

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

B.N., by his mother and next friend A.N.,)	
on behalf of himself and a class of those)	
similarly situated,)	
)	
Plaintiffs,)	
)	
v.)	No. 3:09-CV-199
)	
ANNE WALTERMANN MURPHY, <i>et al.</i> ,)	
)	COMPLAINT – CLASS ACTION
Defendants.)	

FIRST AMENDED VERIFIED CLASS ACTION COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF

COMES NOW Plaintiff, by his mother and next friend and by counsel, being first duly sworn upon her oath, and states as follows:

Introductory Statement

1. This is a class action complaint for declaratory and injunctive relief brought by a seriously disabled Medicaid recipient who is enrolled in Indiana’s Aged and Disabled Waiver program. B.N. is an eight-year-old student with cerebral palsy and other substantial disabling conditions, who has previously received through the waiver program eighty (80) hours each month in respite services. These services were provided to B.N. by skilled nurses capable of administering his numerous medications and suctioning his airway, in order to ensure that his health and well-being was not jeopardized while his mother (and primary caretaker) was unavailable. However, in the spring of 2008, the Indiana Family and Social Services Administration requested, and the United States Department of Health

and Human Services approved, an alteration to Indiana's Aged and Disabled Waiver program whereby individuals enrolled in the program could not receive more than sixty (60) hours each month in respite services.

2. As a result of these new "caps," B.N.'s health and well-being has been jeopardized, and he and his family are for the first time forced to consider institutional placements for B.N. in lieu of his current placement at home with his family. Moreover, these dangers are shared by numerous other disabled individuals enrolled in the Aged and Disabled Waiver program. The caps are violative of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101, *et seq.*), the Rehabilitation Act of 1973 (29 U.S.C. § 791, *et seq.*), and state and federal Medicaid law (Indiana Code § 12-15-1-1, *et seq.*, and 42 U.S.C. § 1396, *et seq.*), and insofar as the caps have not been formally promulgated by the agency they are void under Indiana Code § 4-22-2-1, *et seq.*

Jurisdiction, Venue, and Cause of Action

3. The Court has jurisdiction of this case pursuant to 28 U.S.C. § 1331.
4. Venue is proper in this district pursuant to 28 U.S.C. § 1391.
5. Declaratory relief is authorized by Rule 57 of the Federal Rules of Civil Procedure and 28 U.S.C. §§ 2201 and 2202.
6. The Court has jurisdiction over the supplemental state law claims pursuant to 28 U.S.C. § 1367.
7. This action is brought pursuant to Indiana law and 42 U.S.C. § 1983 to redress the deprivation, under color of state law, of rights secured by the laws of the United States.

8. By removing this case to federal court (R. Doc. 16), the defendants have consented to this Court's jurisdiction and waived sovereign immunity. *Lapides v. Bd. of Regents of Univ. Sys. of Georgia*, 535 U.S. 613 (2002).¹

Parties

9. B.N. are the initials of a minor resident of LaPorte County, Indiana. He brings this action by his mother and next friend A.N., and on behalf of a putative class of those similarly situated.
10. Anne Waltermann Murphy is the duly appointed Secretary of the Indiana Family and Social Services Administration, and is sued in her official capacity.
11. Pat Casanova is the duly appointed Interim Director of the Office of Medicaid Policy and Planning of the Indiana Family and Social Services Administration, and is sued in her official capacity.
12. Megan Ornellas is the duly appointed Director of the Division of Aging of the Indiana Family and Social Services Administration, and is sued in her official capacity.

Class Action Allegations

13. The plaintiff brings this action on his own behalf and on behalf of a class of those similarly situated pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure.
14. The putative class is defined as:

All persons in Indiana who are or will be enrolled in or eligible for the Aged and Disabled Waiver program and for whom more than sixty (60)

¹ The defendants' Notice of Removal was initially filed as R. Doc. 3. However, insofar as this document contained the real name of a minor, the Court ordered that the document be sealed and that the defendants file a redacted copy of their Notice of Removal (R. Doc. 10). The defendants subsequently filed a redacted copy of their Notice of Removal (R. Doc. 16, Att. 3).

hours a month in respite services is or will be medically necessary.

