

 ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARKETRIC HUNTER, a minor child,
by and through his mother and legal
guardian, THELMA LYNNAH,

Plaintiff,

vs.

RHONDA MEDOWS, in her Official
Capacity as Commissioner of the
GEORGIA DEPARTMENT OF
COMMUNITY HEALTH, and
GEORGIA MEDICAL CARE
FOUNDATION, INC., a Georgia
corporation,

Defendants.

FILED IN CLERK'S OFFICE
U S D C Atlanta

SEP 18 2008

JAMES N. HATTEN, Clerk
By:  Deputy Clerk

CIVIL ACTION FILE NO.

1:08-CV-2930

TWT

VERIFIED COMPLAINT FOR
INJUNCTIVE AND DECLARATORY RELIEF

Comes now Plaintiff Marketric Hunter, a minor child, by and through his mother and legal guardian Thelma Lynnah, and brings this action pursuant to 42 U.S.C. §1983 for injunctive and declaratory relief against Defendant Rhonda Medows, in her official capacity as the Commissioner of Georgia's Department of Community Health, and Defendant Georgia Medical Care Foundation, Inc., a

Georgia corporation, to redress defendants' violations of the plaintiff's rights under the Medicaid Act, 42 U.S.C. §1396 *et seq.*, and shows as follows:

JURISDICTION AND VENUE

1.

This civil action is authorized by 42 U.S.C. § 1983 to redress the deprivation under color of law of rights guaranteed by the Medicaid Act and the United States Constitution. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343.

2.

This Court has authority to grant the plaintiff's claims for declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202, and Rules 57 and 65 of the Federal Rules of Civil Procedure.

3.

Venue lies in the Atlanta Division of the Northern District of Georgia pursuant to 28 U.S.C. § 1391(b).

PARTIES

4.

Plaintiff Marketric Hunter (Marketric) is seven (7) years old and a resident of Savannah, Georgia. He brings this action by and through Thelma Lynah, his adoptive mother and legal guardian.

5.

Marketric is eligible to receive Medicaid benefits.

6.

Defendant Rhonda Medows (Defendant Medows) is the Commissioner of Georgia's Department of Community Health (DCH). This action is brought against Defendant Medows in her official capacity as the Commissioner of DCH. The Department of Community Health (DCH) is the state agency that administers the Medicaid program in Georgia. (Throughout this complaint, Defendant Medows and DCH occasionally will be referred to collectively as "DCH.")

7.

Defendant Georgia Medical Care Foundation, Inc. (GMCF) is a domestic, non-profit corporation, currently authorized to do business in this state.

FACTUAL ALLEGATIONS

8.

When he was a toddler, Marketric nearly drowned. By the time the paramedics resuscitated him, Marketric's brain was catastrophically and irreparably injured.

9.

Following Marketric's devastating neurologic injury, he developed many severe health conditions which are difficult to control and can quickly become life-threatening.

10.

Marketric's doctors have diagnosed him with many serious, incurable conditions including -- but not limited to -- static encephalopathy, cerebral palsy, spastic quadriplegia with sustained clonus in all four extremities, intractable seizure disorder, chronic lung disease, chronic upper airway obstruction, gastroesophageal reflux, scoliosis with curvatures, and severe mental retardation.

11.

Marketric is medically fragile with multiple systems diagnoses.

12.

Most of Marketric's diagnoses are complications of extensive brain damage.

13.

Marketric's medical conditions are challenging to manage effectively. Marketric experiences frequent and serious infections, respiratory distress, and hospitalizations.

14.

Marketric needs to be administered many medications and treatments on a strict schedule around the clock. He requires frequent deep suctioning to remove secretions from his airways. He often needs oxygen.

15.

Marketric's conditions require constant assessment for signs indicating the need for more or other medications and interventions to prevent further complications, and to keep him as healthy as possible.

16.

When he is most healthy, Marketric is alert and attempts to communicate. Marketric is too medically fragile to attend school outside of his home, so he receives services and therapies at home to, among other things, help him communicate better.

17.

Marketric's physicians have determined that Marketric requires private duty nursing to keep him as healthy as possible, to compensate for health conditions, to improve or prevent conditions from worsening, and to keep him from developing new problems.

18.

Marketric's physicians have repeatedly documented Marketric's medical conditions and health care needs and have prescribed private duty nursing services for Marketric for at least five (5) years.

19.

