary injunctive relief.

The Court has requested that the Defendants respond to Petitioner’s Petition for Injunction by 1:00 p.m. on December 31, 2009. In view of the extremely short time which has been given in which to respond, these Defendants are constrained to present some of their arguments in summary fashion. This Return by necessity is limited to the narrow issues pertaining directly to preliminary injunctive relief, and not to the other issues that Petitioners seek to have this Court determine.

The core position of these Defendants is simple: Petitioners simply have not shown any likelihood of immediate harm to themselves, or for that matter to anyone else, that would require

¹ The Defendants on whose behalf the present Return is being filed are all Defendants listed in the caption starting with Emma Forkner and running through David Goodell, the last-named Defendant. These persons are all officers or employees of DHHS or DDSN.

² All of these Defendants reserve all rights to object to the service, or nonservice, of papers in this action, which was made only by certified mail, and not in the manner prescribed by Rule 4, SCRCF.

preliminary injunctive relief,³ nor have they shown any reasonable likelihood that any action by State authorities would contravene any provision of state or federal law. While changes are planned to take effect on January 1, 2010, those changes have been known (or should have been known) to counsel for Plaintiffs by the beginning of December at the very latest.⁴ In fact, the changes had been developed in the course of a very public process that started over six months ago, as set forth in the proposed Complaint in this case. Moreover, and as will be shown herein, the provisions that are scheduled to take effect on January 1, 2010, expressly provide for hardship exceptions. Goodell Affidavit, attached, and exhibits thereto. As the Goodell Affidavit indicates, a number of individuals, although only one of the Petitioners has applied for and received such exceptions, so that their prior levels of services will continue without change after January 1, 2010. In fact, few persons (about 8 out of 85) who requested such an exception have been denied it. Goodell Affidavit. Moreover, Petitioners' claim that many persons stand in danger of being institutionalized is grossly overstated. DDSN is not aware of any person who is likely to be institutionalized as a result of the changes set to take effect in January 1, 2010. . Goodell Affidavit. This is also shown by a brief review of the claims of each of the individual Petitioners, set forth herein.

With respect to the mandatory relief sought by Petitioners, i.e., the spending of certain state funds, DDSN would advise, as set forth in more detail below, that an Order requiring the State to expend in funds in such a manner would involve the State's spending money on a Medicaid program in a manner not authorized by federal Medicaid authorities. This could, and

³ Petitioners have not sought class certification, and as a result, their claims of alleged harm must be limited to whatever they can show in the way of likely harm to themselves. In fact, they can show none.

⁴ As shown by the Priest Affidavit, filed herewith, Petitioners' counsel Harrison attended a meeting in Bamberg in September 2009, where the waiver changes were discussed.

likely would, mean that state funds would be spent in a manner that would prohibit their being recovered from any federal funding source. In other words, the requested injunctive relief would require the expenditure of Medicaid funds in a manner that directly contravenes the provisions of the state waiver plan recently approved by federal authorities; when Medicaid funds are expended in a manner contrary to what has been approved by federal authorities, as would be the case here, a number of unfavorable consequences result, including Medicaid audits, the need for repayment by the State, etc.⁵ See Forkner Affidavit, attached hereto, Paragraph 11.

FACTS

1. Nature of the Medicaid Waiver Program.

A brief description of the MR/RD (Mental Retardation/Related Disabilities) Waiver program that is the subject of the present motion is set forth in *Doe v. Kidd*, 501 F.3d 348 (4th Cir. 2007):

Medicaid is an optional, federal-state program through which the federal government provides financial assistance to states for the medical care of needy individuals. *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 502, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990). Once a state elects to participate in the program, it must comply with all federal Medicaid laws and regulations. *Id.* The South Carolina Department of Health and Human Services (“DHHS”) is the state agency responsible for administering and supervising Medicaid programs in South Carolina. The South Carolina Department of Disabilities and Special Needs (“DDSN”) has specific authority over the state's treatment and training programs for people with mental retardation and related disabilities.

