2003-26

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

JOE DOE, et al.,

Plaintiffs,

v.

JOHN FERGUSON, in his official capacity as the Tennessee Commissioner of Finance and Administration,[1]

Defendant.

Civil Action No. 3-84-1260
Judge Nixon

ORDER

Pending before this Court is the plaintiffs' Petition for Contempt of Court, filed December 11, 1998. At issue is the defendant's compliance with the consent decree entered January 14, 1987.

The parties have submitted a joint motion to dismiss the contempt petition without prejudice. Attached to the motion is a stipulation. From a review of the stipulation, it is apparent that the defendant has agreed to take certain actions to ensure compliance with the consent decree and protect the interests of plaintiff class members. By the stipulation, the parties have resolved the issues raised in the contempt petition, thereby rendering the petition moot.

It is, therefore, ORDERED that the joint motion be granted, and the Petition for Contempt of Court is hereby DISMISSED without prejudice.

DISTRICT COURT JUDGE

[1]Pursuant to Rule 25(d), F.R.C.P., and Executive Order No. 23 (10/19/99), the current Commissioner of the Department of Finance and Administration is substituted for the predecessor commissioner of the Medicaid single state agency, as the defendant in this case.

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JOE DOE, et al.,	)	
	)	
Plaintiffs,	)	
	)	Civil Action No. 3-84-1260
v.	)	Judge Nixon
	)	
JOHN FERGUSON, in his official capacity as the Tennessee Commissioner of Finance and Administration,[1]	)	
	)	
Defendant.	)	

JOINT MOTION TO DISMISS CONTEMPT PETITION

Pending before the Court is the plaintiffs' Petition for Contempt of Court, which was filed December 11, 1998. The petition charges that the state is in violation of the consent decree entered January 14, 1987, which permanently enjoins the state to comply with certain procedural requirements pertaining to the pre-admission evaluation (PAE) process for determining eligibility for Medicaid coverage of nursing facility care. The plaintiffs specifically contend that the state is in violation of paragraph (5)(a)(2), which provides in relevant part as follows:

(5) Access to the PAE System

> In order to implement the due process rights recognized in this order and to preserve the recipient's opportunity to be heard, the following safeguards shall be observed:
>
> (a) Whenever an applicant for admission to a nursing home who has chosen to participate in the Medicaid program, or a current resident of such a nursing

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> home, has applied for PAE approval of reimbursement for their medical care, then the following prohibitions shall be observed to maintain the integrity of the PAE application;
>
> . . .
>
> (2) No such resident may be discharged because TDHE initially denied the PAE application after administrative review until any appeal is resolved or the time during which an appeal may be requested has passed without action.

Lillian Tester, a member of the plaintiff class, alleged in the contempt petition that she had been receiving care in a Medicaid-participating nursing facility. She stated that she had submitted a PAE application, and that it had been initially approved by an administrative law judge but then denied upon review by the defendant Commissioner's designee. Upon that denial, the nursing facility moved to discharge her involuntarily while her appeal was pending before the Chancery Court for Davidson County. The defendant Commissioner's designee upheld the facility's proposed discharge, prompting the filing of the petition for contempt.

A hearing was held January 5, 1999 on the motion for a preliminary injunction. On January 8, 1999, the Court entered an order enjoining the defendant from authorizing, enabling or ratifying the discharge of Lillian Tester from a Medicaid-participating nursing home during the pendency of her PAE appeal. The Court rejected the defendant's argument that the above-quoted language of the consent decree was ambiguous, and should be read as only prohibiting involuntary discharges during the pendency of *administrative* appeals. The Court found that such an interpretation was a relatively recent departure from the defendant's own construction and application of the consent decree over a number of years. It found that during the period following entry of the decree, the state had interpreted "any appeal" to include judicial, as well as administrative, appeals.

The parties have now entered into a stipulation with regard to the matters raised by the contempt petition. A copy of the "Parties' Stipulation Regarding Dismissal" is appended to this motion as exhibit A. The stipulation provides:

1. Defendant has entered into the stipulation in consideration for the plaintiffs' agreement to dismiss their petition without prejudice, and the defendant does not admit liability or noncompliance with the terms of the Court's previous order.

2. Upon review of its policies following the Court's grant of the preliminary injunction entered January 8, 1999, the state has resolved to conform those policies to the language of the consent decree and has taken appropriate administrative steps to do so. Specifically, the defendant is issuing memoranda to the TennCare Bureau, which administers the P.A.E. process, to Medicaid-participating nursing facilities and the Administrative Procedures Division of the Tennessee Secretary of State's Office, informing them of the terms of the consent decree. The memoranda, copies of which will be filed with the Court and incorporated as collective exhibit A to the parties' stipulation, include a statement that residents of Medicaid-participating nursing facilities may not be involuntarily discharged until any appeal of denial of the residents' PAE application, including any available administrative or judicial appeal, is resolved or the time during which an administrative or judicial appeal may be requested has passed without action.