15. As defined, the class meets all the requirements of Rule 23(a) of the Federal Rules of Civil Procedure. Specifically:
 - a. The class is so numerous that joinder of all members is impracticable. The precise number of current members in the class is not known, but is believed to number in the dozens, if not hundreds, and will be ascertained during the discovery process.
 - b. There are questions of law or fact common to the class, namely whether the challenged waiver caps violate state and federal law.
 - c. The claims of the representative party are typical of those of the class.
 - d. The representative party will fairly and adequately represent the class.
16. The further requirements of Rule 23(b)(2) are met in this case as they relate to the class inasmuch as the parties opposing the class have acted or have refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive and corresponding declaratory relief with respect to the class as a whole

Legal Background

17. Medicaid is a federal program of medical assistance for the poor established by Title XIX of the Social Security Act and funded by the federal government and participating states. *See* 42 U.S.C. § 1396, *et seq.*
18. Federal Medicaid appropriations to the states are designed to enable states to furnish medical assistance to those whose incomes and resources are insufficient to meet the costs of necessary medical services. *See* 42 U.S.C. § 1396.

19. Eligibility for Medicaid is limited to low-income people who fall into one of several categories or groups specified in federal law, which includes disabled persons. *See* 42 U.S.C. § 1396a(a)(10)(A).
20. State participation in the Medicaid program is voluntary. However, states that choose to participate in the Medicaid program must submit plans to the United States Department of Health and Human Services in order to qualify for the federal matching funds, and these plans contain the requirements that a state must meet to receive federal approval. *See* 42 U.S.C. § 1396a(a).
21. Indiana participates in the federal Medicaid program and is bound by all of its requirements. *See* IND. CODE 12-15-1-1, *et seq.*
22. The United States Department of Health and Human Services may waive certain requirements of the Medicaid program for states that include as “medical assistance” under their State plan home and community-based services that are provided to an individual who, but for such services, would require the level of care provided in a hospital, nursing facility, or intermediate care facility for the mentally retarded. *See* 42 U.S.C. § 1396n(c)(1).
23. In order for a waiver to be approved by the United States Department of Health and Human Services, the requesting state must provide assurances that

the average per capita expenditure estimated by the State in any fiscal year for medical assistance provided with respect to such individuals [enrolled in the waiver program] does not exceed [one hundred] percent of the average per capita expenditure that the State reasonably estimates would have been made in that fiscal year for expenditures under the State plan for such individuals if the waiver had not been granted.

See 42 U.S.C. § 1396n(c)(2)(D).

24. Indiana Medicaid law defines a “medically reasonable and necessary service” as one “that is required for the care or well being of the patient and is provided in accordance with generally accepted standards of medical or professional practice.” *See* IND. ADMIN. CODE tit. 405, r. 5-2-17.

Factual Allegations

Factual Allegations Concerning B.N.

25. B.N. is an eight-year-old resident of LaPorte County, Indiana. He lives with his mother, A.N., as well as his father and his sister. However, his father works full-time and is on-call for his job twenty-four (24) hours a day and seven (7) days a week. His sister is less than five (5) years old.
26. B.N. was born three (3) months pre-mature. He is therefore disabled and has been since birth. He has cerebral palsy, acid reflux, dystonia, chronic lung disease, and a GJ-tube.
27. B.N. cannot walk or talk. He cannot eat, and is instead fed directly through a tube into his small intestine (which is known as a GJ-tube). He cannot toilet, and therefore still wears diapers, nor can he accomplish any of his other activities of daily living. In short, he is entirely dependant on assistance in order to survive.
28. B.N. also wears an oximeter, which is necessary in order to display his oxygen level at all times. His oxygen level frequently dips to unsafe levels, at which point his mother or his nurses are required to provide him with oxygen. Without the oximeter, B.N.’s family, nurses, and other caretakers would be unable to properly and safely monitor his condition.

29. Because B.N. cannot swallow, his mouth and airway must be suctioned at least fifty (50) times each day, and generally about one hundred (100) times each day. This keeps B.N.'s airway clean and free from obstructions, and removes secretions from his mouth area.
30. B.N. is required to take medications at thirteen (13) very specific times throughout the day: 7:00 a.m., 8:00 a.m., 9:00 a.m., 11:00 a.m., 1:00 p.m., 2:00 p.m., 3:00 p.m., 4:00 p.m., 5:00 p.m., 8:00 p.m., 9:00 p.m., 10:00 p.m., and 11:45 p.m. He is also required to take medications if he wakes up in the middle of the night, which he often does.
31. In addition, B.N. has an internal interthical pump, which constantly distributes a necessary medication known as baclofen to B.N. directly through his spinal fluid.
32. Because of the number of medications that B.N. takes and the need for them to be administered safely and properly, because of B.N.'s need for constant suctioning of his mouth and airway, and because of the need to monitor B.N.'s oxygen level and other conditions, he may only be safely and adequately cared for by his mother—who is experienced at providing care to B.N.—or through skilled nursing or respite nursing services.
33. B.N.'s father is not familiar with the medications or treatment that B.N. is required to receive in order to survive. Moreover, he is on-call at his job at all times, and often has to leave the house unexpectedly for his work. He can offer only very minimal assistance in caring for B.N..
34. B.N. attends second grade at Kingsbury Elementary School, although at the time of the filing of his original complaint in this case he was being home-schooled