This case involves the Medicaid waiver program created by 42 U.S.C. § 1396n(c) (2000), which permits states to waive the requirement that persons with mental retardation or a related disability live in an institution in order to receive certain Medicaid services. *See generally Bryson v. Shumway*, 308 F.3d 79, 82 (1st Cir.2002) (“[The program] allow[s] states to experiment with

⁵ While the present request pertains only to the nine individual Petitioners, the implications of granting preliminary relief as to any or all of those nine persons is that a much broader, program-wide, injunction might soon follow.

methods of care, or to provide care on a targeted basis, without adhering to the strict mandates of the Medicaid system.”). When an individual in South Carolina applies for DDSN services, including the waiver program, DHHS first determines whether the individual is eligible for Medicaid funding. Thereafter, DDSN determines whether the individual is eligible for DDSN services and, if so, what “level of care” the individual requires. To be given the option under the waiver program of receiving services at home or in the community, rather than in an institution, individuals must first qualify for the Intermediate Care Facility for the Mentally Retarded (“ICF/MR”) level of care—that is, they must meet the criteria necessary to reside in an institution like a nursing home. If approved, waiver services are provided in a variety of settings including, in order of restrictiveness: (1) a Supervised Living Program II (“SLP II”), an apartment where recipients of DDSN services live together; (2) a Community Training Home I (“CTH I”), a private foster home where a recipient of DDSN services resides with a family, one member of whom is a trained caregiver; and (3) a Community Training Home II (“CTH II”), a group home with live-in caregivers for four or fewer recipients of DDSN services. Appeals from DDSN decisions about the services, if any, it will provide are taken to a DHHS hearing officer and, after that, to the state of South Carolina’s Administrative Law Judge Division.

501 F.3d at 351-352 (emphases added). The conditions under which the requirements of federal law will be “waived” are subject to approval by the federal Department of Health and Human Services, and specifically by the federal Centers for Medicare and Medicaid Services (CMS).

The process is described more fully as follows in a typical case:

In 1993, New Hampshire requested federal approval to provide home and community-based services for individuals with ABDs under the Medicaid waiver provisions. Section 1915(c) of the Social Security Act, 42 U.S.C. § 1396n(c), permits states to include in their Medicaid plans non-medical services, such as case management, habilitation services, and respite care. *Id.* § 1396n(c)(4)(B). States must apply for a waiver and be approved in order to include such services in their Medicaid plans. *Id.* § 1396n(c)(1). Programs approved under this subsection are waived from many Medicaid strictures, *id.* § 1396n(c)(3), such as the requirements that programs be in place statewide, *see id.* § 1396a(a)(1), and that medical assistance be made available to all individuals equally, *see id.* § 1396a(a)(10)(B). Waivers are initially approved for three years and may be re-approved for five-year

periods. *Id.* § 1396n(c)(1). The waiver program is designed to allow states to experiment with methods of care, or to provide care on a targeted basis, without adhering to the strict mandates of the Medicaid system.

Bryson v. Shumway, 308 F.3d 79, 82 (1st Cir. 2002)(emphasis added). To qualify for federal matching funds, known as the Federal Medical Assistance Percentage (FMAP), a state must establish and administer its Medicaid program through a state plan approved by CMS. *Id.*

Congress enacted the American Recovery and Reinvestment Act (ARRA) on February 17, 2009. H.R. 1, 111th Cong., Pub.L. No. 111-5 (1st Sess.2009). As one court has explained,

Under ARRA, qualifying states receive a general 6.2 percent increase in their FMAP, and states with relatively high growth in unemployment rates receive additional increases based on quarterly unemployment statistics. *Id.* § 5001(b), (c).

In order to receive enhanced FMAP, a state may not restrict eligibility “standards, methodologies, or procedures” beyond those in effect on July 1, 2008. *Id.* § 5001(f)(1).

Gray Panthers of San Francisco v. Schwarzenegger, 2009 WL 2880555, *3 (N.D. Cal. 2009)(emphasis added). Petitioners apparently claim that the changes set to take effect in South Carolina’s Medicaid Waiver program on January 1, 2010, are in violation of Section 5001 of ARRA. However, as set forth herein, this is not the case. The changes proposed for South Carolina are not changes in eligibility requirements, but changes in the levels of services provided. Both CMS and the only federal court to address the issue (*Gray Panthers, supra*) have held that changes in the level of services, as opposed to eligibility, do not implicate the aforementioned provisions of ARRA.

