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,	)	No. 12-5356
Plaintiffs,	)	Judge: Robert W. Gettleman
vs.	)	Magistrate: Sidney I. Schenkier
JULIE HAMOS, in her official capacity as Director of the Illinois Department of Healthcare and Family Services,	)	
Defendant.	)	

PLAINTIFFS' RESPONSE
TO DEFENDANT'S MOTION TO DISMISS

Now comes the Plaintiffs, by and through their attorneys, Robert H. Farley, Jr. Ltd., Cahill and Associates, and Michelle N. Schneiderheinze and files this Response to Defendant's Motion To Dismiss, as follows:

I. INTRODUCTION

On July 9, 2012, the Plaintiffs, individually and on behalf of a Class of approximately 1,050 medically fragile disabled children in Illinois, brought an action for Declaratory and Injunctive Relief against the Defendant under the Americans with Disabilities Act and Section

504 of the Rehabilitation Act and the Medicaid Act. (Doc. 1 - Compl. at par. 1, 21). The Plaintiffs and Class, currently receive funding from the Defendant for skilled nursing services at their home at an average monthly cost between $11,000 to $16,000, depending upon their medical needs, so that they do not have to be institutionalized or hospitalized for their entire life at a rate of approximately $55,000 per month. (Compl. at par. 1). The Plaintiffs' funding from the Defendant comes from the State of Illinois "Medicaid Home and Community-Based Services (HCBS) Waiver for Children that are Medically Fragile, Technology Dependent" program (MF/TD) and Medicaid. (Id.).

The named Plaintiffs receive between 12-18 hours per day of skilled nursing care (RN or LPN) at their residences.[1] Due to their medical fragile conditions, if the Plaintiffs do not receive funding from the Defendant to maintain these existing services, then they will be forced to be institutionalized or if they remain at home with reduced services, then they face a strong possibility of imminent death or a life threatening episode.[2] The treating doctors of the named Plaintiffs have signed Declarations in support of Plaintiffs Motion for Temporary Restraining Order and Preliminary Injunction which states that each Plaintiff needs to maintain their current medical plan of care and that without maintaining existing services then they will be institutionalized in a hospital or if they remain at home with reduced services then they face a strong possibility of imminent death or a life threatening episode. (Doc. 6 - Exhibits 13, 16, 19, 22, 25, 28).

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[1] Compl. at par. 24(a), 24(e), 25(a) 25(e), 26(a), 26(g), 27(a), 27(h), 28(a), 28(g), 29(a), 29(g).

[2] Compl. at par. 39(d), 41, 42; 46(d), 48, 49; 53(e), 59, 60; 64(f), 70, 71; 75(e), 80, 82; 86(e), 91, 93.

The Plaintiffs allege that effective September 1, 2012, the State of Illinois is unraveling 27 years of community based services to medically fragile children by making draconian cuts to Medicaid services to the Plaintiffs and putative Class which puts them at risk of institutionalization in violation of the Americans with Disabilities Act, Rehabilitation Act and Medicaid. (Compl. at par. 4) The Defendant places the Plaintiffs at risk of institutionalization by readily acknowledging that "Illinois is making several significant changes to the state's Medicaid program for children who are technology dependent" because "[t]he Medicaid program is on the brink of collapse." (Compl. at par. 5) (See also, Exhibit "A" - MF/TD Renewal at "Major Changes").

II. PLAINTIFFS AND CLASS AT RISK OF INSTITUTIONALIZATION

The Defendant places the Plaintiffs and Class at risk of institutionalization by undertaking the following actions:

A. Medically Fragile, Technology Dependent Waiver ("MF/TD") Expires On November 30, 2012 Which Places the Plaintiffs and Class At Risk of Institutionalization.

