

UNITED STATE DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RECEIVED

SEP 01 2000
MICHAEL W. DOBBINS
CLERK, U. S. DISTRICT COURT

DONNA RADASZEWSKI,)
Guardian for Eric Radaszewski, on)
his behalf,)

JUDGE GRADY

00C 5391

Plaintiff,)

vs.)

No. Civil Action

ANN PATLA,)
Director, Illinois Department of)
Public Aid,)

MAGISTRATE JUDGE KEYS

Defendant.)

DOCKETED

SEP 05 2000

COMPLAINT

I. Preliminary Statement

1. Plaintiff Donna Radaszewski brings this action on behalf of her medically vulnerable adult child, Eric Radaszewski. Eric is 21 years old and is eligible for medical assistance under the Medicaid program. In 1992, he was diagnosed with brain cancer. As a result of the disease and treatment, Eric lost a great deal of his brain and bodily functioning and needs one-on-one skilled nursing care twenty four hours per day. Eric has received a minimum of sixteen hours per day nursing care provided by registered nurses at home with his parents for the past five years under a Medicaid waiver program for children who have exceptional medical needs and who would be institutionalized at State expense if not given extensive medical care at home. Since Eric has turned 21, defendant, without appropriate notice or hearing, has reduced the funding for his nursing services to \$4593 per month, providing Eric the equivalent of only five hours of services per day. Eric now faces an immediate, potentially lethal, medical crisis because the hours of one-on-one nursing services provided to him have been drastically reduced.

Eric's mother and guardian, Donna Radaszewski, brings this action on Eric's behalf, seeking

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declaratory relief declaring the State's reduction of these medically necessary nursing services to be in violation of the Medicaid statute and its implementing regulations and the requirements of due process.

Plaintiff also seeks injunctive relief enjoining the reduction of the nursing services provided to Eric.

II. Jurisdiction

2. Jurisdiction is conferred on this court by 28 U.S.C. §§1331 and 1343(3). Declaratory relief is authorized under 28 U.S.C. §2201.

3. Plaintiff's claims are brought pursuant to 42 U.S.C. §1983.

III. Parties

4. Plaintiff Donna Radaszewski is the guardian for her disabled adult son, Eric Radaszewski. She brings this action in her capacity of guardian on his behalf. Plaintiff and her son reside in DuPage County, Illinois.

5. Defendant Ann Patla is the Director of the Illinois Department of Public Aid (IDPA). IDPA is the state agency charged with the administration of the Medicaid program in Illinois.

III. Description of the Medicaid Program

6. The Medicaid program, Title XIX of the Social Security Act, codified at 42 U.S.C. §1396 *et seq.*, is a joint federal and state funded program enacted to provide necessary medical assistance to needy disabled persons and families with dependant children, whose income and resources are insufficient to meet the cost of care. States choosing to participate in the Medicaid program must operate the program in conformity with federal statutory and regulatory requirements. 42 U.S.C. §1396a.

7. Each State participating in the Medicaid program must submit a Medicaid plan to the Secretary of Health and Human Services (HHS) for approval. 42 U.S.C. §1396.

8. Participating States must cover certain mandatory medical services in their plans and may, at

their option, offer certain other services in their plans. 42 U.S.C. §1396a(a)(10), 42 CFR §440.225.

9. Each service covered in a State's Medicaid program must be sufficient in amount, duration and scope to reasonably achieve its purpose. 42 U.S.C. §1396a(a)(10)(B), 42 CFR §440.230(b).

10. A State may not arbitrarily deny or reduce the amount or scope of any covered service based solely on the diagnosis or type of illness or condition of the Medicaid recipient. 42 CFR §440.230(c).

11. Private duty nursing is an optional covered service under the Medicaid statute. 42 U.S.C. §1396d(a)(8), 42 U.S.C. §1396a(a)(10)(A). If a State chooses to include private duty nursing as a covered service in its state plan, then these services must be provided to persons who require more individual and continuous care than is available from a visiting nurse or than is routinely provided by the nursing staff of a hospital or nursing facility. 42 CFR §440.80. Under the regulation, the state has the option to provide private duty nursing services in the recipient's home, at a hospital or at a skilled nursing facility. 42 CFR §440.80(c).

12. Illinois' Medicaid plan includes coverage for private duty nursing, with the conditions that the private duty nursing is recommended by a physician, that prior approval from the State agency is sought, and that the nursing care not be provided by a relative. The State plan provides no conditions regarding where these services must be provided. Sections of the Illinois State Medicaid Plan relating to private duty nursing services, Exhibit A, attached to and made a part of this Complaint.

13. Each State must designate a single state agency to administer and or supervise the administration of the State's Medicaid plan. 42 U.S.C. §1396a(a)(5). If other State agencies perform services for the Medicaid agency, the Medicaid agency must not delegate its authority to issue policies, rules, and regulations on program matters, 42 CFR §431.10(e)(1)(ii), and the other State agency must not have the authority to change or disapprove any administrative decision of the Medicaid agency or otherwise

substitute its judgment for that of the Medicaid agency with respect to the application of policies, rules and regulations issued by the Medicaid agency. 42 CFR §431.10(e)(3).

