IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
FIFTH DIVISION

BRADLEY LEDGERWOOD, ET AL. **PLAINTIFFS**

v. **60CV-17-442**

ARKANSAS DEPARTMENT OF HUMAN SERVICES **DEFENDANT**

MEMORANDUM ORDER

Parties appeared before the Court on April 19, 2018 to be heard on Disability Rights Arkansas, LLC's Motion to Intervene and cross Motions for Summary Judgment. Thomas Nichols appeared for Proposed Intervenors DRA, Inc. Kevin DeLibon and Trevor Hawkins appeared for Plaintiffs. Richard Rosen appeared for the Department of Human Services (DHS). The Court heard arguments regarding the Motion to Intervene and denied the Motion. The Court then heard arguments regarding the cross Motions for Summary Judgment.

MOTION TO INTERVENE

The issue regarding the Motion to Intervene deals with questions of timeliness and adequacy of the remedy requested by the Plaintiffs. Arkansas law states that timeliness is an issue to be determined within the discretion of the Court. The factors the Court must consider are: (1) how far the proceedings have progressed, (2) any prejudice to other parties that might be affected by the delay, and (3) the reason for the delay.

No trial date has been reset or set after the Arkansas Supreme Court mandate was issued affirming the Court's Temporary Restraining Order. There are cross-motions for Summary Judgment pending. Proposed Intervenors waited a year or more after the action commenced to intervene. The Plaintiffs in this matter have already established a factual basis for the Temporary Restraining Order to be entered. The Proposed Intervenors have not done so. There is no stipulation as to facts concerning the Proposed Intervenors. In order for the Court to decide whether those named movants are entitled for relief, there would need to be discovery on those

issues and an opportunity for those facts to be proven, requiring suspension of any action concerning the primary Plaintiffs. Further, the Proposed Intervenors focus their concern on DHS rule making. The Court is concerned that this issue is not justiciable and not the current controversy. There is no controversy presently about DHS rulemaking because the Court has entered a temporary restraining order granting to the named Plaintiffs the right to receive services based upon the existing rule. Whether DHS may or may not change that rule is a contingency and not a controversy. The Proposed Intervenors are able to prosecute separate actions against DHS to address their concerns. For these reasons, the Court hereby DENIES the Motion to Intervene.

CROSS-MOTIONS FOR SUMMARY JUDGMENT

In the cross Motions for Summary Judgment, the respective parties agree that there are no genuine issues of material fact. Their perspectives diverge on the legal question of whether the Department of Human Services (DHS) substantially complied with the requirements of the Administrative Procedures Act in its notice of rulemaking. The Plaintiffs argue that the DHS did not substantially comply with the requirements of A.C.A. 25-15-204 and assert that the notice of rulemaking failed to identify that DHS sought a change in assessment methodology and omitted vital information about the way the RUGs methodology works. DHS maintains that it substantially complied with the statute's requirement of a statement of terms or substance of the intended action or a description of the subjects or issues involved. DHS asserts that sovereign immunity doctrine bars the award requested by Plaintiffs and that Plaintiffs lack standing due to their failure to comment/failure to see the notice of rulemaking as published.

ANALYSIS

The Court has jurisdiction to determine the validity or applicability of an agency rule if it is alleged that the rule, or its threatened application, injures or threatens to injure the plaintiff in his or her person, business or property pursuant to the Arkansas Administrative Procedure Act, A.C.A. § 25-15-207.

It is settled law that a claim of sovereign immunity may be surmounted where a state agency is acting illegally. *Arkansas Dept. of Community Correction v. City of Pine Bluff*, 2013 Ark. 36 (2013). The scope of the exception to sovereign immunity for unconstitutional acts or for acts that are ultra vires, arbitrary, capricious, or in bad faith, extends only to injunctive relief. *Arkansas Lottery Comm'n v. Alpha Mktg.*, 2013 Ark. 232 (2013). A state agency may be enjoined if it can be shown: (1) that the pending action of the agency is ultra vires or without the authority of the agency, or (2) that the agency is about to act in bad faith, arbitrarily, capriciously, and in a wantonly injurious manner. *Arkansas Tech Univ. v. Link,* 341 Ark. 495, 17 S.W.3d 809 (2000).