At the time of the filing of this lawsuit, the existing MF/TD Waiver which allows the Plaintiffs and Class to receive skilled nursing services and other services in their home or community was set to expire on August 31, 2012. (Compl. at par. 103-106). Without the continuation of this existing MF/TD Waiver, the Plaintiffs and Class are at risk of institutionalization.[3] After the filing of the lawsuit, the Defendant obtained a temporary

[3]Although *Olmstead* involved plaintiffs who were seeking to be removed from institutions, the holding equally applies to plaintiffs who are seeking to avoid institutionalization. *See Fisher v. Oklahoma Health Care Auth.*, 335 F.3d 1175, 1181 (10th Cir. 2003); *Marlo M. v. Cansler*, 679 F.Supp.2d 635, 637 (E.D.N.C. 2010) (granting preliminary injunction where the plaintiffs were at risk of institutionalization)

extension of the existing MF/TD Waiver allowing that program to operate through November 29, 2012. (Def. Memo of Law at Exhibit B). The Defendant's counsel stated in open court on September 27, 2012, that the Defendant has not requested a further extension to operate the MF/TD Waiver past November 29, 2012. The federal agency, overseeing the MF/TD Waiver, namely, the Centers for Medicare and Medicaid Services (CMS) by Ralph Lollar, the Director of the Division of Long Term Services and Supports, confirmed in an email, dated September 21, 2012, that the Illinois MF/TD Waiver will expire unless the State of Illinois requests another temporary extension. (See Exhibit "B")

B. Illinois Seeks To Renew The Expiring Waiver By Reducing Their Level of In-Home Funding By Approximately 50% Which Places The Plaintiffs And Class At Risk Of Institutionalization.

The Defendant has submitted a renewal of the MF/TD Waiver which eliminates the hospital level of care and substitutes a nursing facility as being the level of care which the medically fragile children require.[4] (Compl. at par. 10). Accordingly, in order to be cost neutral, the comparable institution (nursing facility) rate would be used instead of the hospital rate of approximately $55,000. (Id. at. par. 9, 10) The nursing facility rate will be approximately $9,400 per month, which means the State of Illinois will not approve community based skill nursing and Medicaid funding for the medically fragile children which exceeds the sum of $9,400 per month. (Id. at 10). A significant number of children in the MF/TD Waiver receive Medicaid services (skilled nursing, medication, equipment, supplies and therapies) which are

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[4] This reduction from a hospital level of care to a nursing home level of care is not required by the passage of the Illinois SMART Act. The only portions of the Illinois SMART ACT which impacts this case is to permit the Defendant to utilize "cost-sharing" or Co-Pays and to deny benefits to medically fragile "families with income up to 500% of the federal poverty level." (See Def. Motion to Dismiss at Exhibit "D").

approximately $20,000 per month. The average monthly cost for the approximately 550 children in the MF/TD is $15,166 while the average monthly cost for the other approximately 500 children not in the MF/TD but receiving PDN is $11,166 per month. (Id).

By Illinois reclassifying 99% of the persons in the MF/TD Waiver as only needing a nursing facility level of care as opposed to a hospital level care in order to cap or limit the "medical necessity" level of funding, the State is placing the Plaintiffs and putative Class at risk of institutionalization. (Id. at 11).

C. Illinois Seeks To Renew The Expiring Waiver By Excluding All Medically Fragile Children With Parental Incomes Exceeding 500% Of The Federal Poverty Rate For Home and Community-Based Services Which Places The Child At Risk of Institutionalization.

The Defendant has submitted a renewal of the MF/TD Waiver where a medically fragile child will be unable to receive in-home medically necessary services when the average cost of those services is $188,000 from a family that is excluded because they make too much money (in excess of $95,450 for a family of 3). (Id. at 107). Excluding families with incomes over 500% of the FPR will place the child at risk of institutionalization in order to receive the medically necessary services which he or she will not be able to receive in the community. (Id. at 16).

D. Illinois Seeks To Renew The Expiring Waiver and Make Changes to the State Medicaid Plan By Imposing Cost Sharing or Co Pays On Children With Parental Incomes Exceeding 150% Of The Federal Poverty Rate For Home and Community-Based Services Which Violates Federal Law and Which Places The Child At Risk of Institutionalization.

The Defendant seeks to make changes to both the State Medicaid Plan and MF/TD Waiver to impose cost sharing or co pays on children with parental incomes exceeding 150% ($28,635 for a family of 3) of the federal poverty rate for home and community-based services

which violates federal law and which places the child at risk of institutionalization. (Id. at 6(C), 18-19).

III. TIMELINE

The existing MF/TD Waiver which was initially set to expire on August 31, 2012, has been temporary extended through November 29, 2012. The waiver will expire on November 30, 2012 unless the Defendant asks for another temporary extension.