2. Claims of the individual Petitioners.

As is shown below, none of the individual Petitioners has set forth a credible claim of adverse effect on themselves that requires the drastic remedy of preliminary injunctive relief. Five of the nine Petitioners receive residential habilitation services, which are not affected by the

January 1, 2010 changes. One has requested, and been granted, a hardship exemption. Another has filed an appeal, which stays the effect of the changes. This leaves only two others, one of whose services will not change for other reasons, and the other of whom will receive a reduction from 8 hours of service daily to 7 hours daily. In other words, the proposed changes will have no practical effect on eight of the nine Petitioners, and the changes that affect the sole remaining Petitioner are minimal. Moreover, as discussed below, ARRA does not in any event prohibit reductions in services.

Rob L. (Complaint, Paragraphs 206 through 224). The only reduction in services that would allegedly occur for this individual is a reduction of personal caregiver services at home from 8 hours a day, seven days a week, to 7 hours a day, seven days a week. In other words, the reduction would be one hour a day.

Karen W. (Complaint, Paragraphs 225 through 251). As the Complaint states, this individual has been on the waiting list for services for 18 years, and is still over 1,500 persons down on that list. In other words, this person is not even receiving waiver services at present. As a result, there is no suggestion that the changes set for January 1, 2010, will result in any immediate changes to this person's situation. . In any event, this person is receiving residential habilitation services, which are not affected by the January 1, 2010 changes. Goodell Affidavit, Paragraph 10.

Susan E. (Complaint, Paragraphs 252 through 265). The only allegation of a possible change to the situation of this individual is a reduction from 2 ½ cases per month of Ensure, a nutritional supplement, to 2 cases per month. The price of a half case of Ensure appears to be no more than \$20-\$25 per month, according to online shopping sources.

Edward M. (Complaint, Paragraphs 266 through 284). As set forth in the Goodell Affidavit, the only change that would occur to this person's situation is a 1% drop in funding. In addition, this person requested, and was granted, the case-by-case exception from the reductions scheduled to take place in 2010. Goodell Affidavit. As a result, no further relief is needed in order to protect any rights this person might have. Most of the allegations of the Complaint pertaining to this individual are completely irrelevant to the issues presented in this case.

Richard S. (Complaint, Paragraphs 285 through 302). It appears that this individual is already involved in the administrative hearing process, which is very incompletely described in the Complaint. In addition, this person has, as of a day or so ago, appealed the proposed 2010 changes via administrative appeal to DHHS. That effect of the appeal is to keep his level of services unchanged. As a result, his situation presents no need for injunctive relief in the present case, because a stay is already in place with respect to him.

Peter B. (Complaint, Paragraphs 303 through 314). It is clear from the Complaint that any reductions in services for this individual took place in June 2009. As a result, the case of this individual does not present a claim that would be affected by enjoining the January 1, 2010 changes to the Medicaid waiver. In any event, this person is receiving residential habilitation services, which are not affected by the January 1, 2010 changes.

Ann J. (Complaint, Paragraphs 315 through 317). The Complaint contains no suggestion as to how the changes set to take effect on January 1, 2010 would affect this individual. In any event, this person is receiving residential habilitation services, which are not affected by the January 1, 2010 changes.

Corrie D. (Complaint, Paragraphs 318 through 331). The Complaint contains no suggestion as to how the changes set to take effect on January 1, 2010 would affect this individual. Most of the allegations of the Complaint pertaining to this individual are completely irrelevant to the issues presented in this case. In any event, this person is receiving residential habilitation services, which are not affected by the January 1, 2010 changes.

Robyn P. (Complaint, Paragraphs 332 through 363). This person's situation is one in which the parent could request the case-by-case exception from the reductions scheduled to take place in 2010, even assuming that those reductions would affect this person, which is by no means clear. The eligibility decisions related to this person were made in 2005, and would be unaffected by the standards in effect on July 1, 2008. In any event, this person is receiving residential habilitation services, which are not affected by the January 1, 2010 changes.

ARGUMENT

It is well settled that “[t]he remedy of an injunction is a drastic one and ought to be applied with caution.” *Strategic Resources Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006). Likewise, “[t]he party seeking an injunction has the burden of demonstrating facts and circumstances warranting an injunction.” *Id.* In the present case, granting a temporary injunction would be a particularly drastic remedy, because it could have seismic effects on whether the Defendants, in complying with any temporary injunction, might endanger the ability of the State to receive reimbursement from federal funds for any monies

spent pursuant to any injunction. Conversely, Petitioners have made no real showing of a legitimate emergency need for temporary injunctive relief.