On September 5, 2008, Marketric was admitted to Children's Medical Center in Augusta to have surgery to place a rod next to his spine to correct severe scoliosis.

20.

For the rod to be placed in Marketric's back, an incision was made from the back of his neck down the full length of his back.

21.

Marketric is sedated on pain medication in an effort to control his pain. Although a body cast was applied during surgery, it has been removed because of

Marketric's particular medical and physical conditions. The surgical incision running the length of Marketric's back prevents Marketric from receiving respiratory treatments with medication, use of a CPT vest, and suctioning as he ordinarily would.

22.

During his recuperation, Marketric requires pain medication and he is at greater risk of complications. Marketric requires even more medication, treatment, assessment, and modified positioning than he requires regularly in an effort to prevent a myriad of problems, including respiratory distress, respiratory infection, skin breakdown, increased seizure activity, and aspiration with g-tube feedings. Because of his incision, Marketric cannot tolerate his normal respiratory treatment regimen. He must be turned every hour 24 hours per day to keep his airway clear.

23.

Marketric's primary treating physician, a Board certified pediatrician licensed to practice in the State of Georgia, determined that Marketric would require 168 hours per week of private duty nursing services after his surgery and requested Medicaid's approval for an increase in the number of nursing hours for Marketric upon his discharge from the hospital in Augusta and return to his residence in Savannah, Georgia.

24.

Marketric's physician and the nursing agency providing services to Marketric submitted the physician's request for approval of the increase to 168 hours per week on August 18, 2008 in anticipation of his surgery on September 5, 2008.

25.

The request has not been approved or denied.

26.

The State of Georgia participates in the Medicaid program, a voluntary federal – state partnership for payment of certain healthcare services of persons eligible to receive Medicaid.

27.

The Medicaid Act requires states participating in Medicaid to provide certain services to Medicaid-eligible beneficiaries under age 21.

28.

The provisions of the Medicaid Act specific to beneficiaries under age 21 years are known as Early and Periodic Screening, Diagnostic and Treatment, or EPSDT, set forth at 42 U.S.C. §1396d(r).

29.

The EPSDT provisions of the Medicaid Act include 42 U.S.C. §1396d(r)(5), which requires that states provide to children

“[s]uch other necessary health care, diagnostic services, treatment, and other measures described in subsection (a) of this section to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, whether or not such services are covered under the state plan.”

30.

The reference to “subsection (a)” above refers to 42 U.S.C. §1396d(a) of the Medicaid Act which lists categories of services that states must provide to Medicaid-eligible children.

31.

Private duty nursing is one of the enumerated categories of service under subsection (a). See 42 U.S.C. §1396d(a)(8).

32.

“Private duty nursing” is defined in the Code of Federal Regulations, 42 C.F.R. §440.80, as “nursing services for recipients who require more individual and continuous care than is available from a visiting nurse or routinely provided by the nursing staff of the hospital or skilled nursing facility....” Under 42 C.F.R.

§440.80, private duty nursing services must be provided by a registered nurse or a licensed practical nurse under the direction of the recipient's treating physician.

33.

Under the EPSDT provisions of the Medicaid Act, Georgia's Medicaid Agency must provide private duty nursing services to Medicaid eligible children under 21 when such nursing services are found by a child's treating physician to be necessary to correct or ameliorate a child's condition or illness.

34.

Marketric's treating physician has determined that Marketric requires 168 hours per week of private duty nursing services post-surgery to correct or ameliorate his illnesses and conditions.

35.

Under the EPSDT provision of the Medicaid Act, Marketric is entitled to receive all private duty nursing services necessary to correct or ameliorate his physical and mental illnesses and conditions as prescribed by his treating physician, whether or not such services are covered under Georgia's state Medicaid plan.

36.

In Georgia, the phrase “correct or ameliorate” means to “improve or maintain a child’s health in the best condition possible, compensate for a health problem, prevent it from worsening, prevent the development of additional health problems, or improve or maintain a child’s overall health, even if treatment or services will not cure the recipient’s overall health.” O.C.G.A. § 49-4-169.1(1).

37.

The Georgia Pediatric Program or GAPP is a subprogram of the Georgia Medicaid program by which medically fragile children receive in-home nursing services. DCH has written policies and procedures for GAPP (the GAPP Manual). The GAPP Manual governs the provision of Medicaid funded in-home nursing services to medically fragile children in Georgia.

38.

