

DIANA D., as next of friend of KD, a child,
KAREN G., as next friend of TG and ZM,
children, GUADALUPE P., as next of friend
of LP, a child, SALLY L., as next of friend of
CH, DENA D., as next friend of BD, a child,
OCI ACQUISITION, LLC d/b/a
CARE OPTIONS FOR KIDS,
CONNECTCARE SOLUTIONS, LLC
d/b/a CONNECTCARE THERAPY FOR
KIDS, ATLAS PEDIATRIC THERAPY
CONSULTANTS LLC, and PATHFINDER
PEDIATRIC HOME CARE, INC.,

Plaintiffs,

v.

CHRIS TRAYLOR, as EXECUTIVE
COMMISSIONER of TEXAS
HEALTH AND HUMAN SERVICES
COMMISSION, and TEXAS
HEALTH AND HUMAN SERVICES
COMMISSION,

Defendants.

IN THE DISTRICT COURT

Filed in The District Court
of Travis County, Texas

SEP 25 2015

At 4:20 P M.
Velva L. Price, District Clerk

200th JUDICIAL DISTRICT OF

TRAVIS COUNTY, TEXAS

ORDER GRANTING TEMPORARY INJUNCTION AND DENYING SUPERSEDEAS

On the 21st and 22nd days of September, 2015 the Court held a hearing on Plaintiffs' application for temporary injunction in the above entitled and numbered cause. The Court has considered the testimony, documentary evidence, pleadings, briefs, and arguments of counsel and GRANTS the Temporary Injunction based on the following:

General History:

1) Plaintiffs include the parents as next friends of several minor children who suffer from severe and disabling conditions, including seizure disorders, delayed development, autism, speech developmental delays, epilepsy, cerebral palsy, and other conditions. These Plaintiffs and

many other minor children suffering from similar conditions across the State of Texas can exhibit a wide variety of disabling symptoms, including:

- a. nonverbal
- b. non-ambulatory
- c. difficulty with speech
- d. uncontrolled behavioral outbursts
- e. difficulty with motor control over their limbs
- f. difficulty with mental processing of information.

2) Because of these disabling conditions and symptoms, these children depend on home-health providers for physical, occupational, and speech therapy services under the Texas Medicaid program to develop basic skills such as walking, talking, dressing themselves, feeding themselves, understanding simple communications, and maintaining control over their own behavior. The Plaintiffs include several home health service providers who deliver physical, occupational, and speech therapy services under the Texas Medicaid program to the children of Texas who depend on such services.

3) Texas Health and Human Services Commission (“HHSC”) and Chris Traylor, as Executive Commissioner of HHSC (“Commissioner Traylor”) have developed proposed decreases to the reimbursement rates for physical, occupational, and speech therapy services that will probably result in a decrease, or complete elimination, of available home health services for Medicaid-dependent children across Texas.

Proposed Rate Changes:

4) On or about July 20, 2015, HHSC and Commissioner Traylor held a hearing regarding new proposed reimbursement rates to be implemented on September 1, 2015 for physical,

occupational, and speech therapy services under the Texas Medicaid program (the “July 20, 2015 Proposed Rates”). A copy of the July 20, 2015 Proposed Rates is attached hereto as *Exhibit A*.

5) Following the commencement of this lawsuit, on or about August 20, 2015, HHSC and Commissioner Traylor produced a different set of new proposed reimbursement rates to be implemented on September 1, 2015 for physical, occupational, and speech therapy services under the Texas Medicaid program (the “August 20, 2015 Proposed Rates”). A copy of the August 20, 2015 Proposed Rates is attached hereto as *Exhibit A-1*.

6) Prior to a temporary injunction hearing at which Plaintiffs sought to enjoin HHSC and Commissioner Traylor from implementing either the July 20, 2015 Proposed Rates or the August 20, 2015 Proposed Rates, HHSC and Commissioner Traylor withdrew both sets of rates and advised the Court that they would start over with a new rate proposal.

7) Nine days later, on September 4, 2015, HHSC and Commissioner Traylor proposed new rates to be implemented on October 1, 2015 for physical, occupational, and speech therapy services under the Texas Medicaid program (the “September 4, 2015 Proposed Rates”). A copy of the September 4, 2015 Proposed Rates is attached hereto as *Exhibit A-2*.