- temporarily because he broke his arm. A nurse only works at his school one (1) day each week, and an individual who is not a medical professional may not safely and properly administer B.N.'s medications, suction his mouth and airway, or otherwise care for him.
35. Therefore, B.N. receives approximately fifty (50) hours each week of skilled nursing services through the Medicaid prior authorization program, which is separate from the Medicaid waiver program. These services are provided from 7:00 a.m. to 5:00 p.m. on weekdays, but are not provided on the weekends or in the evenings. The provider of these services is unwilling and/or unable to provide additional services through the prior authorization program.
36. Before 7:00 a.m. and after 5:00 p.m. on weekdays, B.N. is cared for exclusively by his mother, A.N., who administers his medications, suctions his mouth and airway, and otherwise ensures that he is in a safe and secure environment.
37. A.N. does not work, although she is contemplating going back to work. She uses the respite hours that she receives on the weekends, such that she can spend time with her husband or her daughter, run errands, or simply rest from having to care for B.N. constantly. Her daughter is enrolled in kindergarten at Westville Elementary School. However, because A.N. is only able to utilize these hours on the weekends, she is unable to participate in any of her daughter's school activities, even though she would very much like to do so. For instance, in the summer and fall of 2008 her daughter participates in swim lessons at Michigan City High School; however, A.N. was unable to attend a single swimming lesson, simply because she was required to care for B.N..

38. B.N. has been enrolled in the Indiana's Aged and Disabled Waiver program since 2005 or 2006. Prior to April of 2008, he was approved for eighty (80) hours each month in respite services.
39. In April of 2008, however, B.N. and his mother were informed that, due to new caps that had been placed on respite services for individuals enrolled in Indiana's Aged and Disabled Waiver program, he could no longer receive eighty (80) hours each month in respite services. Rather, he could receive no more than sixty (60) hours each month in respite services.
40. The services that B.N. receives under Indiana's Aged and Disabled Waiver program must be re-determined and re-approved each year. In April of 2008, he and his mother applied for eighty (80) hours each month in respite services, which was the same amount of services that he was receiving prior to that time.
41. However, B.N.'s application for eighty (80) hours each month in respite services was denied. According to the denial letter, "[t]he waiver will [only] approve up to 60 hours per month of respite service." A true and correct copy of the denial letter was attached to the plaintiff's original complaint and incorporated therein as Exhibit 1. This letter is also incorporated herein.
42. Neither B.N.'s condition nor his family's need for respite services has changed since he was approved for eighty (80) hours each month in respite services, and the new caps on respite services have therefore been applied to him.
43. After receiving the denial letter, B.N. and his mother re-applied for sixty (60) hours each month in respite services, and were approved for this amount.

44. If B.N.'s respite hours are not increased back to their pre-cap level, his mother and other family members will be unable to care for him for such a substantial portion of each day. B.N. may therefore be required to be admitted into a nursing home, hospital, or other institutional alternative if his respite hours are not increased, and he and his family do not know how they will care for him in his home or in another community setting.
45. Since B.N.'s hours were reduced, A.N. has found herself constantly exhausted and has had difficulty providing the care that B.N. requires in order to survive. Additionally, she has been able to spend only very little time on the weekends with her husband or her daughter, and has spent almost no time with them on weekdays. This has caused a strain on their familial relationships.
46. Moreover, A.N. is only 5'4" tall, and suffers from degenerative hip displacia, and her doctor has therefore told her that she should not lift more than thirty (30) pounds. However, B.N. weighs sixty-seven (67) pounds at present and is still growing. Because she cares for B.N. constantly, A.N. is forced to pick him up and carry him anyway.
47. B.N. does not desire to be institutionalized, nor does his mother desire that he be institutionalized; rather, they prefer that he receive services in his home or in other community placements, which afford him greater liberty than would a nursing home and which permit him to live with his family. If B.N.'s respite hours are not increased back to their pre-cap level, his health and well-being will be in perpetual jeopardy.