Petitioners have not established any of the three elements for a temporary injunction. These, as set forth in *Scratch Golf Co. v. Dunes West Residential Golf Properties, Inc.*, 361 S.C. 117, 603 S.E.2d 905 (2004), are that a plaintiff must establish that (1) it would suffer irreparable harm if the injunction is not granted; (2) it will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law. In addition, “[b]efore granting an injunction, the trial court should balance the equities: the court should look at the particular facts of each case and the equities of each party and determine which side, if any, is more entitled to equitable relief. *Peek v. Spartanburg Regional Healthcare System*, 367 S.C. 450, 455, 626 S.E.2d 34, 36-37 (Ct. App. 2005). Petitioners’ claims for temporary injunction are deficient in all of these respects.

1. Petitioners have not shown a likelihood of irreparable harm.

A review of the motion for temporary injunction reveals that it is devoid of any specific, credible claim of imminent harm to any of the individual Petitioners. The proposed Complaint and its attachments, moreover, contain claims that are vague and conclusory. The lack of harm has been discussed above in the discussions of the allegations made on behalf of each of the Petitioners.

In contrast, the Affidavit of David Goodell, filed herewith, demonstrates that the alleged harm to the Petitioners is nonexistent. Five of the nine Petitioners are receiving residential habilitation services, which are not affected by the January 1, 2010, changes. Goodell Affidavit, Paragraph 9. Of the other four Petitioners, one of them Edward M., has requested of DDSN in any fashion that their service levels remain unchanged, although the agency had provided for a case-by-case review of alleged hardship cases and has granted almost 80 such requests while

denying only about 8. Goodell Affidavit. Since most Petitioners have not even attempted to use the existing process for relief through the agency, they cannot claim to be the potential victims of irreparable harm. This is not merely a matter of failure to exhaust administrative remedies; instead it shows that Petitioners simply cannot credibly claim possible harm, because they have declined to use a process that has worked for many others. The Goodell Affidavit also notes that none of the Petitioners stands in any immediate danger of being institutionalized as a result of the proposed 2010 changes. In most instances, this is also readily apparent from the Complaint itself, which simply fails even to allege a claim of immediate harm.

As noted in the authorities cited above, the Court should weigh the equities between the parties. The Goodell and Forkner Affidavits note that granting the requested temporary injunction would require the State to spend funds in a way that has not been approved by CMS for the use of Medicaid funds. As a result, the State could well end up spending funds that would have to come from the State Treasury.

For the same reasons as those stated above, there is no present likelihood that any rights of the Petitioners under the federal Americans With Disabilities Act, or the Rehabilitation Act, or the Constitution, will be violated, because Petitioners have simply failed to allege or prove any reasonable likelihood that they will be moved to a more restrictive environment in the absence of temporary injunctive relief.

2. Petitioners have shown no likelihood of success on the merits.

Petitioners' legal claims under ARRA are devoid of merit. As held in *Gray Panthers of San Francisco v. Schwarzenegger*, 2009 WL 2880555, (N.D. Cal. 2009), *supra*, while ARRA provides that income eligibility standards for Medicaid cannot be changed while still receiving stimulus funds,

there is no corresponding provision in § 5001 that applies to the cutting of benefits or services. The fact that Congress did include the limitation in § 5001(f)(1) [pertaining to income eligibility requirements] indicates that it could also easily have included a prohibition against cutting benefits or services if it wanted to, but chose not to.

2009 WL 2880555 at *10. In fact, as that court noted, a provision that would have prevented the cutting of services was proposed, but did not pass. *Id.* at *6.

As previously indicated, CMS, the agency charged with applying Medicaid statutes generally, is of the same view, which in effect is that Petitioners' suggested interpretation of ARRA is incorrect, and that states can indeed cut waiver services without running afoul of ARRA. Deference to agency interpretation is especially justified when the agency is CMS and the statute is the Medicaid statute, because of the intricacies and complexities of the subject matter:

The Medicaid statute is a prototypical "complex and highly technical regulatory program" benefitting from expert administration, which makes deference particularly warranted. [citation omitted] . . . Recognizing the mechanisms for evaluation of amendments at the agency level, "[w]e take care not lightly to disrupt the informed judgments of those who must labor daily in the minefield of often arcane policy, especially given the substantive complexities of the Medicaid statute." *Cnty. Health Ctr. v. Wilson-Coker*, 311 F.3d 132, 138 (2d Cir.2002).

