IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

T.B. by and through his parents THOMAS BOYCE and MARGARET BOYCE, **Q.G.** by and through his parents MICHAEL GOLDBERG and MAYUMI GOLDBERG, **M.K.** by and through her parents BRADLEY KISH and MARY KISH, **X.N.** by and through his parents FRANCISCO NEVAREZ and LISETTE NEVAREZ, **S.P.** by and through her parents FRANK PETERSON and CORELYN PETERSON, **O.W.** by and through his parents, JEFFREY WELLMAN and AMY WELLMAN, individually and on behalf of a class,	)	)
Plaintiff,	)	No. 12-cv-5356
v.	)	
	)	Judge Robert W. Gettleman
JULIE HAMOS, in her official capacity as Director of the Illinois Department of Healthcare and Family Services	)	
Defendant.	)	

ORDER

Plaintiffs in this case are medically fragile disabled children who receive funding from the Illinois Department of Healthcare and Family Services for skilled nursing services in their homes. On July 9, 2012, plaintiffs filed a complaint for declaratory and injunctive relief against defendant Julie Hamos, in her official capacity of Director of the Illinois Department of Healthcare and Family Services. The complaint alleges that the potential changes to the Illinois State Medicaid Plan and the Medicaid Home and Community-Based Services ("HCBS") Waiver for Children that are Medically Fragile, Technology Dependent ("MF/TD") proposed by defendant violate the Americans with Disabilities Act ("ADA"), the Rehabilitation Act, and Medicaid statutes by forcing them into institutions or hospitals to receive the services they now

receive in their homes. On August 14, 2012, defendant filed a motion to dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(1), alleging that plaintiffs lack standing in this case. For the following reasons, the motion is denied.

BACKGROUND

At the time plaintiffs filed their complaint, the Illinois Department of Healthcare and Family Services ("HFS") provided funding for medically fragile, technology dependent children to receive nursing services in their homes through the MF/TD waiver program. That waiver program (the "current waiver") was set to expire on August 31, 2012. Instead of seeking to renew the waiver in its current form, HFS developed an amended MF/TD waiver program (the "new waiver") and submitted the new waiver request to the federal Center for Medicare and Medicaid Services ("CMS") for approval.[1] In order to allow CMS time to review the proposed new waiver program, HFS requested, and CMS granted, an extension of the current waiver. This temporary extension of the current MF/TD waiver will continue through November 29, 2012.[2]

Under 42 U.S.C. § 1396n(f)(2), a waiver request will be deemed granted "unless the Secretary [of Health and Human Services], within 90 days after the date of its submission to the Secretary, either denies such request in writing or informs the State agency in writing with respect to any additional information which is needed in order to make a final determination with

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[1]The terms of the new waiver and the state Medicaid plan amendment are set forth in 305 ILCS 5/5-2(b). In brief, the changes to the wavier and Medicaid plan that plaintiffs challenge are: (1) the change from a "hospital" level of care to a "nursing" level; (2) the limitation of community services to families with income up to 500% of the federal poverty level; and (3) the imposition of cost-sharing or co-pays.

[2] Defendant acknowledges that it can request further extensions of the current waiver, if deemed necessary, but has stated that as of September 27, 2012, it has not decided to request an additional extension.

respect to the request." On August 7, 2012, within 90 days of HFS' submission of the proposed new waiver request, CMS asked the state agency for additional information. This request halted the 90-day clock on the federal approval of the new waiver request. Pursuant to 42 U.S.C. § 1396n(f)(2), a fresh 90-day clock will begin to run "[a]fter the date the Secretary receives such additional information." To date, defendant has not advised the court if this additional information has been provided to CMS. As a result, the court assumes for purposes of the instant motion that the 90-day window for federal approval has not yet begun to run.

DISCUSSION

A. Legal Standard

Under Rule 12(b)(1) a court must dismiss any action for which it lacks subject matter jurisdiction. Rule 12(b)(1) motions are premised on either facial or factual attacks on jurisdiction. Villasenor v. Industrial Wire & Cable, Inc., 929 F.Supp. 310, 312 (N.D.Ill. 1996). If the defendant makes a factual attack on the plaintiff's assertion of subject matter jurisdiction, it is proper for the court to look beyond the jurisdictional allegations in the complaint and to view whatever evidence has been submitted in response to the motion. Id. To withstand such a motion, the plaintiff must submit "'competent proof'" that the court has subject matter jurisdiction. NLFC, Inc. v. Devcom Mid–America, Inc., 45 F.3d 231, 237 (7th Cir. 1995) (quoting McNutt v. General Motors Acceptance Corp. of Indiana, 298 U.S. 178, 189 (1936)). Put another way, plaintiffs must prove by "a preponderance of the evidence or 'proof to a reasonable probability that jurisdiction exists.'" Id. at 237 (quoting Gould v. Artisoft, Inc., 1 F.3d 544, 547 (7th Cir. 1993)).