14. The single state Medicaid agency must be informed about the adherence of local agencies to the provisions of the State Plan. 42 CFR §435.903.

15. In Illinois, IDPA is the single state agency responsible for administering the Medicaid program.

16. Each State must establish certain requirements that States must follow when determining eligibility: States must establish standards and methods of determining eligibility that are consistent with the objectives of the Medicaid program and the rights of individuals under the Medicaid statute (42 CFR §435.901); the Medicaid agency must ensure that eligibility is determined in a manner that is consistent with recipients' best interests (42 CFR §435.902); the Medicaid agency must redetermine eligibility at the appropriate time when it has information about anticipated changes in a recipient's circumstances (42 CFR §435.916(c)(2)); and the agency must furnish Medicaid promptly without delay caused by the agency's administrative procedures and continue to furnish those services until the recipient is found to be ineligible (42 CFR §435.930).

17. States have the option of covering persons needing home and community based care services, if these persons would otherwise require institutional care that would be paid for by Medicaid. These services are provided under a range of waiver programs that are authorized under 42 U.S.C. §§1396a(a)(10)(A)(ii)(VI), 1396n(b)-(e). Under this waiver authority, the Secretary of HHS may grant waivers of otherwise applicable requirements, including for example financial eligibility requirements and service limitations. Id.

18. Illinois has included several home and community based care waiver programs in its Medicaid program that have been approved by the Secretary of HHS. Under the waiver for technology

dependant children, Illinois provides medical assistance to children under age 21 who need exceptional medical care at home to avoid institutionalization waiving otherwise applicable financial eligibility criteria for the families of the children; under the Home Services waiver program, Illinois provides services that are not otherwise covered under the Medicaid program, including personal care and homemaker services, to enable disabled adults to remain in their homes.

19. Each State plan must provide that the state the agency will provide notice and an opportunity for an administrative hearing before services are reduced or terminated. 42 U.S.C. §1396a(a)(3), 42 CFR §431.200 et seq.

IV. **Facts**

20. Eric Radaszewski is 21 years old; his birth date is August 5, 1973.

21. Eric is disabled and has very low income. He is eligible for Medicaid.

22. On February 11, 1992, Eric was diagnosed with medulloblastoma, a brain cancer.

23. On December 24, 1993, Eric suffered a mid brain stroke after he had undergone surgery, radiation and chemotherapy as treatment for the cancer.

24. The disease, stroke and the subsequent treatment have left Eric with a very low level of body and mental functioning.

25. It is the opinion of Eric's physician that Eric requires the services of a registered nurse, one-on-one, 24 hours per day in order to survive.

26. For the past five years, Eric has been cared at home by registered nurses 16 hours per day, with 336 additional hours per year of services from registered nurses to provide Eric's parents respite. The balance of his 24 hour per day care came from his parents, who were specially trained to provide the necessary monitoring and services to avoid medical crisis for Eric.

27. This care was paid for by the special Illinois Medicaid waiver program for technology

dependant children under age 21 who are at risk of institutionalization paid for by Medicaid if their exceptional medical needs are not met at home. Parental income and resource deeming rules otherwise applicable to the Medicaid program are waived in this program.

28. This special Medicaid waiver program for technology dependant children is administered by the Illinois Division of Specialized Care for Children (DSCC) under a contract with IDPA. DSCC is a state agency.

29. As Eric's 21st birthday approached, Eric's mother was advised to contact the Office of Rehabilitation Services to obtain continued nursing services for Eric under the Home Services Program, a Medicaid home-and-community-based waiver program for disabled adults. ORS is a division of the Department of Human Services, a state agency, and operates this waiver program under agreement with IDPA.

30. On February 18, 2000, ORS issued a decision limiting Eric's eligibility for home based services based on a "service cost maximum" of \$4,593 per month.

31. This service cost maximum amount has reduced funding for Eric's skilled registered nursing services to the equivalent of five hours per day.

32. No state agency sent Eric or his guardian notice that his nursing services would be reduced effective August 3, 2000, or offering continued nursing services at the unreduced amount pending an administrative appeal.

33. Eric's parents filed an administrative appeal on the ORS decision limiting Eric's services to \$4,593 per month, and an administrative hearing was held by an IDPA hearing officer on July 25, 2000.

34. At this hearing, Eric's treating physician, Janina Badowska, M.D. testified that in her medical opinion, Eric requires 24 hour one-on-one skilled nursing care from registered nurses and that the level of care offered by the ORS service cost maximum would leave Eric at great medical risk. She further

testified that Eric's needs could not be met by staffing levels at a skilled nursing facility.

35. At the hearing Eric's counsel argued that the service cost maximum limitation imposed by the ORS decision and the failure to provide Eric the private duty nursing services at the level he requires violates the federal Medicaid statute and regulations.