The Defendant's renewal of the MF/TD Waiver is moving slowly as indicated by the Defendant's counsel statement in open court on September 27, 2012, that the Defendant had not submitted to CMS the Request for Additional Information ("RAI") which CMS requested on August 7, 2012 pertaining to the renewal of the MF/TD Waiver. (Def. Memo of Law att Exhibit C). Once CMS receives the requested information from the Defendant, CMS has up to 90 days to respond to the State of Illinois. (Id.) The 90 day clock does not begin to run until the Defendant submits additional information to CMS. (Id.) However, the stoppage of this 90 day clock with respect to the renewal of the MF/TD Waiver does not extend the existing waiver past November 29, 2012 unless the Defendant requests another temporary extension of the existing waiver. (See Exhibit "B" - CMS email from Ralph Lollar, dated September 21, 2012).

IV. ARGUMENT

A. Standing

In ruling on a motion to dismiss for want of standing, the District Court must accept as true all material allegations of the complaint, drawing all reasonable inference therefrom in the plaintiff's favor. *Retired Chicago Police Assoc. v. City of Chicago,* 76 F.3d 856, 862 (7th Cir.

1996). The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing the required elements of standing. *Id.* (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992)). Those elements are (i) an injury in fact, which is an invasion of a legally protected interest that is concrete and particularized and, thus, actual or imminent, not conjectural or hypothetical; (ii) a causal relationship between the injury and the challenged conduct, such that the injury can be fairly traced to the challenged action of the defendant; and (iii) a likelihood that the injury will be redressed by a favorable decision. *See Lujan,* 504 U.S. at 560-561.

B. Standing Due To Threatened or Imminent Injury - Expiration Of Existing MF/TD Waiver On November 30, 2012

At the time of the filing of the lawsuit, the existing MF/TD Waiver which had worked well since 1985 to allow medically fragile children to remain in their own homes rather than in an institutional setting was set to expire on August 31, 2012. (Compl. at par. 2, 10, 106). The Defendant submitted a renewal of the MF/TD Waiver with significant adverse changes to medically fragile children which placed them at risk of institutionalization. (Id. at par 5-11, 107).

The Plaintiffs and Class were at risk of an imminent injury at the time of the filing of the lawsuit on July 9, 2012, with the expiration of the MF/TD Waiver. The fact that after the filing of the lawsuit, the Defendant obtained on July 27, 2012 a temporary extension of the existing MF/TD Waiver to continue to operate through November 29, 2012,[5] still places the Plaintiffs and Class at risk of an imminent injury as the existing MF/TD Waiver will expire on November 30, 2012 with no other comparable program in place for the Plaintiffs and Class. Even assuming the Defendant asks for another temporary extension for 90 days past November

[5] See Exhibit "B" attached to Def. Memorandum of Law.

30, 2012, the Plaintiffs and Class are still at risk of an imminent injury.

Threatened injury can satisfy Article III standing requirement. *Babbit v. United Farm Workers Nat'l Union,* 442 U.S. 289, 298 (1979). "One does not need to await the consummation of a threatened injury to obtain preventative relief. If the injury is certainly pending, that is enough." *Id.*. In *Sierra Club v. Franklin County Power,* 546 F.3d 918, 926 (7th Cir. 2008), the Seventh Circuit held that the Sierra Club had standing and a ripe claim to challenge construction of a power plant that it argued would increase air pollution, and that it need not wait until the plant was completed and operational to make claims ripe for adjudication to stop the plant from being built. The Seventh Circuit stated:

> The defendants also argue that because the plant will take years to build, McKasson's injury is not "actual or imminent" and does not meet the second requirement for injury in fact. But the defendants forget that threatened injury can satisfy Article III standing requirements. *See Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289 (1979) ("[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."); *see also Massachusetts v. EPA,* 549 U.S. 497, 521 (2007) (EPS;s refusal to regulate greenhouse gas emissions presented an imminent risk of harm); *Mainstreet Org. of Realtors v. Calumet City,* 505 F.3d 742, 744 (7th Cir. 2007) ("[S]tanding in the Article III sense does not require a certainty or even a very high probability that the plaintiff is complaining about a real injury, suffered or threatened."). . . As a practical matter, it makes sense for Sierra Club to challenge the validity of the Company's permit now, rather than waiting until the plant is operational. . . . Moreover, while this suit has been pending, the Company has again publicly announced its commitment to completing the plant. So "[t]his is not a case of some abstract psychic harm or a one-day-I'll-be-hurt-allegation . . . ." *Mainstreet,* 505 F.3d at 745. Injury to McKasson has been freshly threatened and is not merely hypothetical. *Id.* at 926.