3. The defendant represents that, in the exercise of due diligence, a review of PAE appeal policies has been undertaken. Based on that review, the defendant represents that no plaintiff class members, other than Lillian Tester[2], were adversely affected by the state's interpretation of the consent decree as only prohibiting discharges during the pendency of administrative appeals.

4. The defendant has no present intention of doing so, but reserves his right under Rule 60, F.R.C.P., to seek relief from the order, if future justification exists.

5. Additionally, while not an issue raised by the contempt petition, the defendant agrees that if a plaintiff class member prevails in his or her PAE application appeal by decision of an administrative law judge (ALJ), the defendant shall not appeal. An ALJ's decision shall not be deemed precedent for future appeals. The defendant reserves the right to apply to this Court for relief from an ALJ's ruling interpreting federal law. The defendant also reserves the right to enact emergency rules or public necessity rules in accordance with the state Administrative Procedures Act. The defendant shall immediately apply this term of the stipulation to any class member whose PAE appeal is currently pending at any stage of

[2]Ms. Tester obtained a favorable final order on her appeal to the Chancery Court, has received Medicaid coverage retroactively, and is receiving coverage currently. The would-be intervenor, Management Care Corporation d/b/a Lakebridge Health Care Center, has now been paid for the entire period of her care, and continues to receive payment from Medicaid. The financial claims the corporation asserted in support of intervention have, therefore, been rendered moot.

appeal or judicial review. The defendant will immediately apply the terms of this stipulation to any individual who, since July 1, 1997, has obtained a favorable decision on appeal and had such decision reversed by the defendant Commissioner of Health or her designee; the defendant will ensure that the decisions favorable to those class members are immediately reassessed and appropriate corrective action taken, if necessary.

6. The parties agree that the plaintiffs are a prevailing party in these contempt proceedings, for purposes of seeking an award of reasonable fees under 42 U.S.C. § 1988 and the Court's inherent power to enforce its orders via contempt proceedings.

In light of the foregoing, it appears that there is no need or justification for continuing to prosecute the petition for contempt. The parties therefore jointly move the Court to dismiss the contempt petition without prejudice.

DATED this 10th day of November, 1999.

Respectfully submitted,

Gordon Bonnyman, TN BPR #2419
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Counsel for the Defendant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document has been mailed this 10th day of November, 1999 to counsel for the movants for intervention at the following addresses:

Mr. William M. Barrick
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Counsel for Movant, Management Care Corporation d/b/a Lakebridge Health Care Center

Counsel for the Plaintiffs

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PARTIES' STIPULATION REGARDING DISMISSAL

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> In order to implement the due process rights recognized in this order and to preserve the recipient's opportunity to be heard, the following safeguards shall be observed:
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home, has applied for PAE approval of reimbursement for their medical care, then the following prohibitions shall be observed to maintain the integrity of the PAE application;

...

(2) No such resident may be discharged because TDHE initially denied the PAE application after administrative review until any appeal is resolved or the time during which an appeal may be requested has passed without action.

The parties submit this stipulation with regard to the matters raised by the contempt petition, and the defendant enters into this stipulation in consideration for the plaintiffs' agreement to dismiss their petition without prejudice. The defendant, by entering into this stipulation, does not admit liability or noncompliance with the terms of the Court's previous order.

1. Upon review of its policies following the Court's grant of the preliminary injunction entered January 8, 1999, the state has resolved to conform those policies to the language of the consent decree and has taken appropriate administrative steps to do so. Specifically, the defendant is issuing memoranda to the TennCare Bureau, which administers the P.A.E. process, to Medicaid-participating nursing facilities and the Administrative Procedures Division of the Tennessee Secretary of State's Office, informing them of the terms of the consent decree. The memoranda, copies of which will be filed with the Court and incorporated as collective exhibit A hereto, include a statement that residents of Medicaid-participating nursing facilities may not be involuntarily discharged until any appeal of denial of the residents' PAE application, including any available

administrative or judicial appeal, is resolved or the time during which an administrative or judicial appeal may be requested has passed without action.

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decisions favorable to those class members are immediately reassessed and appropriate corrective action taken, if necessary.

5. The parties agree that the plaintiffs are a prevailing party in these contempt proceedings, for purposes of seeking an award of reasonable fees under 42 U.S.C. § 1988 and the Court's inherent power to enforce its orders via contempt proceedings.

DATED this 12th day of November, 1999.

Respectfully submitted,

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