B. Defendant's Motion to Dismiss

Article III standing under the Constitution requires that: (1) the plaintiff must have suffered a concrete and particularized harm that is actual or imminent rather than conjectural or hypothetical; (2) there must be a fairly traceable causal connection between the injury and the defendant's conduct, and the injury may not be the result of a third party's independent action; and (3) it must be more likely than speculative that injury would be remedied by a favorable outcome. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992).

Defendant's motion to dismiss for lack of standing alleges that there is no imminent injury to plaintiffs, that plaintiffs' claims are hypothetical and conjectural, and that intervening events have rendered the case moot. Plaintiffs argue that they face two imminent potential injuries: the expiration of the current waiver and the potential reduction in home care services through the allegedly injurious amendments in the new waiver program.

There is no question that a reduction in medical services may constitute an injury, especially for plaintiffs such as these. To date, plaintiffs have not experienced a reduction in services, but plaintiffs need not have already experienced such injury to satisfy the Article III standing requirement. As the Supreme Court has stated, "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough." Pennsylvania v. West Virginia, 262 U.S. 553, 593 (1923). This threatened injury must be "'real and immediate,' not 'conjectural' or 'hypothetical,'" O'Shea v. Littleton, 414 U.S. 488, 494 (1974) (quoting Golden v. Zwickler, 394 U.S. 103, 109 -110 (1969)), but plaintiffs need show only "a reasonable probability – not a certainty – of suffering

tangible harm unless [they] obtain[] the relief that [they are] seeking in the suit." Hoover v. Wagner, 47 F.3d 845, 847 (7th Cir.1995).

The potential harm that plaintiffs face is not abstract. As it stands, plaintiffs' funding expires in little more than a month, and the allegedly injurious amendments will be approved or denied within 90 days of the state agency's response to CMS. The time line in question is short. Plaintiffs need not wait for their funding to expire on November 30th to have standing; that injury is imminent and plaintiffs may seek the appropriate preventative relief.[3] Nor must they wait for federal approval of the new waiver plan in order to have standing, as the defendant claims. Under the terms of the Illinois statute which outlines the new waiver program and the state Medicaid plan amendments, 305 ILCS 5/5-2b, the proposed program may be put in place as soon as federal approval is given. The possibility that CMS may reject the proposed new waiver does not mean that the harm is too speculative and uncertain to justify standing because the current waiver program expires in a little over a month. Plaintiffs need not show certainty of the harm "or even a very high probability." MainStreet Org. of Realtors v. Calumet City, Ill., 505 F.3d 742, 744 (7th Cir. 2007). "[T]he fact that a loss or other harm on which a suit is based is probabilistic rather than certain does not defeat standing." Id. (citing Korczak v. Sedeman, 427 F.3d 419, 422-23 (7th Cir. 2005) and North Shore Gas Co. v. EPA, 930 F.2d 1239, 1242 (7th Cir. 1991)). Therefore, the chance that the new program will not be put into place does not mean that plaintiffs must wait for CMS' decision in order to petition the court for relief.

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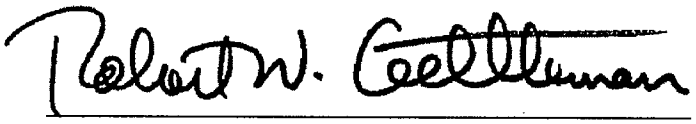
[3] That the state may request an extension to the current waiver is not material. The state has not done so, nor expressed an intention to do so. Additionally, even if the state does request an extension, this simply moves the deadline 90 days away; it does not remove the threat of injury.

Defendants also argue that, even if plaintiffs had standing at the time of filing, the extension of the current waiver has rendered the case moot. The court disagrees. As mentioned above, although the extension of the current waiver on July 27, 2012, did provide plaintiffs with an additional 90 days of services, the November 29, 2012, deadline rapidly approaches. Plaintiffs still face the imminent threat of the alleged reduction in services.

CONCLUSION

For the reasons stated above, defendant's motion to dismiss based on lack of standing is denied.

ENTER: October 23, 2012



Robert W. Gettleman
United States District Judge