

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 LYNAH,
Plaintiff,

vs.

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

CIVIL ACTION FILE NO.
1:08-CV-2930-TWT

**ORDER ON PLAINTIFF'S MOTION
FOR PRELIMINARY INJUNCTION**

This is an action for injunctive and declaratory relief in which the Plaintiff claims that the Defendants are violating his rights under the Early Periodic Screening Diagnosis & Treatment ("EPSDT") provisions of the Medicaid Act, 42 U.S.C. §§ 1396a(a)(43) and 1396d(r). Before the Court is the Motion of Plaintiff Marketric Hunter, a minor child, by and through his mother and legal guardian, Thelma Lynah, for a Preliminary Injunction. For the reasons set forth below, the Plaintiff's motion is GRANTED IN PART and DENIED IN PART.

FINDINGS OF FACT

Plaintiff Marketric Hunter is seven years old and lives with his adoptive mother, Thelma Lynah, in Savannah, Georgia. He has multiple, complex medical conditions and physical impairments including static encephalopathy and cerebral palsy due to a catastrophic brain injury he experienced as a result of nearly drowning when he was two. He is eligible for Medicaid and participates in the Georgia Pediatric Program (“GAPP”), which is a subprogram of the Georgia Medicaid program, through which medically fragile children receive in-home private duty skilled nursing services.

Defendant Rhonda Medows is the Commissioner of Georgia’s Department of Community Health. The Department of Community Health (“DCH”) is the state agency that administers the Medicaid program in Georgia.

Defendant Georgia Medical Care Foundation, Inc. (“GMCF”) is a non-profit corporation. GMCF, through a contractual relationship with DCH, reviews and decides all requests for private duty skilled nursing services under the GAPP program made on behalf of Medicaid-eligible children under 21 in Georgia.

During the summer of 2008, Marketric was receiving seventy (70) hours a week of skilled nursing care under the GAPP program. During this time, Marketric’s doctors determined that he needed surgery on his spine to correct

severe scoliosis. On or about August 6, 2008, Marketric's treating physician, Dr. Saad Hammid, wrote a letter requesting an increase in the number of skilled nursing hours that Marketric was receiving. The request was for Marketric to have 112 hours per week of private duty skilled nursing services leading up to the surgery and an open-ended request for 168 hours per week (i.e., full time, 24 hour coverage) upon discharge from the hospital following the surgery. On or about August 18, 2008, Maxim- Savannah, the company providing Marketric's nursing services, submitted Dr. Hammid's letter to GMCF along with a packet of materials, and communicated by e-mail to GMCF that Marketric's surgery was scheduled for September 5, 2008.

Dr. Joseph Rosenfeld, GMCF's Medical Director of the GAPP program, testified through affidavit¹ that he spoke with Dr. Hammid about Marketric's condition on August 20, 2008. According to Dr. Rosenfeld's testimony, Dr. Hammid told him that Marketric's surgery was going to take place in October or November. He also told Dr. Rosenfeld that the request for increased hours prior to surgery was because Marketric's caregiver had been having back trouble and wanted additional assistance caring for Marketric. Dr. Hammid explained that he expected Marketric to remain in the hospital for ten days after the surgery was

¹ Dr. Rosenfeld's affidavit was filed on Sept 26, 2008, in support of GMCF's response to Plaintiff's motion for preliminary injunction.

performed. Dr. Rosenfeld further testified that, following this conversation, GMCF had internal communications about the number of hours that were medically necessary and a post-operation weaning schedule.

On September 11, GMCF received additional materials from Maxim-Savannah, including a letter from Dr. Hammid. In this letter, Dr. Hammid stated that Marketric's surgery had been performed on September 5, 2008. Dr. Hammid's letter did not contain details about the surgery or Marketric's current condition. At the request of GMCF, Dr. Hammid wrote another letter on September 11, 2008, containing additional information about Marketric's surgery and condition.

On September 17, 2008, less than a week after receiving Dr. Hammid's September 11, 2008, letters, GMCF conducted its medical review and prepared a schedule providing for increased hours after surgery, followed by a gradual reduction in skilled nursing hours.

On September 18, 2008, Marketric filed suit pursuant to 42 U.S.C. § 1983 and the Medicaid Act, 42 U.S.C. § 1396 et seq., against Defendants Medows and GMCF requesting a temporary restraining order and preliminary injunction enjoining Defendants from denying the provision of 168 hours per week of private

duty skilled nursing services as had been requested on Marketric's behalf. This suit was filed before GMCF had communicated its schedule to Plaintiff.

On September 22, 2008, after hearing from the parties' counsel and considering the evidence before the Court at that time, the Court entered a Temporary Restraining Order enjoining Defendant Medows from denying Marketric's treating physician's request for 168 hours per week of private duty skilled nursing services until the hearing on Plaintiff's Motion for a Preliminary Injunction, which the Court scheduled for September 29, 2008.