West Virginia v. Thompson, 475 F.3d 204, 212 (4th Cir. 2007).

CMS's views on the subject are apparent from that agency's approval on November 9, 2009, and November 24, 2009, of the proposed changes in the South Carolina waiver program. Those approval are consistent with an earlier FAQ document that CMS issued on July 7, 2009. Goodell Affidavit, Ex. B, p. 9. There, CMS set forth the following question and answer:

Question 19: Can States modify or eliminate services, as opposed to eligibility criteria, and still qualify for the increased FMAP?

Answer: If the change in the service has no potential impact on an individual's ability to maintain Medicaid eligibility, such a change would not disqualify a State from the increased FMAP.

Likewise, in response to its Question 20, CMS advised that reduction in optional services provided would not disqualify a State from receiving FMAP because no beneficiaries would lose eligibility. Accordingly, and despite the apparent complexity of the federal statutes involved in this matter, the result is already clear, and that result is the kinds of service cuts of which Petitioners claims will not give rise to a claim under ARRA.⁶

3. There is an adequate remedy at law.

In the absence of a showing of immediate harm, an examination of Petitioners' claims shows that those claims are capable of being resolved through normal agency processes. As noted above, there are opportunities for Petitioners to request that the changes set to take effect in 2010 not apply to them. Those remedies are by no means ephemeral, having been used successfully by a number of other consumers in the past few weeks, as set forth in the Goodell Affidavit. Moreover, any decision by DDSN involving the 2010 changes is reviewable under normal APA procedures, with the opportunity available to seek stays through the Administrative Law Court or the appellate courts on a case-by-case basis if necessary. Those remedies are adequate to protect any rights that any individual Petitioner might claim.

4. Petitioners' claims for temporary injunctive relief are barred by their unreasonable delay, and by the doctrine of laches.

Finally, Petitioners have unreasonably delayed their motion for temporary injunctive relief. As set forth above, Petitioners have had reason to know for months that the changes set for

⁶ As for the ADA, the Rehabilitation Act and the constitutional requirement of the least restrictive environment, Petitioners' present showing is far short of establishing, as a matter of fact, the possibility of any likelihood of immediate harm.

January 1, 2010 would take place then.⁷ Any doubt about the matter was removed nearly two months ago, when CMS approved the changes on November 9, 2009. Petitioners did not bring the instant matter until December 23, 2009 (serving the Defendants only by certified mail, which meant that many did not receive it until December 29), and even then did not request temporary injunctive relief until late in the afternoon of December 30, 2009, a week later.

The doctrine of laches has been described by this Court as follows:

Laches is an equitable doctrine defined as “neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done.” *Hallums v. Hallums*, 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1988). In order to establish laches as a defense, a party must show that the complaining party unreasonably delayed its assertion of a right, resulting in prejudice to the party asserting the defense of laches. *See Strickland v. Strickland*, 375 S.C. 76, 83, 650 S.E.2d 465, 469 (2007).

Historic Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 432, 673 S.E.2d 448, 456 (2009).

Here, the delay, while measured only in weeks and months, was still unreasonable under the circumstances. As a result, temporary injunctive relief should be denied for that reason as well.⁸

CONCLUSION

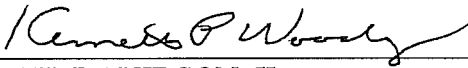
For the foregoing reasons, these Defendants respectfully submit that Petitioners’ motion for temporary injunction should be denied. In so arguing, these Defendants do not concede that this Court should assume original jurisdiction over this case, but instead, they reserve the right to respond with respect to that issue under the time periods prescribed by law.

⁷ Again, see the Priest Affidavit referenced above.

⁸ These Defendants incorporate all arguments made by the Budget and Control Board Defendants, or any other Defendants who may respond separately, including their argument about the need for the posting of a substantial bond.

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

BY: 

WILLIAM H. DAVIDSON, II

ANDREW F. LINDEMANN

KENNETH P. WOODINGTON

1611 Devonshire Drive, 2nd Floor

Post Office Box 8568

Columbia, South Carolina 29202

wdavidson@dml-law.com

(803) 806-8222

(803) 806-8855

ATTORNEY FOR DEFENDANTS FORKNER, ET AL.

COLUMBIA, SOUTH CAROLINA

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