Although the GAPP Manual suggests that GAPP provides “private duty nursing,” DCH has acknowledged that GAPP does not actually provide “private duty nursing.” Instead, GAPP provides “skilled nursing in shifts.”

39.

Marketric has been receiving nursing services in his home through GAPP for many years. Notwithstanding his treating physicians’ determination that greater

numbers of private duty nursing hours are medically necessary for Marketric, Defendants, through the application of GAPP policies, have capped Marketric's hours of nursing services to 70 hours per week.

40.

Defendant GMCF is a subcontractor of Affiliated Computer Services, Inc., (ACS). ACS is the prime contractor for a healthcare administration project comprising Georgia's Medicaid and PeachCare programs and known as the Georgia Health Partnership or GHP.

41.

Under the auspices of GHP, DCH has delegated many of the tasks involved in the administration and operation of Georgia's Medicaid program to Defendant GMCF.

42.

Defendant GMCF reviews requests submitted by Medicaid providers to obtain prior authorization of payment for certain medical services.

43.

Defendant GMCF reviews and determines whether to approve or deny all requests for prior approval for nursing services under GAPP for Medicaid-eligible individuals under the age of 21 years in Georgia.

44.

All decisions made by Defendant GMCF for the prior approval of nursing services under GAPP are made pursuant to the policies and procedures of DCH.

45.

The staff at GMCF who review these prior approval requests meet with DCH staff and lawyers to discuss how GMCF applies DCH policies and procedures when reviewing the requests for nursing services under GAPP.

46.

GMCF's responsibilities under its subcontract include providing testimony at appeals hearings for DCH when GMCF's decision results in an adverse action being taken to deny Medicaid coverage for private duty nursing requested for an eligible child.

47.

DCH trained GMCF staff about how to conduct themselves as witnesses at appeals hearings.

48.

GMCF applies the policies and procedures of the GAPP program to deny requests for prior approval for nursing services, either by denying approval for any services or by approving less of the service than was requested.

49.

Defendant GMCF makes all decisions about the “medical necessity of the child” for any nursing services that will be provided to Medicaid-eligible children in Georgia.

50.

Defendants make their decisions about weaning and reducing the number of approved hours for children in the GAPP program based upon whether the condition of the child has worsened enough during the previous review period.

51.

GMCF applies GAPP policies and procedures to limit the number of Medicaid-funded private duty nursing hours that any child can receive, regardless of what the child’s treating physicians have determined the child needs. GMCF makes its decision about the reduction of the number of approved hours for children in the GAPP program based upon whether the condition of the child has worsened enough during the previous review period.

52.

GAPP policy states that it will not cover nursing services for individuals requiring sixteen (16) to twenty-four (24) hours of nursing care for an extended period of time in excess of one (1) week or for an indefinite period of time.

53.

Defendants applied the policies and procedures of the GAPP program when deciding to approve or deny prior approval requests for Medicaid-funded nursing services for Marketric over the five years his physician has prescribed private duty nursing services for him.

54.

Prior to Defendant GMCF's failure to approve the current request for an increase in nursing hours, Defendant GMCF had been engaged in a consistent reduction in the number of approved nursing hours for Marketric.

55.

Notwithstanding his treating physicians' determination that greater numbers of private duty nursing hours are medically necessary for Marketric, Defendant GMCF first capped Marketric's hours at 84 hours per week and subsequently reduced his hours to 70 hours per week.

56.

On May 7, 2008, Ms. Lynah received a notice from Defendant GMCF that Marketric's nursing hours were being reduced from 70 to 63 hours per week, because he had not been in the hospital in the previous three month period and

because he had not had any exacerbation in his “disease process.” Ms. Lynah promptly filed an administrative appeal of this reduction.

57.

GMCF applies GAPP policies and procedures to limit the number of Medicaid-funded provide duty nursing hours that Marketric can receive, regardless of what his treating physicians have determined that he needs.

58.

Defendants did not apply the EPSDT “correct or ameliorate” standard to the request for nursing services for Marketric.

59.

Defendant GMCF’s employees have been instructed by DCH to return to nursing providers any application that does not fully comply with the policies and procedures of the GAPP program.

60.

Defendant GMCF’s employees have been instructed by DCH to take all requests in the order in which they are received and to not expedite requests for nursing services.

61.

On August 18, 2008, Defendant GMCF's employees received the request submitted by Marketric's physician and nursing agency under GAPP to increase his approved hours of nursing services to 168 hours after his surgery on September 5, 2008, during his period of recuperation.