In the instant case, the existing MF/TD Waiver will expire on November 30, 2012. In open Court on September 27, 2012, counsel for the Defendant stated that no decision had been made to extend the existing MF/TD Waiver beyond the expiration date of November 30, 2012.

Accordingly, the Plaintiffs and Class faces imminent injury.

Moreover, Defendant's counsel stated in open Court on September 27, 2012, that the Defendant will be submitting in the near future additional information which the Centers for Medicare and Medicaid Services (CMS) requested for the renewal of the MF/TD waiver. The Defendant's commitment to move forward with the changes to the renewal of MF/TD waiver, which the Plaintiffs' claim violates the ADA; the Rehabilitation Act and Medicaid, is a freshly threatened injury to the Plaintiffs and Class. Accordingly, the Plaintiffs and Class have satisfied Article III Standing.[6]

In *Mayer v. Wind,* 922 F.Supp. 902 (S.D.N.Y. 1996), the Court found that the "imminent prospect" of a reduction in home care services satisfied the "injury in fact" requirement of Article III standing for Medicaid recipient plaintiffs. *Id.* at 906. As for the fact that none of the Medicaid recipient plaintiffs was experiencing a reduction of home care services on the date the complaint was filed, the Court in *Mayer* found it "is of no moment" to the question of standing; the "imminent prospect" of a reduction in home care services faced by one named plaintiff was sufficient injury in fact and gave that plaintiff standing to bring a class action. *Id.* at 906-907. *See also Independent Living Ctr. of S. Cal. v. Shewry,* 543 F.3d 1050, 1065 (9th Cir. 2008) where the Circuit Court held that Medicaid beneficiaries facing a reduction in "quality services, and

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[6] Even if the federal agency, CMS approves all the changes that the Defendant seeks to make in either the State Medicaid Plan or the renewal of the MF/TD waiver, which are objectionable to the Plaintiffs and Class, the United States Department of Justice asserts, "[a] state's obligation under the ADA are independent from the requirements of the Medicaid program." (See Doc. 7 - at Exhibit "A" - Statement of the Department of Justice at page 3, paragraph 7). Moreover, "budget cuts can violate the ADA and *Olmstead* when significant funding cuts to community services create a risk of institutionalization or segregation." *Id.* at page 3, paragraph 9).

access to quality services" due to a 10% cut in provider payments were injured so as to satisfy standing requirements. In the instant case, the Plaintiffs face an imminent prospect of a reduction of home care skilled nursing services and have satisfied the injury in fact requirement of standing.

Furthermore, the more drastic the injury that government action makes more likely, the lesser the increment in probability necessary to establish standing. In *Village of Elk Grove Village v. Evans,* 997 F.2d 328 (7th Cir. 1993), for example, the plaintiffs were concerned that construction of a radio tower on a flood plain, "by plopping down a huge slab of concrete near the creek and thus limiting the creek's drainage area," would increase the risk of flooding. *Id.* at 329. The court acknowledged that the injury was probabilistic, but reasoned that "even a small probability of injury is sufficient to create a case or controversy - - to take a suit out of the category of the hypothetical - - provided of course that the relief sought would, if granted, reduce the probability." *Id.* In the instant case, the Plaintiffs and putative class face a risk of institutionalization or if they remain in the community without sufficient skilled nursing supports, they face the ultimate drastic injury, imminent death or a life threatening episode.

C. Defendant's Arguments.

The Defendant's claim that "[n]o Plaintiff here can allege a direct concrete or imminent injury" because "the current MF/TD waiver has been extended" is without merit. (Def. Memo at page 7). The current MF/TD waiver will expire on November 30, 2012 and even assuming arguendo that the State extends it out another additional 90 days, the Plaintiffs are still at imminent risk of substantial reduction of medically necessary services and are at risk of institutionalization and have standing to pursue this litigation.

With respect to the renewal of the MF/TD waiver which the Defendant claims that "federal approval is not likely before November 29, 2012," that process to renew the MF/TD waiver, does not automatically extend the current MF/TD waiver beyond November 29, 2012. (Def. Memo at page 8). Only the Defendant can request another temporary extension of the existing or current MF/TD waiver. CMS has stated that with respect to the renewal of a waiver, if the 90 day clock has stopped because CMS has requested additional information (RAI), the existing or current waiver will expire unless the State requests a temporary extension. (Exhibit "B") As of September 27, 2012, the Defendant's counsel has represented to the Court that no additional request for a temporary extension has been made to the current waiver which expires on November 30, 2012.