The Court may reverse or modify the decision if the substantial rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) in violation of constitutional or statutory provisions; (2) in excess of the agency's statutory authority; (3) made upon unlawful procedure; (4) affected by other error or law; (5) not supported by substantial evidence of record; or (6) arbitrary, capricious, or characterized by abuse of discretion. *A.C.A. §25-15-212(h).*

"To be invalid as arbitrary or capricious, an agency's decision must lack a rational basis or rely on a finding of fact based on an erroneous view of the law." *Odyssey Healthcare Operating A. LP v. Ark. DHS,* 2015 Ark. App. 459. An agency's decision that is supported by

"substantial evidence" is not arbitrary and capricious. *Id.* Substantial evidence is "valid, legal and persuasive evidence that a reasonable mind might accept to support a conclusion and force the mind to pass beyond speculation and conjecture." *Ark. Dep't of Human Serv's v. Bixler,* 364 Ark. 292, 219 S.W.3d 125 (2005). "The question is not whether the testimony would have supported a contrary finding but whether it supports the finding that was made." *Ark. Contractor's Licensing Board v Pagasus,* 347 Ark. 320, 64 S.W.3d 241 (2001). It is the prerogative of the agency to believe or disbelieve any witness and to decide what weight to accord the evidence. *McQuay v. Arkansas State Bd. Or Architects,* 337 Ark. 339, 989 SW2d 499 (1999). Credibility and the weight of evidence are clearly within the administrative agency's discretion.

Due process requires, at minimum, that a person be given notice and a reasonable opportunity for a hearing before a deprivation by state action. *Ark. Dep't of Corr. v. Bailey,* 368 Ark. 518, 247 S.W.3d 851 (2007). Where a governmental entity sets its own rules, that entity must strictly adhere to those rules. While deference is granted to an agency's findings of fact, the agency must strictly adhere to both the letter and spirit of its own rules and regulations. *Flynn v Bd. Of Certified Court Reporter Examiners,* 372 Ark. 520, 279 S.W.3d 75 (2008). "[T]he test is one of fairness under the circumstances of each case –whether the [individual] knew what conduct was in issue and had a fair opportunity to present his defense." *Soule Glass & Glazing Co. v NLRB,* 652 F.2d 1055 (1st Cir.1981).

SUBSTANTIAL COMPLIANCE

Arkansas Code Annotated § 25-15-204 requires that "notice shall include: (i) A statement of the terms or substance of the intended action or a description of the subjects and issues involved; and (ii) The time, location, and manner in which an interested persons may present his or her position on the intended action of the agency or on the issues related to the intended action

of the agency...and "shall be published: (i) in a newspaper of general daily circulation for three (3) consecutive days and, when appropriate, in those trade industry, or professional publications that the agency may select." ACA 25-15-204(F) provides that an agency shall not file a final rule with the Secretary of State for adoption unless the final rule has been approved under § 10-3-309. A.C.A. § 10-3-309(3)(A)(i) states that the "proposed rule shall be reviewed by the Administrative Rules and Regulations Subcommittee of the Legislative Council. Deficient notice falls short of the obligation to afford all interested persons reasonable opportunity to comment regarding the specific nature and significance of the problem the agency addresses with the proposed rule.

DHS had rulemaking authority to promulgate rules related to its Medicaid Home and Community Based Waiver Programs when the Notice of Rule Making was published in the Arkansas Democrat-Gazette newspaper on August 3, 2015 through August 5, 2015. For approximately seventeen years, DHS determined beneficiaries' number of attendant care hours based on the professional discretion of a DHS registered nurse who assessed the beneficiary. The Notice of Rulemaking stated:

> Effective January 1, 2016, [DHS] is renewing the ElderChoices 1915(c) HCBS waiver. The renewal combines the ElderChoices and Alternatives for Adults with Physical Disabilities (AADP) waivers into one waiver to be called the ARChoices in Homecare waiver covering participants 21 and older with a physical disability and individuals aged 65 and older. Effective January 1, 2016, the Department is also increasing the rate for Personal Care Services from $4.19 to $4.50 per 15 minute unit. The estimated annualized budget impact of the rate increase for the State Plan Personal Care Services is $11,439,689.
>
> The proposed policy is available for review at the Division of Medical Services.... You may also access it on the Medicaid

> website (www.medicaid.state.ar.us) and download it from the "Proposed Rules for Public Comment" section of the Website's General menu.... All comments must be submitted in writing, at the above address, no later than September 1, 2015.

