

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

O.B., et al., individually)	
and on behalf of a class,)	
)	
Plaintiffs,)	
)	15 C 10463
v.)	
)	Judge Charles P. Kocoras
FELICIA F. NORWOOD,)	
in her official capacity as Director)	
of Healthcare and Family Services,)	
)	
Defendant.)	

ORDER

Plaintiffs O.B., C.F., J.M., and S.M. (collectively, “Plaintiffs”) bring this four-count action pursuant to 42 U.S.C. § 1983 and various provisions of Title XIX of the Social Security Act (the “Medicaid Act”), 42 U.S.C. §§ 1396 *et seq.* (Counts I and II); the Americans with Disabilities Act (the “ADA”), 42 U.S.C. §§ 12101 *et seq.* (Count III); and the Rehabilitation Act, 29 U.S.C. §§ 701 *et seq.* (Count IV). This Court’s Opinions of March 21, 2016 and May 17, 2016 [36, 55] denied Defendant Felicia F. Norwood’s Motion to Dismiss [21], granted Plaintiffs’ Motion for Preliminary Injunction [6] as to Counts I and II, and granted Plaintiffs’ Motion for Class Certification [4]. Now before the Court is Plaintiffs’ Motion to Enforce the Preliminary Injunction Order entered by the Court on April 6, 2016 [42]. For the reasons in the following Statement, Plaintiffs’ Motion to Enforce [66] is granted in part, on the terms and conditions outlined below.

STATEMENT

The factual and legal bases underlying Plaintiffs' claims are set out more fully in the Court's March 21 and May 17 Opinions and its April 6, 2016 Preliminary Injunction Order. That Order [42] provides, in pertinent part, as follows:

- A. Defendant Felicia F. Norwood shall take immediate and affirmative steps to arrange directly or through referral to appropriate agencies, organizations, or individuals, corrective treatment of in-home shift nursing services to Plaintiffs and such similarly situated Medicaid-eligible children under the age of 21 in the State of Illinois who also have been approved for in-home shift nursing services, but who are not receiving in-home shift nursing services at the level approved by Defendant, as required by the Medicaid Act.
- B. Defendant Felicia F. Norwood shall provide the following information to Plaintiffs within 30 days of the entry of this Order:
 - (1) what steps have been undertaken by Defendant to arrange for in-home shift nursing services to Plaintiffs and such similarly situated Medicaid-eligible children; and
 - (2) an identifying list of such similarly situated Medicaid-eligible children which contains (a) their currently approved level of in-home shift nursing care and (b) how much of their in-home shift nursing care was used or delivered during the preceding 90 days.

In the instant motion, Plaintiffs complain that Norwood has failed to do the following in response to this Order: (1) “to take immediate and affirmative steps to arrange’ for in-home shift nursing services at the approved level to the Plaintiffs and Class Members,” (2) “to provide to the Plaintiffs ‘what steps have been undertaken by Defendant to arrange for in-home shift nursing services,’” and (3) to provide “‘an identifying list’ of Class Members, which contains ‘how much of their in-home shift nursing care was used or delivered during the preceding 90 days.’” Dkt. 66, at ¶ 1.

The Court addresses each argument in turn.

As to the Order's requirement of "an identifying list" of "similarly situated Medicaid-eligible children," Plaintiffs acknowledge that Norwood has produced a list that provides the "Recipient Identification Number (RIN) for each child," but complain that "Plaintiffs are unable to identify the children listed or their families" from the RIN alone. *Id.* at ¶ 8 (citing Ex. D, Dkt. 67, at 7-30). To that end, Plaintiffs request each child's name and address and the name, phone number, and any available email address of each child's legally responsible caregiver. *Id.* Norwood has not opposed providing such information as burdensome or for confidentiality reasons (indeed, though Norwood's counsel generally opposed the instant motion in open court, Norwood filed no response in opposition at all). Nor does the information strike the Court as burdensome to provide, and any confidentiality issues would appear to be addressed by the Agreed Protective Order [33] entered in the case. Thus, because the information appears necessary to identify adequately the class members affected by the Court's Preliminary Injunction Order, and Norwood has identified no justification for withholding the information, the Court grants Plaintiff's request for an updated list that also includes the name and address of each child and the name, phone number, and any available email address of each child's legally responsible caregiver.