Defendant's reliance on *Rock Energy Cooperative v. Village of Rocktown,* 614 F.3d 745, (7th Cir. 2010) to argue that the Plaintiffs lack standing to pursue declaratory relief is not persuasive. (Def. Memo at page 7) The plaintiff utility in *Rock Energy* did not have standing to claim that the defendant lacked legal authority to acquire their assets under eminent-domain. The defendant had not taken any direct steps under eminent domain to acquire the assets and in five years since the ordinance was passed, "the Village had done nothing other than write a letter or two indicating that condemnation was on the table." *Id.* at 749. In the instant case, the Plaintiffs are faced with a soon to be expiring current MF/TD Waiver. The Defendant has undertaken a course of action to significantly reduce Medicaid benefits by submitting a renewal of the MF/TD Waiver. The Plaintiffs have satisfied standing where there is a threatened or imminent injury of

sufficient immediacy and reality to warrant relief.[7]

Defendant's claim that "the Complaint is now moot because federal CMS has granted an extension of the current waiver and requested additional information from HFS" is without merit. (Def. Memo at page 9) The Plaintiffs claims are not moot as they still have an actual, ongoing controversy. Since the filing of the lawsuit, the Defendant is still moving forward with the process to implement significant adverse changes to the renewal of the MF/TD waiver. The Defendant has briefly extended the current MF/TD waiver, but has not abandoned its efforts to cut back Medicaid benefits to the Plaintiffs and Class. Accordingly, Plaintiffs claims are not moot.

III. CONCLUSION

For the foregoing reasons, the Plaintiffs respectfully requests that this Court denies the Defendant's Motion to Dismiss.

Respectfully submitted,

/s/ Robert H. Farley, Jr.
One of the Attorneys for
the Plaintiffs

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[7] The Defendant's reliance on *Capeheart v. Terrell*, 2012 WL 3711720 (7th Cir.) is also unpersuasive. In *Capeheart,* the claim seeking to enjoin institution of a proposed demonstration policy was not ripe for review where the challenged policy "was circulated as a proposal, criticized, and withdrawn. Nothing in the record hints that it will resurface." *Id.* at *4. In the instant case, there has been no withdrawal by the Defendant to not to move forward with substantial medicaid cuts to the Plaintiffs and Class.

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CERTIFICATE OF SERVICE

I, Robert H. Farley, Jr., one of the Attorneys for the Plaintiffs, deposes and states that he caused the foregoing Plaintiffs' Response to Defendant's Motion To Dismiss to be served by electronically filing said document with the Clerk of the Court using the CM/ECF system, this 2nd day of October, 2012.

EXHIBIT "A"

Application for a §1915(c) Home and Community-Based Services Waiver

PURPOSE OF THE HCBS WAIVER PROGRAM

The Medicaid Home and Community-Based Services (HCBS) waiver program is authorized in §1915(c) of the Social Security Act. The program permits a State to furnish an array of home and community-based services that assist Medicaid beneficiaries to live in the community and avoid institutionalization. The State has broad discretion to design its waiver program to address the needs of the waiver's target population. Waiver services complement and/or supplement the services that are available to participants through the Medicaid State plan and other federal, state and local public programs as well as the supports that families and communities provide.

The Centers for Medicare & Medicaid Services (CMS) recognizes that the design and operational features of a waiver program will vary depending on the specific needs of the target population, the resources available to the State, service delivery system structure, State goals and objectives, and other factors. A State has the latitude to design a waiver program that is cost-effective and employs a variety of service delivery approaches, including participant direction of services.

