

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION**

<b>KATHRYN A. PRICE, et al.,</b>	:	
	:	CASE NO. 1:13-CV-74
Plaintiffs,	:	
	:	MAGISTRATE JUDGE LITKOVITZ
v.	:	
	:	
<b>DIRECTOR, OHIO DEPARTMENT OF MEDICAID, et al.,</b>	:	
	:	
Defendants.	:	

**DEFENDANTS’ MOTION FOR STAY OF THE COURT’S ORDER (DOC. 121)  
PENDING APPEAL**

Defendants John B. McCarthy, Director of the Ohio Department of Medicaid, and Bonnie Kantor-Burman, Director of the Ohio Department of Aging, move this Court to stay the declaratory and injunctive relief that it ordered (*see* doc. 121), pending the resolution of Defendants’ appeal to the United States Court of Appeals for the Sixth Circuit. This stay is necessary to protect the safety of Assisted Living Waiver applicants, and to comply with the waiver as described by Congress.

As with any Medicaid Waiver program, the Assisted Living Waiver to which Plaintiffs applied allows the State to relax some Medicaid requirements. In this case, the Waiver allowed Plaintiffs access to services without comparable services being available to all Medicaid recipients. *See* 42 U.S.C. § 1396a(a)(10)(B). In exchange for that flexibility, federal law imposes other requirements on the provision of waiver services. These additional requirements ensure that services provided only to a subset of Medicaid recipients are offered in a safe and

medically appropriate way. Among other requirements, federal law requires Assisted Living Waiver services to be provided “pursuant to a written plan of care” only after “there has been a determination that but for the provision of such services the individuals would require the level of care provided in a hospital or a nursing facility . . . .” 42 U.S.C. § 1396n(c)(1).

The Court’s order upends the tradeoff described by Congress and requires the State to pay for services that are provided before a plan of care exists, and before anyone has determined that the applicant requires a level of care appropriate for the Assisted Living Waiver. In so doing, it puts some Assisted Living Waiver applicants at risk. It requires the State and federal governments to pay for care for vulnerable Ohioans without having a plan of care in place. A plan of care ensures that waiver participants get the full range of services that they need. Without a plan, recipients may receive unsafe or incomplete care that puts them at risk.

By requiring payment for services provided “pursuant to” a plan of care that does not yet exist, this Court’s order undercuts the federal regulatory scheme, including carefully crafted safety precautions. For those reasons alone, this Court should stay its order.

**A. Standard of Review**

This Court has discretion to grant a stay of its order pending appeal when “the circumstances of the particular case” warrant. *Nken v. Holder*, 556 U.S. 418, 433 (2009) (quoting *Virginian R. Co. v. United States*, 272 U.S. 658, 672-3 (1926)). The Court should consider four factors:

- (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits;
- (2) whether the applicant will be irreparably injured absent a stay;
- (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and
- (4) where the public interest lies.

*Id.* at 434 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)); *see also Ohio State Conf. of N.A.A.C.P. v. Husted*, 769 F.3d 385, 387 (6th Cir. 2014). In this case, each factor suggests that a stay is warranted.

**B. Defendants are likely to succeed on the merits of their appeal.**

This Court's decision on the merits of Plaintiffs' claims flows from its conclusion that the statutory requirement that waiver services be "provided pursuant to a written plan of care" unambiguously means that the State must pay retroactively for services provided when no written plan of care exists, but that fall within the bounds of a plan that is created later. Even if the Court's interpretation of the words "pursuant to" is plausible, it is not the only possible, unambiguously correct interpretation. As the Centers for Medicare and Medicaid Services ("CMS") confirmed, a more natural reading of the statute is that services cannot be "provided pursuant to a written plan of care" until that plan of care exists. For that reason, Defendants are likely to prevail in arguing that the Court erred by giving CMS guidance no weight.

Nearly every other conclusion in the Court's Order flows from this error. Because it erroneously concluded that the Defendants had violated clear federal law, the Court allowed plaintiffs to amend their complaint at the eleventh hour in a response memorandum in opposition to Defendants' motion for summary judgment. The Court certified a vaguely defined class that extends indefinitely into the past and future, and ordered Defendants to meet Plaintiffs' burden of identifying the members of the class. For these reasons and others, Defendants are likely to prevail in their appeal.

**C. The relief ordered by the Court cannot be simply undone should Defendants prevail on appeal. Absent a stay, the Court's order will irreparably harm Defendants.**

The injunctive relief ordered by the Court has two elements. First, though no named

Plaintiffs or class members identified by the named Plaintiffs have asserted any intent to apply for the Assisted Living Waiver in the future, the Court ordered that future Assisted Living Waiver applications must receive retroactive coverage even when no plan of care existed and no level of care determination had been made at the time care was provided. Second, reaching indefinitely into the past, the Court ordered that all past applicants receive notice of the new rule announced by the Court and have their eligibility re-determined in accordance with that rule.

The stay should be granted as to both the prospective and retrospective injunctions for the same reason: The bell rung by the Court's order cannot be simply un-rung. If Defendants pay for the services pursuant to this Court's order and then prevail in their appeal, it will be difficult or impossible to recover those payments. And the cost of the mass notice alone will be substantial.

**D. The stay will not substantially injure named Plaintiffs or members of the class. Some class members will benefit by keeping the safeguards urged by CMS in place. For this same reason the stay is in the public interest.**

The named Plaintiffs are an executrix of an applicant's estate and a next friend of an applicant. If the stay is granted, neither the estate nor the next friend will get the monetary payments they seek as quickly as they would like—and ultimately, it is payment for services that they seek. Plaintiffs have paid for care provided during a period in which the State determined they were not yet eligible for the Assisted Living Waiver, and they seek to recover those payments. But a delay in payment is more than offset by the benefit to Assisted Living Waiver applicants of the safeguards that this Court's order would undo. CMS, the federal agency that oversees the Medicaid program, reasonably reads federal law to require that a plan of care exist and a level of care determination be completed *before* services may be provided under the Assisted Living Waiver. These requirements promote the safety of all applicants. They do not allow the State and federal governments to pay for services that do not follow an existing plan of



**Certificate of Service**

I certify that on this 30th of September 2015, a copy of the foregoing Motion to Stay was filed electronically with the Clerk of the Court. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Cheryl R. Hawkinson  
**CHERYL R. HAWKINSON**