8) Defendants have exhibited a pattern of behavior attempting to impose new rates, and have withdrawn the rates or taken other steps, resulting in Plaintiffs’ challenge to the rates arguably becoming moot. This issue is appropriate for the Court to adjudicate, however, based on the “capable of repetition yet evading review” exception to the mootness doctrine. *Davis v. Burnam*, 137 S.W.3d 325, 333 (Tex. App.—Austin 2004, no pet.). Defendants’ actions withdrawing the proposed rates demonstrate that the action is too short in duration to be litigated fully before the action ceases or expires. *Id.* Defendants’ choice to withdraw the rates and propose similar ones as soon as a hearing has passed creates a reasonable expectation that the

same complaining parties will be subjected to the same action again should the Defendants withdraw the currently pending rates and assert that this case is moot. *Id.*

- 9) Pursuant to 1 TAC §355.8021(a)(2)(A), reimbursement rates must be based on:
 - a. an analysis of the Centers for Medicare and Medicaid Services fees for similar services;
 - b. Medicaid fees paid by other states;
 - c. a survey of costs reported by Medicaid home health agencies;
 - d. the Medicare Low Utilization Payment Adjustment (LUPA) fees;
 - e. previous Medicaid payments for Medicaid-reimbursable therapy, nursing, and aide services; or
 - f. some combination thereof.
- 10) Pursuant to 1 TAC §355.8021(a)(2)(B), periodic rate reviews conducted by HHSC must include, but will not be limited to, consideration of the payments for, as well as all costs associated with, providing these Medicaid-reimbursable therapy services.
- 11) Any proposed reimbursement rates that modify or disregard the key components of the methodology set forth in 1 TAC §355.8021(a)(2) could constitute a rule change. *Accord, El Paso Hosp. Dist. v. Tex. HHS Comm'n*, 247 S.W.3d 709, 714–15 (Tex. 2008). To be valid, rates resulting from a rule change must be adopted through proper rule-making procedures. *Id.* at 715.
- 12) Those rule-making procedures include:
 - a. Determining whether a rule may affect a local economy before proposing the rule for adoption. If so, preparing a local employment impact statement for the proposed rule. TEX. GOV'T CODE § 2001.022(a).
 - b. Providing at least 30 days' notice of the intention to adopt the new rule. TEX. GOV'T CODE § 2001.023(a). The notice must comply with section 2001.024 of the Texas Government Code. This includes, among other things, a note about the public benefits and costs associated with the new rule. TEX. GOV'T CODE § 2001.024(a)(5).
 - c. Preparing, for rules that may have an adverse economic impact on small businesses,:

- i. an economic impact statement that estimates the number of small businesses subject to the proposed rule, projects the economic impact of the rule on small businesses, and describes alternative methods of achieving the purpose of the proposed rule; and
- ii. a regulatory flexibility analysis that includes the agency's consideration of alternative methods of achieving the purpose of the proposed rule.

TEX. GOV'T CODE § 2006.002(c).

The September 4, 2015 Proposed Rates:

- 13) The September 4, 2015 Proposed Rates affect at least one local economy.
- 14) The September 4, 2015 Proposed Rates may have an adverse impact on small businesses.
- 15) The September 4, 2015 Proposed Rates were probably not determined in compliance with 1 TAC §355.8021(a)(2)(A).
- 16) The September 4, 2015 Proposed Rates are the result of a periodic rate review under 1 TAC §355.8021(a)(2)(B) that was probably not in compliance with adequate or appropriate consideration of payments for, as well as the costs associated with, providing these Medicaid-reimbursable therapy services.
- 17) Defendants probably did not adequately or appropriately consider the impact that the September 4, 2015 Proposed Rates would have on access to care if implemented.

Failure to Comply with Rule 355.8021(a)(2):

- 18) The Proposed Rates are probably not adequately or appropriately based on the formula set forth in 1 TAC §355.8021(a)(2)(A); therefore, they may constitute a rule change, which must be adopted through proper rule-making procedures.
- 19) The September 4, 2015 Proposed Rates are also not based on any identifiable documented criteria. The Truven Data is not data representing Medicaid fees paid by other states, so even if the September 4, 2015 Proposed Rates are based on Truven Data, the September 4,

2015 Proposed Rates are based on something other than the key components of the formula set forth in 1 TAC §355.8021(a)(2)(A).