Request for a Renewal to a §1915(c) Home and Community-Based Services Waiver

1. Major Changes

Describe any significant changes to the approved waiver that are being made in this renewal application:

Illinois is taking the opportunity to make several significant changes to the state's medical programs for children who are technology dependent and at the same time as renewal of this waiver. Some are indicated because of budget limitations requiring the state to identify strategies that will help the state preserve the program and incentivize a philosophy of shared responsibility. Illinois' Medicaid Budget changes are described in the Illinois General Assembly's Smart Act (SB 2840), Medicaid budget cut legislation. Changes specific to this program are under section 305 ILCS 5/5-2b of this Bill. In addition, to maximize efficiency and quality, Illinois has determined that Care Coordination is the key component for managing care for medically complex children. The new program will incorporate a Care Coordination model with a single point of access, eligibility determination, resource allocation and ongoing care coordination for all children in Illinois that meet the financial criteria and medical criteria set forth in a proposed state plan amendment that will identify technology dependent children seeking in home services. This will allow care coordination of all technology dependent children seeking in-home services whether or not they meet the institutional level of care required by home and community-based service waivers and create a single, seamless system of care and oversight.

The following is an overview of the major program changes underway:

State Plan Amendment
A new state plan amendment will be submitted for approval effective September 1, 2012 that creates the eligibility criteria for the technology dependent children program both financially and medically. This will create one eligibility group for all children participating in this program. The current legislative proposed limit for financial eligibility is 500% of the Federal Poverty Limit (FPL). The medical eligibility criteria will be based on a new level of care tool that will define waiver eligibility and resource allocation, based on medical need. It will be flexible enough to approve service levels for those who do not meet the institutional criteria of a waiver, creating a single point of entry and system for all children seeking in-home nursing and personal care services. The new expanded financial eligibility will provide an opportunity for some children to access nursing and personal care services that may not have been eligible in the past such as children with higher incomes who did not meet the waiver eligibility criteria. In addition, the state plan will identify co-pays for private duty nursing service for all families at or above 150% of the FPL.

Care Coordination
These program changes include enhancing care coordination through the Division of Specialized Care for Children, University of Illinois of Illinois (DSCC-UIC) through an intergovernmental agreement. DSCC-UIC will provide a single

point of entry and care coordination of eligible technology dependent children. The role of DSCC-UIC will be expanded to include not only those eligible for the medically fragile, technology dependent (MFTD) children's waiver but all children who are eligible and seek in-home nursing services. Care coordination levels will be based on risk and individual needs. DSCC-UIC will be providing a more involved role in quality improvement strategies that include monitoring hospital and emergency room visits, linkage to and monitoring of all services including medical equipment and supplies, well exams, follow-up physician visits, immunizations, and other preventive services. The new program will include an independent entity to conduct eligibility to separate eligibility from care coordination activities.

Flexibility of services
The waiver includes only services not otherwise covered under the state's Medical Programs. Nursing, the most widely used service for children under the waiver is not a waiver service. Subsequently, to expand flexibility and opportunities for families, Illinois will be offering nursing and personal care services in a more flexible way. First, personal attendant services for technology dependent children will be available under the state's Medical Programs for eligible children, and second, Illinois will be moving from a set number of weekly hours to a dollar amount based on individual medical need. The dollar amount will provide families with the opportunity to stretch dollars by mixing licensed and unlicensed staff. In addition, the state will offer a limited annual flexible account that will allow families to bank up to one-week of nursing and personal care services that may be used at the family's discretion.

Waiver Changes (These are sections in the waiver to be revised.)

Main
1. Request Information: Section F-Levels of Care
• Hospital level of care has been removed as a comparable population. The institutional cost comparison will be nursing facility, using a comparable population with similar medical and technology needs as those served in the waiver.
4. Waivers Requested B. Income and Resources for the Medically Needy
• The state will not request a waiver to use institutional income and resource rules for the medically needy (parental income will now be considered in determining financial eligibility)

Appendix B: Participant Access and Eligibility
B-4: Eligibility Groups Served in the Waiver:
•The state has removed all other eligibility groups and will submit a state plan amendment for approval to be effective September 1, 2012 to cover technology dependent children up to 500% of the FPL as identified through a level of care instrument. This new eligibility group will be the only eligibility group under this waiver.

Appendix C: Participant Services
•Respite has been eliminated as families may now use the flexible account through the Medical Program's nursing and personal care services.
•Environmental Accessibility Adaptations (EAA) and Specialized Medical Equipment and Supplies (SMES) now include limits. The total cost for purchase of all EAA and SMES purchases, rental, and repairs may not exceed $25,000 over five years.