62.

Ms. Lynah, Marketric's adoptive mother, has never received any written notice from Defendant GMCF or Defendant Medows that the August 18th request has been approved or denied.

63.

GMCF has failed to timely consider Marketric's physician's request that Marketric receive 168 hours per week of nursing services until his physician determines that he has sufficiently recovered from his surgery to allow a reduction in this level of service.

64.

Marketric was discharged home from Children's Medical Center on September 16, 2008, without the necessary nursing services that his physician has prescribed.

65.

As a result of Defendants' acts and omissions, Marketric has been and is being denied services essential to his health and is suffering irreparable injury.

COUNT ONE

66.

The allegations contained in the numbered paragraphs above are incorporated by reference as if set forth herein verbatim.

67.

Under the EPSDT provisions of the Medicaid Act, 42 U.S.C. §1396d(r), Marketric has a right to receive Medicaid-funded private duty nursing services that his treating physician has determined are necessary to improve his health or maintain his health in the best condition possible, to compensate for a health problem, to prevent a health problem from worsening, to prevent the development of additional health problems, or to improve or maintain his overall health, even if treatment or services will not cure his overall health.

68.

Defendants' failure to timely provide private duty nursing services as prescribed by Marketric's treating physician increases the risk to Marketric that

one or more of his health problems will worsen, develop additional complications, hospitalization, and even death.

69.

Marketric has suffered, continues to suffer, and will suffer irreparable injury as a result of, *inter alia*, Defendants' refusal to approve the request submitted by Marketric's physicians as medically necessary to correct or ameliorate Marketric's multiple and complex conditions.

70.

The potential for harm to the Defendants is negligible if Defendant Meadows is required to provide private duty nursing hours as prescribed by Marketric's physician.

71.

Marketric has a substantial likelihood of success on the merits of his claims based upon Defendants' violation of the Medicaid Act, 42 U.S.C. §§1396a *et seq.*

72.

It is in the public interest that Marketric receive healthcare services covered by the Medicaid Act in the manner that his physician determines are necessary to provide medically necessary care at home and to avoid the increased risk of illness,

hospitalization, and death that is created by limiting or reducing the medical care he receives.

73.

This is a proper case for the entry of a temporary restraining order to limit further and greater irreparable harm to Marketric under Fed.R.Civ.P. 65(b).

COUNT TWO

74.

The allegations contained in the numbered paragraphs above are incorporated by reference as if set forth herein verbatim.

75.

Defendants have, by the actions and inactions set forth above, violated the Medicaid Act, 42 U.S.C. §§1396 *et seq.*, and its implementing regulations by:

(a) denying Marketric all services to which he is entitled under EPSDT, in violation of 42 U.S.C. §1396d(r)(5);

(b) failing to inform Marketric of the scope of services available under the EPSDT benefit of the Medicaid program, in violation of 42 U.S.C. §1396a(a)(43)(A);

(c) denying and reducing EPSDT services in amount, duration and scope because of Marketric's diagnosis, type of illness or condition, in violation of 42 C.F.R. §§440.230(b) and (c);

(d) denying services to Marketric on the basis of cost, in clear violation of the Medicaid Act;

(e) failing to provide adequate written notice of its decisions to deny or reduce benefits;

(f) ignoring requests for Medicaid-funded services;

(g) failing to provide access to Medicaid-funded services with reasonable promptness;

(h) making arbitrary and capricious decisions to deny or reduce Medicaid-funded services to Marketric and/or creating justifications for those decisions after Marketric has sought to challenge them;

(i) failing to provide Marketric with a meaningful opportunity to be heard and the means by which he might challenge any reduction or denial of Medicaid-funded services to him;

(j) refusing to allow nurses to travel with Marketric to the doctor's office despite repeated requests from the primary pediatrician;

(k) refusing to consider the requests of Marketric's primary pediatrician for nurses to travel with Marketric and then refusing to provide notice of the denial of services to Marketric;

(l) refusing to apply the proper legal standard for medical necessity to the approval of nursing services;

(m) denying services to Marketric because his "disease process" has not deteriorated enough;

(n) refusing to actually provide Medicaid-funded "private duty nursing" to Marketric, as that service is defined in 42 C.F.R. §440.80.

76.