Plaintiffs also complain that the list of similarly situated Medicaid-eligible children that Norwood provided is "not accurate." Dkt. 66, ¶ 7. This criticism appears to be rooted in Norwood's explanation accompanying the list that it was compiled based on "paid claims data" which "is not complete after 90 days." Dkt. 67, at 6. According to Norwood, "providers have 180 days to submit a claim for payment," and

the list she provided (which looks back 90 days, as the Court's Order required) may not factor in "claims for reimbursement that have either not yet been submitted by the nursing agency or have been submitted but not yet processed for payment." *Id.* As a result, Norwood asserts, "the staffing percentages in the attached spreadsheet [are] not accurate, and [are] likely lower than the actual staffing percentage, due to the lag inherent in the billing process." *Id.* In other words, the list may not capture all services performed, and that situation may improve as related claims are processed.

While Plaintiffs do not dispute this billing lag, they doubt "Defendant's contention that 'HFS must rely upon paid claims data to establish the actual utilization of allocation or hours for each child.'" Dkt. 66, ¶ 9. Plaintiffs suggest instead that "the Defendant could inquire with service providers (nursing agencies) regarding the exact number of hours provided to each child for the preceding 90 days." *Id.* Given the passage of time already since the Court's April 6 Preliminary Injunction Order and Norwood's May 6, 2016 report pursuant thereto, the Court rejects Plaintiffs' suggestion that Norwood's agency (HFS) be required to inquire with service providers regarding the exact amount of services provided as unnecessary, inefficient, and unreliable. Instead, the Court will require Norwood to update the staffing percentages in Plaintiffs' Exhibit D based upon newly received paid claims data; such updates to be provided monthly for four consecutive months, beginning 30 days from the entry of this Order. The Court will then revisit this issue upon completion of these updates, pending a status report from the parties explaining whether and to what extent the paid claims data for the services reflected in Plaintiffs' Exhibit D remain out of date.

Finally, Plaintiffs also complain that Norwood has failed to meet the Preliminary Injunction Order's requirements to "take immediate and affirmative steps to arrange" for in-home shift nursing services for plaintiffs who are not receiving such services at the approved level, and to report "what, if any, affirmative steps" have been taken to arrange for further services. Dkt. 66, ¶¶ 4-6. Quoting from a May 6, 2016 letter submitted on Norwood's behalf pursuant to these requirements, Plaintiffs argue that Norwood "does not identify any specific actions taken to arrange services," and instead represents merely that HFS "continues to recruit nurses," "will 'continue to monitor these cases,'" and "will be undertaking a comprehensive review" of "each case." *Id.* Plaintiffs also remind the Court that its Preliminary Injunction Order "does not direct the Defendant to study the issue, but rather, to take immediate and affirmative steps to arrange for the delivery of in-home shift nursing services." *Id.*

Plaintiffs are correct that the Court's Preliminary Injunction Order required Norwood to "take immediate and affirmative steps to arrange . . . in-home shift nursing services," and provide information regarding "what steps have been undertaken" in that regard. Dkt. 42, at 2. But when issuing that Order, the Court also committed to preserve "Norwood's discretion to fashion the most effective but least burdensome method of providing the EPSDT services approved for each Plaintiff." Dkt. 36, at 19. Norwood, through the Illinois Attorney General Welfare Litigation Bureau, insists that "a comprehensive case by case review" is vitally necessary "to determine the affirmative steps that can be enacted to achieve greater alignment" between the services approved and the services actually provided. Dkt. 67, at 3-4.