20) Should it be determined that any of the Proposed Rates comply with the methodology and formula in 1 TAC §355.8021(a)(2)(A), those Proposed Rates could still amount to a rule change because they are probably the result of a periodic rate review that failed to adequately or appropriately consider payments for, as well as all costs associated with, providing these Medicaid-reimbursable therapy services. 1 TAC §355.8021(a)(2)(B).

21) The margins analysis conducted by Texas A&M University is seriously flawed and not sufficient to meet the requirements of 1 TAC §355.8021(a)(2)(B). Defendants appear to have performed no other competent cost analysis. Defendants' own purported analysis fails to include overhead, administrative, benefits, employer taxes, therapy materials, testing kits and other costs of providing these Medicaid-reimbursable therapy services.

22) In proposing to promulgate each set of Proposed Rates, Defendants did not follow proper rule-making procedures. Defendants did not:

- a. determine whether the rule would affect a local economy or prepare a local employment impact statement;
- b. provide at least 30 days' proper notice of the intention to adopt the new rule. The notice provided did not comply with section 2001.024 of the Texas Government Code;
- c. prepare an economic impact statement or a regulatory flexibility analysis.

23) The September 4, 2015 Proposed Rates are likely a rule that HHSC did not properly promulgate. They may be invalid and may be enjoined. *El Paso Hosp. Dist.*, 247 S.W.3d at 715.

Access to Care:

24) In addition to the above violations of the rule-making process, Texas law requires that HHSC provide Medicaid recipients with proper access to care. Pursuant to the provisions of 1

TAC 353.411(a)(5), 1 TAC 353.413(a), and 1 TAC 353.413(d), Texas law requires: that service providers ensure the reasonable availability and accessibility of speech, occupational, and physical therapist specialists for all Medicaid service recipients; that service providers must provide comprehensive and timely speech, occupational and physical therapy services for all Medicaid service recipients; and that HHSC will not delegate its responsibility to deliver speech, occupational, and physical therapy services to all eligible children.

25) HHSC likely neither conducted nor received an adequate, appropriate, or reliable study or analysis on the impact of any of the Proposed Rates on access to care as required by the above regulations.

26) The implementation of the Proposed Rates will likely result in service providers being unable to deliver speech, occupational, and physical therapy services to all eligible children. Because HHSC only provides services to eligible children through service providers, the implementation of either of the proposed rates will probably render service providers unable to comply with 1 TAC 353.411(a)(5), and/or 1 TAC 353.413(a), and will probably result in HHSC failing to comply with its responsibility to deliver speech, occupational, and physical therapy services to all eligible children.

27) Any proposed change to reimbursement rates for physical, occupational, and speech therapy services under the Texas Medicaid program during the pendency of this lawsuit would constitute a periodic rate review pursuant to 1 TAC §355.8021(a)(2)(B) and which will include a review of payments for providing Medicaid-reimbursable therapy services and which will include a review of costs associated with providing Medicaid-reimbursable therapy services.

Additional Violations:

28) In addition to the above violations of the rule-making process, each set of Proposed Rates will likely violate Defendants' statutory duty to maximize the Medicaid finance system. TEX. GOV'T CODE §531.02113.

29) HHSC must optimize the Medicaid finance system to:

- a. maximize the state's receipt of federal funds;
- b. create incentives for providers to use preventive care;
- c. increase and retain providers in the system to maintain an adequate provider network;
- d. more accurately reflect the costs borne by providers; and
- e. encourage the improvement of the quality of care.

Id.

30) If implemented, the Proposed Rates will likely not create incentives for providers to use preventive care, dramatically decrease the number of providers in the system, fail to accurately reflect the costs borne by the providers, and not encourage the improvement of the quality of care.

31) The September 4, 2015 Proposed Rates are probably based on arbitrary criteria that lack adequate or appropriate consideration for the impact on service providers or recipients, and probably lack adequate or appropriate consideration for the legal obligations of Commissioner Traylor and HHSC with regard to the adoption of reimbursement rates. Therefore the September 4, 2015 Proposed Rates are likely in violation of the due course of law provision of the Texas Constitution Art. I, §19.