48. At least eighty (80) hours of respite services each month are medically necessary for B.N..

Factual Allegations Concerning the Defendants' Policy

49. The Indiana Family and Social Services Administration—through its Division of Aging and its Office of Medicaid Policy and Planning—operates Indiana's Aged and Disabled Waiver program.
50. The United States Department of Health and Human Service must approve a state's proposed waiver program before it goes into operation.
51. In early 2008, the Indiana Family and Social Services Administration submitted to the United States Department of Health and Human Services a "Request for a Renewal to a § 1915(c) Home and Community-Based Services Waiver," in which it sought approval for changes to Indiana's Aged and Disabled Waiver program. Excerpts from this request were attached to the plaintiff's original complaint and incorporated therein as Exhibit 2. These excerpts are also incorporated herein.
52. Among the changes for which the Indiana Family and Social Services Administration sought approval were dramatic reductions in the maximum number of hours that individuals enrolled in the Aged and Disabled Waiver program could receive respite services.
53. Specifically, the Indiana Family and Social Services Administration sought to cap respite services at no more than sixty (60) hours each month, regardless of the medical necessity of such services or the requirements for an individual patient.
54. On or about May 22, 2008, the United States Department of Health and Human Services approved Indiana's waiver program, as proposed in its most recent

- request for renewal, thereby placing caps on the number of respite hours that individuals enrolled in the Aged and Disabled Waiver program could receive. These changes went into effect on July 1, 2008. This approval was attached to the plaintiff's original complaint and incorporated therein as Exhibit 3. This approval is also incorporated herein.
55. The total cost of providing services to all individuals enrolled in Indiana's Aged and Disabled Waiver program is and will continue to be significantly less than the total cost of institutionalizing all such individuals, regardless of whether the new caps are imposed.
 56. The new caps bear no rational relationship to the cost of institutionalizing an individual.
 57. An injunction prohibiting the enforcement of the new caps on respite services would not and will not fundamentally alter the Aged and Disabled Waiver program.
 58. Individuals enrolled in the Aged and Disabled Waiver program are eligible for specific services under that program, including respite services.
 59. Respite services under Indiana's Aged and Disabled Waiver program are those that are provided temporarily or periodically in the absence of the usual caregiver. They may include home health aide services, skilled nursing services, or nursing facility services.
 60. As a result of the new caps on respite services, B.N. and his mother are unable to receive medically necessary services, and B.N. is at risk of requiring institutionalization.

61. The Indiana Family and Social Services Administration receives federal funding, and is therefore subject to the requirements of the Rehabilitation Act of 1973.
62. The new caps on respite services have never been formally promulgated by the defendants.
63. Also as a result of the new caps on respite services, the plaintiff and the members of the putative class are suffering irreparable injury for which there is no adequate remedy at law.
64. At all times the defendants have acted or refused to act under color of state law.

Legal Claims

65. The defendants have violated the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973 by imposing caps on the amount of respite services for which individuals enrolled in Indiana's Aged and Disabled Waiver program are eligible, which results in the discrimination against seriously disabled individuals and which will result in the unnecessary institutionalization of such individuals.
66. The defendants violate state and federal Medicaid law and the Supremacy Clause of the United States Constitution by imposing caps on respite services that bear no relationship to medical necessity and by failing to provide payment for medically necessary respite services.
67. The defendants violate Indiana Code § 4-22-2-1, *et seq.*, by implementing caps on waiver services that have never been promulgated pursuant to the state's rule-making process.

Request for Relief

WHEREFORE, the plaintiff and the members of the putative class request that this Court:

1. Accept jurisdiction of this cause and set it for hearing.
2. Certify this cause as a class action, with the class as defined above.
3. Declare that the defendants have violated the rights of the plaintiff and the class for the reasons specified in paragraphs 65 through 67, above.
4. Enter a preliminary injunction, later to be made permanent, enjoining the defendants from enforcing the aforementioned caps on respite services.
5. Award the plaintiff and the class their costs and reasonable attorneys' fees pursuant to 42 U.S.C. § 1988 and all other applicable statutes.
6. Award all other proper relief.

Respectfully Submitted,

/s/ *Gavin M. Rose*

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CERTIFICATE OF SERVICE

I hereby certify that on June 11, 2009, a true copy of the foregoing was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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