Application for a §1915(c) Home and Community-Based Services Waiver

1. Request Information (1 of 3)

A. The State of Illinois requests approval for a Medicaid home and community-based services (HCBS) waiver under the authority of §1915(c) of the Social Security Act (the Act).
B. **Program Title** (*optional - this title will be used to locate this waiver in the finder*):
HCBS Waiver for Children who are Medically Fragile, Technology Dependent
C. **Type of Request: renewal**

Requested Approval Period: *(For new waivers requesting five year approval periods, the waiver must serve individuals who are dually eligible for Medicaid and Medicare.)*

3 years ○ **5 years**

Original Base Waiver Number: IL.0278
Waiver Number: IL.0278.R04.00
Draft ID: IL.02.04.00

EXHIBIT "B"

From: farleylaw <farleylaw@aol.com>
To: john.huston <john.huston@illinois.gov>; karen.konieczny <karen.konieczny@illinois.gov>
Subject: Fwd: Expiration Date for Illinois MF/TD Waiver
Date: Sat, Sep 22, 2012 11:13 am

John,

I am forwarding you the email correspondence which I had with CMS concerning when the MF/TD Waiver expires. You and I had a different position the last time we were in Court before Judge Gettleman. CMS supports my interpretation. If you or the Defendant have a contrary position, then please advise me no later than Tuesday, September 25, 2012. In summary, the MF/TD waiver can continue to operate through November 29, 2012. The waiver will expire on November 30, 2012 unless the Defendant requests another Temporary Extension of the Waiver. CMS' formal Request for Additional Information ("RAI") does not stop or extend the clock for the waiver expiring on November 30, 2012.

Bob Farley
630-369-0103
-----Original Message-----
From: Lollar, Ralph F. (CMS/CMCS) (CMS/CMCS) <Ralph.Lollar@cms.hhs.gov>
To: farleylaw <farleylaw@aol.com>
Sent: Fri, Sep 21, 2012 4:25 pm
Subject: RE: Expiration Date for Illinois MF/TD Waiver

I can't speak to the exact dates without looking further but I can tell you that the RAI stops the clock on federal approval or disapproval only. When the state sends a RAI response in the review clock begins at day 1 and a new 90 day clock begins. If the waiver expires at any time during this time frame the waiver expires. Only a CMS approved Temporary Extension (TE) will keep the waiver open.

A TE cannot be approved for more than a 90 day period. When the TE expires the waiver expires unless the state requests and CMS approves another TE.

Does this provide you with the information you need or do I need to verify dates?

Ralph

From: farleylaw@aol.com [mailto:farleylaw@aol.com]
Sent: Friday, September 21, 2012 11:03 AM
To: Lollar, Ralph F. (CMS/CMCS)
Subject: Expiration Date for Illinois MF/TD Waiver

Ms. Ralph Lollar
Director, Division of Long Term Services and Supports
Centers for Medicare and Medicaid Services

September 21, 2012
Dear Mr. Lollar,

It is my understanding that on July 27, 2012, the Centers for Medicare and Medicaid Services ("CMS") granted a 90 day temporary extension of the Illinois' Home and Community-Based Services Waiver program for Children who are Medically Fragile, Technology Dependent ("MF/TD") to continue to operate through November 29, 2012. (See attachment) It is my understanding that this MF/TD Waiver will expire on November 30, 2012, unless the State of Illinois requests another 90 day extension prior to November 30, 2012.
On August 7, 2012, CMS made a formal Request for Additional Information ("RAI") that describes issues that arose in their review of the State of Illinois proposed MF/TD waiver renewal (See attachment), which stopped the 90-day clock with respect to the renewal of the MF/TD waiver until CMS' receipt of the State of Illinois response. It is my

understanding that the stoppage of this 90-day clock has no impact with respect to the MF/TD waiver expiring on November 30, 2012.

Please confirm whether my understanding as noted above is correct, and if I am not correct, then please clarify the matter for me. This issue arose with respect to Federal Judge Robert W. Gettleman inquiring in the case T.B. v. Hamos 12 C 5356 (N.D. IL) and I represent the Plaintiffs. The lawyer for the State of Illinois stated to Judge Gettleman that it was his understanding that the "RAI" would extend the waiver past November 30, 2012. I believe to the contrary that the waiver will expire on November 30, 2012, unless the State of Illinois makes another request for an extension. I will be appearing before Judge Gettleman on Thursday, September 27, 2012, and I would like to provide some clarification to the Court on that date.

Sincerely,

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