Marketric's right to receive the EPSDT benefits to which he is entitled is a right secured by the laws of the United States, including, but not limited to, the Medicaid Act. In violation of 42 U.S.C. § 1983, Defendants have subjected Marketric to the deprivation of his rights under color of a statute, ordinance, regulation, custom, or usage of the State of Georgia.

COUNT THREE

77.

The allegations contained in the numbered paragraphs above are incorporated by reference verbatim.

78.

Defendant Medows has, by the actions and inactions set forth above, violated Marketric's right to due process which is protected by the 5th and 14th Amendments to the United States Constitution by:

(a) failing to provide adequate written notice of her decisions to deny or reduce services to which Marketric is entitled in accordance with the Medicaid Act and a meaningful opportunity to challenge these decisions;

(b) by ignoring his requests for services, Defendant Medows is denying to him essential Medicaid-funded services, to which he is entitled to receive in accordance with the Medicaid Act, without providing any notice, however inadequate, of the reasons for her decisions to deny benefits to him and a meaningful opportunity to challenge these decisions;

(c) making decisions about Medicaid coverage that are arbitrary and capricious;

(d) misleading Marketric and his providers about the nursing service actually being provided to Marketric under the GAPP program.

79.

Marketric has a protected property interest in receiving Medicaid-funded services to which he is entitled under the Medicaid Act. Marketric's right to due

process when being denied or suffering the loss of protected property rights is a right secured by the 5th and 14th Amendments to the Constitution of United States. In violation of 42 U.S.C. § 1983, Defendant Medows has subjected Marketric to the deprivation of his right to due process under color of a statute, ordinance, regulation, custom, or usage of the State of Georgia.

COUNT FOUR

80.

The allegations set forth in the numbered paragraphs above are incorporated herein as fully as if set forth verbatim.

81.

Pursuant to 42 U.S.C. § 1988, Marketric should recover a reasonable attorney's fee as part of its costs for taking action to enforce Section 1983.

WHEREFORE, Marketric respectfully requests that the Court:

(a) issue a temporary restraining order and preliminary injunction to prohibit Defendants from denying nursing services to Marketric that have been prescribed by his physician as necessary for him;

(b) enter a preliminary and permanent injunction against Defendants to prohibit them from denying necessary healthcare services as ordered for him by his primary care physician;

(c) issue preliminary and permanent injunctive relief enjoining Defendants from violating Plaintiff's rights to have all approvals required by Defendants issue promptly, without delay caused by Defendants' prior approval process and requiring Defendants to immediately provide all medically necessary services to which Marketric is entitled under the Medicaid program;

(d) issue preliminary and permanent injunctive relief enjoining Defendants from violating Plaintiff's right to due process and requiring Defendants to provide written notice of the specific factual reasons and specific regulations and/or policies which it has applied when threatening to reduce or when denying Medicaid-funded services to which Marketric is entitled under the Medicaid program;

(e) declare that Defendants' actions and inactions violate the Medicaid Act;

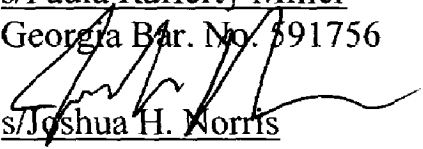
(f) declare that Defendants' actions and inactions violate his right to due process of law under the 5th and 14th Amendments to the United States Constitution;

(g) award Marketric his litigation expenses, including reasonable attorney's fees; and

(h) award such other relief as may be just, equitable and appropriate.

Respectfully submitted this 18th day of September, 2008.

s/Paula Rafferty Miller
Georgia Bar. No. 591756


s/Joshua H. Norris
Georgia Bar No. 545854

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VERIFICATION

STATE OF GEORGIA

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COUNTY OF RICHMOND

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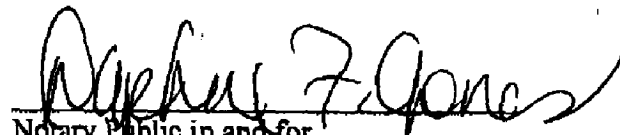
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On this day, Thelma Lynah appeared before me, the undersigned notary public. After I administered an oath to her, upon her oath, she said that she read the Verified Complaint for Injunctive and Declaratory Relief and that the facts stated in it are within her personal knowledge and are true and correct.


THELMA LYNAH

SWORN TO and SUBSCRIBED before me on September 16, 2008.

NOTARY PUBLIC RICHMOND CO. GA.
MY COMMISSION EXPIRES 08-27-2011


Notary Public in and for
the State of Georgia