On September 24, 2008, GMCF issued a letter to Ms. Lynah denying the request made by Dr. Hammid on August 18, 2008, for 168 hours per week of skilled nursing hours for an indefinite period of time. Taking into account the fact that Marketric was receiving a week of twenty-four (24) hour per day skilled nursing care per the terms of this Court's Order of September 22, 2008, the letter set forth an approved schedule of increased skilled nursing hours to provide the medically necessary level of care to ameliorate Marketric's condition. The schedule provided for an additional three (3) days of twenty (20) hours per day of skilled nursing care, eight (8) days of sixteen (16) hours per day skilled nursing care, and three (3) months of twelve (12) hours per day of skilled nursing care. The letter also noted that Plaintiff's open-ended request for twenty-four (24) hours

per day of private duty skilled nursing services fell outside the current GAPP policy which states that “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” are not covered by GAPP (Manual § 905.d). The letter stated further that notwithstanding the GAPP policy, the medically necessary number of private duty skilled nursing services, as determined by the independent medical review performed by GMCF, was going to be provided to Marketric.

When this matter came before the Court on September 29, 2008, no evidence as to Marketric’s current condition was offered by Plaintiff. GMCF relied on Dr. Rosenfeld’s affidavit which stated, inter alia, that the plan communicated by GMCF to Ms. Lynah on September 24, 2008, provided the medically necessary level of skilled nursing hours required by Marketric’s condition. Dr. Rosenfeld further stated that he did not believe that the hospital would have discharged Marketric if he still required twenty-four (24) hours a day of skilled nursing care.

CONCLUSIONS OF LAW

The provisions of law which govern this matter are set forth in the Court's opinion in *Moore v. Medows*, 563 F.Supp.2d 1354 (N.D.Ga. 2008). *Moore* provides in pertinent part:

The [Medicaid] Act now mandates that states which participate in the Medicaid program provide "early and periodic screening, diagnostic and treatment services" as needed "to correct or ameliorate defects and physical and mental illnesses." 42 U.S.C. § 1396d(r)(5). Providing the necessary services for those under the age of 21 is not optional for a state; the appropriate care must be provided "whether or not such services are covered under the state plan." *Id.* The Court of Appeals for the Eleventh Circuit has held that: "The language of subsection (r)(5) appears to mandate coverage for all medically necessary treatment for eligible recipients under age twenty-one." *Pittman v. Secretary, Florida Dept. of Health and Rehabilitative Services*, 998 F.2d 887, 889 (11th Cir. 1993). The state has no discretion to deny funding of medically necessary treatment. *Id.* at 892. Private skilled nursing is an enumerated category of treatment under the Medicaid Act. 42 U.S.C. § 1396d(a)(8). . . . The only pertinent inquiry is the amount of nursing hours "necessary . . . to correct or ameliorate" the Plaintiff's condition. 42 U.S.C. § 1396d(r)(5). The Plaintiff's treating physician prescribed 94 hours per week of skilled nursing care. (*Moore Aff.*, Ex. A-1) The state must provide for the amount of skilled nursing care which the Plaintiff's treating physician deems necessary to correct or ameliorate her condition. The Defendant may not deny or reduce the hours of skilled nursing care that is medically necessary based upon cost or the lack of a secondary caregiver.

Id. at 1356-57

Based upon the pleadings and evidence before the Court, and the arguments of counsel, Plaintiff's Motion for Preliminary Injunction is granted to the extent

that the Department of Community Health applies a policy of not providing services for individuals requiring 16 to 24 hours of nursing care for more than one week because this criteria is not one of medical necessity. Such a policy of not providing services where it is medically necessary is inconsistent with the Medicaid Act, 42 U.S.C. § 1396a et seq.

With respect to this policy, the Court finds that the Plaintiff has demonstrated a likelihood of success on the merits as to that policy. Also with respect to this policy, Plaintiff has shown irreparable injury, that the balancing of the equities is in favor of the Plaintiff, and that the limited injunction is in the public interest.

Plaintiff's Motion is denied with respect to the Plaintiff's request for 24-hour-a-day private duty nursing services for an open-ended or indefinite period of time. The state has limited discretion in denying a provider's request for services under the EPSDT provision of the Medicaid Act. The state's discretion is limited to a review of the request for fraud, abuse of the Medicaid system, and whether the service is within the reasonable standards of medical care. With respect to Dr. Hammid's prescription of 24-hour-a-day care for an open-ended or indefinite period, the Court believes that is an abuse of the Medicaid system and is without any basis in fact.

The Court accepts Dr. Rosenfeld's conclusion that the medically necessary level of skilled nursing care in this case is twenty-four (24) hours per day for one week beginning last week until 12:00 p.m. today, twenty (20) hours a day for the following three days, sixteen (16) hours a day for the following eight days, and twelve (12) hours a day for the following three months.

The Court finds that the state, in reaching that conclusion, or specifically Dr. Rosenfeld, has applied the medical necessity standard and has reached a reasonable conclusion as to the level of care that is required by that standard under the particular facts and circumstances of the case as they exist today.

The Court GRANTS IN PART and DENIES IN PART Plaintiff's Motion for a Preliminary Injunction and hereby ORDERS as follows:

1. Defendant Rhonda Medows, in her official capacity as the Commissioner of the Department of Community Health, is hereby enjoined from enforcing a policy to limit medically necessary private duty skilled nursing services for eligible Medicaid beneficiaries under the age of 21 using criteria not based on medical necessity.
2. The State is further ordered to provide Plaintiff with the private duty skilled nursing hours in the manner approved by Dr. Joseph Rosenfeld in his letter to Thelma Lynah dated September 24, 2008.

/s/Thomas W. Thrash
THOMAS W. THRASH, JR. JUDGE
UNITED STATES DISTRICT COURT

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