

**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.

Plaintiffs,

vs.

**JULIE HAMOS**, in her official capacity as Director of the Illinois Department of Healthcare and Family Services,  
  
Defendant.

No. 12 C 5356

Judge Robert W. Gettleman

Magistrate Judge Sidney I. Schenkier

**DEFENDANT’S REPLY MEMORANDUM IN SUPPORT OF  
HER MOTION TO DISMISS PLAINTIFFS’ COMPLAINT**

In response to Defendant’s Motion to Dismiss, Plaintiffs raise a number of arguments, both factual and legal, to attempt to overcome the Defendant’s arguments for dismissal of this case. Plaintiffs’ arguments are based on an incorrect reading of the Medicaid Waiver renewal at issue in the lawsuit and ignore that the Illinois law they challenge in their Complaint is subject to federal approval, which has not yet been granted. Plaintiffs’ arguments fail to overcome the arguments raised in Defendant’s Motion to Dismiss. As such, Plaintiffs’ claims are hypothetical and conjectural. There is no case or controversy for the Court to decide, and the Complaint must

be dismissed due to lack of standing and for failure to state a claim upon which relief can be granted.

**I. Nursing Services Are Not MF/TD Waiver Services.**

Plaintiffs' Complaint challenges the proposed renewal of the MF/TD Waiver because it changes the level of care from hospital to nursing facility. (Compl., Paragraph 10; Pltfs' Resp., p. 4). According to Plaintiffs, they will be at risk of institutionalization because their funding will be reduced by approximately 50%. (*Id.*)

Plaintiffs' argument is based on speculation. First, the federal CMS has not yet passed on HFS' request to renew the MF/TD Waiver. Since the current MF/TD Waiver (which was to expire on September 1, 2012) has been extended to November 29, 2012 (Def's Mtn. Ex. B, at Doc. No. 15-1) while federal CMS considers HFS' waiver renewal, there is no case or controversy presented by Plaintiffs because the new provisions in the MF/TD Waiver cannot become effective. Consequently, there is no concrete or imminent injury to Plaintiffs. The current MF/TD Waiver is under an extension granted by CMS. If necessary, HFS can seek another extension to keep to current MF/TD Waiver in place, at federal CMS' discretion. *See*, Def's Memo. Ex. B, at Doc. No. 15-1; Plaintiffs' Resp. Ex. B.

In addition, Plaintiffs inaccurately state that the nursing services they seek to keep in place come from the "HCBS Waiver for Children that are Medically Fragile, Technology Dependent program (MF/TD) and Medicaid." (Pltfs' Resp., p. 2). However, the MF/TD Waiver renewal states: "The waiver includes only services not otherwise covered under the States' Medical Programs. Nursing, the most widely used service for children under the waiver, **is not a waiver service.**" (Plaintiffs' Resp. Ex. A at Flexibility of Services, p. 2 of 139) (Emphasis added). Since nursing is not a waiver service, Plaintiffs' arguments are hypothetical. No

Plaintiff has alleged any imminent reduction of a non-waiver service supported by a notice of reduction of this service. Consequently, Plaintiffs lack standing to maintain this action.

**II. The Plaintiffs Lack Standing Because Their Claims Are Speculative. This Court Cannot Issue An Advisory Decision On A Hypothetical Dispute.**

Plaintiffs' arguments at pages 6-10 of their Response to Defendant's Motion to Dismiss do not meet their burden of establishing standing. First, federal CMS has not decided whether or not to approve the MF/TD Waiver Renewal. The current MF/TD Waiver has been extended by CMS and could be extended again. At this filing, the elapsed time of the extension is about 40 days, and the current MF/TD Waiver will continue for another 50 days (without further extension). No Plaintiff has alleged receipt of any type of notification of actual cuts in MF/TD Waiver services effective at any date certain. Second, the alleged reduction of nursing services that Plaintiffs argue will lead to institutionalization are not MF/TD Waiver services. (Pltfs' Resp. Ex. A, at p. 2 of 139).

In support of their position, Plaintiffs cited several cases in an attempt to show they have standing. (Pltfs' Resp., pp. 8-10). Those cases are readily distinguishable from the present case.