The notice of the proposed rule did not refer to the specific nature and significance of the change in assessment methodology. RUGs is a clear departure from prior practice having both general applicability and future effect on beneficiaries. The mention of where the rule can be found does not cure the failure to mention RUGs or the departure from prior practice in the notice of rulemaking. The fact that the notice received two public comments does not cure or save the flaw in the notice.

Neither the report of the administrative hearing of the Rules Subcommittee of the Arkansas Legislative Council (Pl. Exhibit 4 to the TRO hearing) nor the recording of the Committee hearing that occurred on December 15, 2015(Pl. Exhibit 5 to the TRO hearing)—where DHS sought legislative approval of the proposed rule—made reference to RUGs or changes in the ARChoices assessment methodology as required by A.C.A. §25-15-204(f). The letter to Archoices beneficiaries (Pl. Exhibit 3 to the TRO hearing) refers to impending change effective January 1, 2016 but makes no mention of RUGs, an algorithm, any change in the assessment methodology, or how the new rule would affect the ARChoices beneficiaries. In fact, the letter states that the beneficiaries would receive "the same services."

The Court finds that the notice of rule making does not substantially comply with A.C.A. § 25-15-204 wherein the notice of rule making failed to reference any change in the assessment methodology calculating attendant care hours, makes no mention of RUGs, an algorithm or how ARChoices beneficiaries would be affected by the change.

IRREPARABLE HARM

Plaintiffs argue that they have suffered and will continue to suffer irreparable harm in the absence of a permanent injunction preventing DHS from using RUGs unless or until it is properly promulgated. DHS contends that that the possible reduction of attendant care hours is contingent on each Plaintiff's future reassessment and is therefore contingent, speculative, and non-justiciable.

The prospect of irreparable harm or lack of an otherwise adequate remedy is the foundation of the power to issue injunctive relief. *Wilson v. Pulaski Ass'n of Classroom Teachers*, 330 Ark. 298, 954 S.W.2d 221 (1997). Harm is normally considered irreparable only when it cannot be adequately compensated by money damages or redressed in a court of law. *Three Sisters Petroleum, Inc. v Langley,* 348 Ark. 167, 72 S.W.3d 95 (2002).

Attendant Care involves assistance with activities of daily living, including eating, bathing, dressing, personal hygiene (grooming, shampooing, shaving, skin care, oral care, etc.), toileting, mobility/ambulating, including mastering the use of adaptive aids and equipment, meal planning and preparation, managing finances, laundry, shopping and errands, communication, traveling, participating in the community, and housekeeping. *See DHS Answer ¶ 24.* Sworn testimony of the Plaintiffs has proved that their attendant care hours decreased as a result of RUGs assessment, that Plaintiffs suffered difficulties with cleanliness, were required to remain in waste/soiled clothing, had increased fear of falling, suffered worsened conditions and/or went without food due to the lack of help preparing meals, among other harms described. *See Pl. Exhibits 6-11.* Plaintiffs have sustained injuries for which money damages are not available. Accordingly, the Court finds that the Plaintiffs have demonstrated that irreparable harm results and will continue to result in the absence of a permanent injunction.

CONCLUSION

For the reasons stated above, the Court finds that the Department of Human Services' promulgation was ultra vires, based upon improper procedure and failed to properly promulgate the proposed rule as required by the Administrative Procedure Act, specifically A.C.A. 25-15-204. Plaintiffs' Motion for Summary Judgment is hereby GRANTED and DHS is hereby permanently enjoined from using RUGs methodology to determine attendant care hours unless or until it is properly promulgated. Defendant's Motion for Summary Judgment is hereby DENIED.

IT IS SO ORDERED, this 14 day of May, 2018.

CIRCUIT JUDGE