Need for Temporary Injunction:

32) Plaintiffs have shown a probable right to recovery on their claim for all the above reasons.

33) If a temporary injunction is not granted, Plaintiffs will probably suffer irreparable injury because:

- a. the minor children represented in this lawsuit, plus thousands of other Texas children receiving pediatric services under the Texas Medicaid program, will probably be deprived of those critical services;
- b. Defendants' actions will probably cause multiple Texas Medicaid providers to go out of business and/or stop providing Medicaid services;
- c. Defendants' actions will probably create disincentives for Medicaid providers to use preventive care;
- d. Defendants' actions will probably decrease the quality of care provided to Medicaid recipients in Texas; and
- e. Defendants' actions will probably prevent Texas Medicaid beneficiaries from receiving critical services.

34) The probable harm is imminent because the September 4, 2015 Proposed Rates are set to take effect on October 1, 2015, likely immediately cutting off care for Medicaid beneficiaries. The adoption or implementation of any of the Proposed Rates may be *ultra vires* violations of Texas law. Therefore the issuance of a temporary injunction causes less prejudice or harm to the State of Texas, Commissioner Traylor, or HHSC, and the balance of the equities weighs in favor of granting a temporary injunction.

Temporary Injunction:

Accordingly, it is hereby ORDERED, ADJUDGED and DECREED that a Temporary Injunction is GRANTED to Plaintiffs, and that Commissioner Traylor and HHSC are commanded forthwith to desist and refrain from taking any action to implement the reimbursement rates described in *Exhibit A-2* from the date of entry of this Order until final trial in this lawsuit or until further order of this Court.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that a Temporary Injunction is GRANTED to Plaintiffs, and that Commissioner Traylor and HHSC are commanded forthwith

to desist and refrain from taking any action to propose or implement any change in reimbursement rates for physical, occupational, and speech therapy services under the Texas Medicaid program without conducting a review of payments for providing Medicaid-reimbursable therapy services and conducting a review of costs associated with providing Medicaid-reimbursable therapy services as required by 1 TAC §355.8021(a)(2)(B) from the date of entry of this Order until final trial in this lawsuit or until further order of this Court.

This Order does not affect HHSC's ability to seek CMS's approval of the State Plan Amendment.

It is further ORDERED that trial on the merits of this cause is set for January 18, 2016.

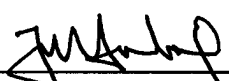
The Court GRANTS Plaintiffs leave to deposit a check with the trial court clerk in lieu of bond. Five hundred of the \$1000.00 deposited by Plaintiffs into the Court's registry on September 23, 2015 shall satisfy the bond requirement to make this Temporary Injunction effective.

It is the Court's understanding that the Defendants intend to file a Notice of Appeal and may assert that pursuant to Civil Practice & Remedies Code §6.001 and Texas Rules of Appellate Procedure 24.1 and 25.1, the filing of a Notice of Appeal constitutes automatic supersedeas of this Court's Temporary Injunction. *See, In re State Bd. for Educator Certification*, 452 S.W.3d 802, 804 (Tex. 2014). The Plaintiffs have requested that the Court decline to permit the Temporary Injunction to be superseded. The Court finds and concludes that permitting the Defendants to supersede the Temporary Injunction would render any relief in this matter ineffective. *In re State Bd. for Educator Certification*, 452 S.W.3d 802, 808 (Tex. 2014). Accordingly, it is ORDERED, ADJUDGED and DECREED that pursuant to Texas Rule of Appellate Procedure 24.2(a)(3), the Court DECLINES to permit the Temporary Injunction to be superseded. Pursuant to Texas Rule of Appellate Procedure 24.2(a)(3), the additional \$500.00

paid in the above-described deposited check in the amount of \$1,000.00 shall serve as the security for this Order declining to permit the Temporary Injunction to be superseded.

The clerk of the above-entitled Court shall forthwith, on the filing by Plaintiffs of the bond required, and on approving the same according to the law, issue a Temporary Injunction in conformity with the law and the terms of this Order.

SIGNED on this day 25th of September, 2015. at 4:15 p.m.



TIM SULA
JUDGE PRESIDING