According to Norwood, this “comprehensive” review was to begin with “the MFTD¹ participants that have been determined to be hospital-compared (highest acuity) with the greatest delta between approved and staffed and move to those that are skilled nursing facility-compared and then to the NPC² participants beginning with those that have greatest delta between approved and staffed in each population.” *Id.* at 3. “The purpose of the review is to determine the reason for the delta and then to use that information to work with DSCC,³ the nursing agency, and the family to devise a plan to address the delta and improve the staffing levels.” *Id.* at 5. The agency’s counsel adds that “[p]otential strategies for addressing the delta between what has been approved and what is being staffed may include, but are not limited to:”

- Utilizing 2 nursing agencies
- Utilizing CNAs when parents are at home
- Increasing the PRN coverage for back up when nurses call off
- Ongoing follow up by DSCC with the nursing agencies on recruitment efforts
- Mediation by DSCC between families and the nursing agency
- Facilitation of expansion of some nursing agencies to other geographic locations to provide care
- Working with the family to pursue recruitment efforts

¹ The Court understands “MFTD” to refer to the “Medically Fragile Technology Dependent” Waiver Program. *See* Dkt. 1, ¶ 28.

² The Court understands “NPCS” to refer to the “Nursing and Personal Care Services” program. *See* Dkt. 1, ¶ 28.

³ The Court understands “DSCC” to refer to the “University of Illinois of Chicago Division of Specialized Care for Children,” which provides care coordination for children who receive in-home shift nursing care. *See* Dkt. 1, ¶ 80.

Granting the State “the widest latitude in the dispatch of its own internal affairs” (*see* March 21 Opinion, Dkt. 36, at 20), the Court must accept Norwood’s assessment that a case-by-case review is necessary “to determine the affirmative steps that can be enacted to achieve greater alignment” between the level of services approved and those provided. Dkt. 67, at 4. The Court also sees the wisdom in prioritizing cases according to their acuity level and the greatest delta between approved and provided services in each population. *See id.* at 3. Also accepting that this commitment was made in earnest and noting that it was made several months ago now, the Court can only surmise that this “comprehensive case-by-case review” is already well underway, at least with respect to the MFTD cases, with “strategies for addressing the delta between what has been approved and what is being staffed” already being implemented in such cases.

Accordingly, as the Court’s Preliminary Injunction Order required Norwood to provide information regarding “what steps have been undertaken by Defendant to arrange for in-home shift nursing services,” the Court directs Norwood to supplement her report with information regarding the cases reviewed and the measures implemented pursuant to such review. Such supplements shall be provided monthly for four consecutive months, beginning 30 days from the entry of this Order, at which time the Court will revisit this issue, pending a status report from the parties regarding the progress of the foregoing comprehensive review being conducted by HFS. The Court also directs counsel for the parties to meet and confer within the next 30 days regarding the status of this review and the time period anticipated to complete it.

In addition to this latter meet and confer requirement, the Court also directs the parties to discuss the possibility of consenting to the appointment of a special master pursuant to Federal Rule of Civil Procedure 53, or some other neutral, to assist in structuring the foregoing comprehensive review process and in resolving disputes regarding the reports generated in connection therewith. A status is set in this matter for September 13, 2016, at 9:30, to report on that issue and the status of and anticipated time to complete the comprehensive case-by-case review underway.

CONCLUSION

Based on the foregoing, Plaintiffs' Motion to Enforce [66] is granted in part as follows:

1. Norwood shall update the staffing percentages appended to the May 6, 2016 letter attached as Exhibit D to the current motion, based upon newly received paid claims data, such updates to be provided to Plaintiffs monthly for four consecutive months beginning 30 days from this Order;
2. Norwood shall provide information regarding the steps undertaken to arrange for in-home shift nursing services based on the case-by-case review referenced in the same May 6, 2016 letter, such updates to be provided to Plaintiffs monthly for four consecutive months, beginning 30 days from this Order;
3. The parties shall meet and confer within the next 30 days regarding the status of the foregoing case-by-case review and the time period anticipated to complete it, as well as the possibility of consenting to the appointment of a special master or some other neutral to assist in structuring this comprehensive review and resolving disputes regarding the reports generated in connection therewith;
4. This matter is set for status on September 13, 2016, at 9:30 a.m.



Charles P. Kocoras
United States District Judge

Dated: August 5, 2016