36. While the administrative appeal was pending, Eric's nursing services were reduced to the equivalent of five hours per day on August 4, 2000.

37. On August 18, 2000, Defendant Ann Patla, as Director of IDPA, issued the final administrative decision, affirming the ORS decision limiting funding of Eric's services to \$4,593 per month. Defendant based this decision on the determination that Eric was challenging the legality of DHS or ORS rules and that such a challenge must be brought in another forum.

38. At no time prior to or since the reduction in nursing services provided to Eric, has IDPA or any of its agents determined Eric's eligibility for private duty nursing services or advise Eric's parents of private duty nursing coverage available under the Medicaid program.

39. Defendant's decision and the reduction in hours of nursing services has caused and will continue to cause Eric irreparable injury for which there is not adequate remedy at law.

V. Claims

40. Reducing Eric's hours of private duty nursing services to the level of five hours daily when he requires 24 hours daily violates 42 U.S.C. §1396a(a)(10) and 42 CFR §§440.230 and 440.80.

41. Reducing Eric's hours of nursing services without determining his ineligibility for private duty nursing under the State Medicaid plan violates the regulatory scheme of 42 CFR Part 435 and 42 U.S.C. §1396a(a)(5).

42. Reducing Eric's hours of nursing services without adequate advance notice and without an opportunity to continue services without reduction pending the outcome of an administrative appeal violates

42 U.S.C. §1396a(a)(3) and 42 C.F.R. §431.200 et seq. and the Due Process clause of the Fourteenth Amendment to the Constitution.

43. Reducing Eric's hours of nursing service by affirming the ORS decision that Eric is entitled only to \$4,593 in nursing services per month while refusing to address Eric's argument that the reduction in nursing services contravenes federal Medicaid requirements violates 42 U.S.C. §1396a(a)(3), 42 CFR §431.200 et seq. and Eric's right to due process.

44. Reducing Eric's hours of nursing services without advising his guardian about the coverage for private duty nursing services under the Medicaid program or how to obtain those services violates Eric's right to due process.

VI. **Prayer for Relief**

Plaintiff prays for the following relief:

- A. That this Court assume jurisdiction of this cause;
- B. That this Court enter a declaratory judgment that defendant's reduction of the hours of nursing services provided to Eric Radaszewski violates 42 U.S.C. §1396a and its implementing regulations as outlined above as well as the requirements of the due process clause of the Fourteenth Amendment to the United States Constitution;
- C. That this Court enter a preliminary and permanent injunction enjoining defendant from reducing Eric Radaszewski's hours of nursing services;
- D. That this Court award plaintiff her costs and fees.
- E. That this Court grant such additional relief that it deems equitable and just.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Eliot Abarbanel", written over a horizontal line.

Eliot Abarbanel
One of the Attorneys for Plaintiff

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AUGUST 1991

ATTACHMENT 3.1-A
Page 3a
OMB No.: 0938-

State/Territory: ILLINOIS

AMOUNT, DURATION, AND SCOPE OF MEDICAL
AND REMEDIAL CARE AND SERVICES PROVIDED TO THE CATEGORICALLY NEEDY

d. Physical therapy, occupational therapy, or speech pathology and
audiology services provided by a home health agency or medical
rehabilitation facility.

Provided: No limitations With limitations*
 Not provided.

8. Private duty nursing services.

Provided: No limitations With limitations*
 Not provided.

Description provided on attachment.

TN No. 91-25
Supersedes _____ Approval Date 9-25-92 Effective Date 10-1-91
TN No. _____

HCFA ID: 7986E

State ILLINOIS

7. HOME HEALTH SERVICES

a. b and c.

Services are provided on a short-term, intermittent basis to facilitate clients transitioning from a more acute level of care. Services must be provided only on direct order of physician, and require prior approval unless client is eligible for these benefits under Medicare.

Limits on services or treatments are not applicable to EPSDT (Healthy Kids) clients. All services or treatments which are medically necessary to correct or lessen health problems detected or suspected by the screening process must be provided to individuals under age 21.

d.

Services available only when provided by a Home Health Agency, on direct order of physician, and with prior approval unless client is eligible for these benefits under Medicare.

Limits on services or treatments are not applicable to EPSDT (Healthy Kids) clients. All services or treatments which are medically necessary to correct or lessen health problems detected or suspected by the screening process must be provided to individuals under age 21.

8. PRIVATE DUTY NURSING SERVICES

Provided only when recommended by the physician. Requires prior approval. Services cannot be covered if provided by a relative.

Limits on services or treatments are not applicable to EPSDT (Healthy Kids) clients. All services or treatments which are medically necessary to correct or lessen health problems detected or suspected by the screening process must be provided to individuals under age 21.

TN # 91-12 APPROVAL DATE 7-1-91 EFFECTIVE DATE 7-1-91

SUPERSEDES

TN # 90-4