*Sierra Club v. Franklin County Power*, 546 F.3d 918, 926 (7<sup>th</sup> Cir. 2008) does not aid Plaintiffs. In *Sierra Club*, the Seventh Circuit held that Plaintiff had standing because the likely exposure to emissions from a proposed but not yet built coal power plant had been judicially determined in prior cases to be injury in fact. *Id.* Unlike those environmental cases, HFS has merely submitted its proposed MF/TD Waiver renewal to federal CMS, and federal CMS must make the determination as to whether the MF/TD Waiver should be renewed as HFS requested. Plaintiffs' claim here is not ripe because federal CMS has not yet decided the issue. Consequently, there is no MF/TD Waiver to challenge. At most, Plaintiffs could only hope to

obtain an advisory opinion to use in an attempt to constrain federal CMS' discretion in whether to allow the proposed waiver renewal.

Plaintiffs' reliance on *Mayer v. Wind*, 922 F.Supp. 902 (S.D. N.Y. 1996) is misplaced. In *Mayer*, the court found Plaintiffs had standing to challenge reduction of their home care services because they had received notices informing them that their level of services were being reduced. While the individuals requested administrative hearings (resulting in reductions being withdrawn or held in abeyance pending the hearings), at least one individual suffered a reduction despite requesting a hearing prior to the effective date of the reduction. 922 F.Supp. at 905-06.

The Court noted that the difference between a threatened injury and a conjectural one is a matter of degree, and since no precise test exists, each case must be considered on an individual basis. 922 F. Supp. at 907. In *Mayer*, the court found the threat of future injury was quite real, since reduction notices had been sent to recipients, who prevailed on appeal, only to receive another notice of reduction six weeks later or had reductions pending their appeals. *Id.*

Here, no individual has alleged that they have received a notice that their current levels of services will be reduced by a date certain. Rather, they allege they might be impacted by possible changes to the MF/TD Waiver that federal CMS has yet to approve or deny. Unless and until federal CMS renders a decision on the MF/TD Waiver renewal, any declaration or injunction by this Court would be advisory and beyond this Court's constitutional powers.

Similarly, *Independent Living Center of S. Cal. v. Shewry*, 543 F.3d 1050 (9<sup>th</sup> Cir. 2008) does not aid Plaintiffs. In *Independent Living Center*, the California legislature enacted a statute reducing payments to fee-for-service providers in the Med-Cal program by ten percent and payments to managed healthcare plans "by the actuarial equivalent" of ten percent. Several months before the reductions were to take place, Independent Living Center filed suit to block

the cuts. Although the district court did not reach the issue of standing, the Ninth Circuit found that Plaintiffs had standing to challenge the reductions. 543 F.3d at 1064-65.

*Independent Living Center* is distinguishable from the present case. Unlike *Independent Living Center* there is no federally approved MF/TD Waiver for Plaintiffs to challenge. Consequently, there is no direct or concrete injury to Plaintiffs to redress. At most, Plaintiffs seek an advisory declaration to attempt to influence federal CMS.

Finally, *Village of Elk Grove Village v. Evans*, 997 F. 2d 328 (7<sup>th</sup> Cir. 1993) is inapplicable for all the reasons stated above. Unless or until federal CMS renders a decision on the proposed MF/TD Waiver renewal or state plan amendments, there is no concrete threat of injury to any Plaintiff to allow Plaintiffs standing to seek declaratory or injunctive relief.

Plaintiffs' challenge to HFS' MF/TD Waiver renewal and challenge to the Illinois SMART Act provisions, 305 ILCS 5/5-2(b) must fail because they have not shown that federal approval had been granted and that implementation of the SMART Act was imminent. HFS and federal CMS may still extend the current waiver an additional 90 days beyond the current extension (to November 29, 2012), if necessary. At present, it is speculative that such additional time is/will be necessary.

WHEREFORE, for all the reasons stated above, and in Defendant's Memorandum in Support of Her Motion to Dismiss Plaintiffs' Complaint (Doc. No. 15), Defendant respectfully requests that this Court dismiss Plaintiffs' Complaint for lack of subject-matter jurisdiction because Plaintiffs lack standing and/or the case is moot. In addition, the Complaint fails to state a claim upon which relief can be granted because it fails to allege the condition precedent (*i.e.* federal approval) has occurred.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

KAREN KONIECZNY, one of the attorneys of record for Defendant, hereby certifies that on October 11, 2012, she caused a copy of the **DEFENDANT'S REPLY MEMORANDUM IN SUPPORT OF HER MOTION TO DISMISS PLAINTIFFS' COMPLAINT** to be served by the Court's ECF/electronic mailing system upon ECF filing users, and that I shall comply with LR 5.5 as to any party who is not a filing user or represented by a filing user.

/s/ Karen Konieczny