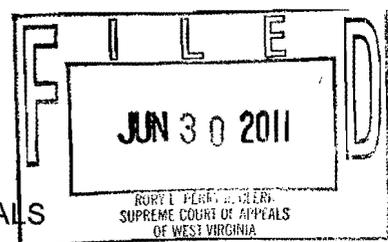


STATE OF WEST VIRGINIA
BEFORE THE SUPREME COURT OF APPEALS



PATSY A. HARDY,
Secretary of the Department of
Health and Human Resources,

Petitioner,

vs.

Case No. 101540

BENJAMIN H.,
A Minor, by his next friend and
mother, GEORGEANN H.

Respondent.

SUPPLEMENTAL RESPONSE ON BEHALF OF BENJAMIN H.

BRUCE PERRONE
Legal Aid of West Virginia
922 Quarrier Street, 4th Floor
Charleston, WV 25301
304-343-4481 ext 2127
bperrone@lawv.net

Counsel for Respondent Benjamin H.

Supplemental Response

Petitioner DHHR's Reply Brief at page 8 states that "[T]he Department has carefully reviewed *Cherry v. Tompkins* and has been unable to find the sentence Benjamin H. asserts was drawn from that opinion."

Attached to this Supplemental Response is a copy of the *Cherry v. Tompkins* decision, highlighting the sentence originally quoted in Benjamin H.'s Response Brief. The referenced sentence is located on the second page of the attached print, near the top of the right column, as the sentence accompanying footnote 1.

A handwritten signature in black ink, appearing to read 'Bruce Perrone', written over a horizontal line.

Bruce Perrone (WVSB 2865)
Legal Aid of West Virginia
Counsel for respondent Benjamin H.
922 Quarrier Street, 4th Floor
Charleston, WV 25301
343-4481 ext 2127
bperrone@lawv.net

BENJAMIN H.
Respondent,
By Counsel.



**OZELLA CHERRY, et al., Plaintiffs v. ARNOLD R. TOMPKINS, Director, Ohio
Department of Human Services, Defendant**

C-1-94-460

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
OHIO, WESTERN DIVISION**

1995 U.S. Dist. LEXIS 21989

**December 22, 1995, Decided
December 22, 1995, Filed**

DISPOSITION: [*1] Plaintiffs' motion to amend Court's Order of March 31, 1995 GRANTED. Plaintiffs' motion for summary judgment on their substantive due process claim DENIED as moot. Defendant's motion for summary judgment on plaintiffs' substantive due process claim DENIED as moot. Plaintiffs' substantive due process claim in Count Five of their second amended complaint DISMISSED with prejudice and Plaintiffs' amended motion to certify class DENIED as moot.

COUNSEL: For OZELLA CHERRY, RICHARD WILHELMY, WILDA LACH, ELAINE RICHARDS, LYDIA HENDON, SHIRLEY NEAL, FEDELA MARRANO, plaintiffs: Janet Eileen Pecquet, Pro Seniors, Inc - 1, Cincinnati, OH.

For OZELLA CHERRY, RICHARD WILHELMY, WILDA LACH, ELAINE RICHARDS, LYDIA HENDON, plaintiffs: Thomas G Bedall, Pro Seniors Inc, Cincinnati, OH.

For SHIRLEY NEAL, FEDELA MARRANO, plaintiff: Gregory Scott French, PRO Seniors Inc, Cincinnati, OH.

For ARNOLD R TOMPKINS, defendant: Alan Paul Schwepe, Assistant Attorney General, Health and Human Services Section, Columbus, OH.

JUDGES: Herman J. Weber, Judge, United States District Judge.

OPINION BY: Herman J. Weber

OPINION

ORDER

This matter is before the Court upon plaintiffs' motion to amend the Court's Order [*2] of March 31, 1995 (doc. no. 64) to include a ruling on plaintiffs' due process claim under Count Five of their second amended complaint. The parties have fully briefed the issues pertinent to this claim in the motions and memoranda listed in the Court's previous Order (doc. no. 63, pp. 1-2). This matter is also before the Court upon plaintiffs' amended motion for class certification (doc. no. 16), defendant's response (doc. no. 20), and plaintiffs' reply (doc. no. 21). On June 23, 1995, the Court held a hearing during which the parties presented evidence and oral arguments.

Pursuant to *Fed. R. Civ. P. 65(a)(2)*, the Court consolidates plaintiffs' claim for preliminary injunction with a hearing on the merits of plaintiffs' due process claim in Count Five. The Court incorporates in full its previous Order on the merits of plaintiffs' claims (doc. no. 63).

I.

Plaintiffs contend that defendant's amended level-of-care criteria are arbitrary and violate the substantive component of the Due Process Clause by failing to consider whether plaintiffs have medically improved prior to the termination of their qualification for Medicaid benefits or waiver services. Plaintiffs assert that [*3] defendant changed the level-of-care criteria, assessed certain individuals under the new criteria, and determined they were eligible for services. Then, with no change in medical conditions or further amendment of the criteria, defendant denied services to previously eligible individuals

thereby violating their rights under the Substantive Due Process Clause.

Plaintiffs analogize the situation to Social Security cases where courts have required the Secretary of Health and Human Services to demonstrate that a recipient has medically improved prior to terminating their benefits. Plaintiffs emphasize that they are not claiming that defendant may never change the level-of-care criteria; plaintiffs argue that once defendant determines a person qualifies for a certain level of care, he may not terminate their eligibility without showing medical improvement or amending the rules of eligibility.

Defendant contends that the Due Process Clause confers no affirmative right to governmental benefits and therefore plaintiffs' due process claim to continued Medicaid benefits lacks a constitutional basis.

This Court finds that plaintiffs' claims to Medicaid benefits are legally indistinguishable [*4] from due process claims raised by individuals who have lost welfare benefits without an adequate hearing. "Such benefits are a matter of statutory entitlement for persons qualified to receive them. Their termination involves state action that adjudicates important rights.... Relevant constitutional restraints apply as much to the withdrawal of public assistance benefits as to disqualification for unemployment, or to denial of a tax exemption, or to discharge from public employment." *Goldberg v. Kelly*, 397 U.S. 254, 262, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970) (internal citations omitted). In the instant case, plaintiffs who have qualified for Medicaid benefits under defendant's amended level-of-care criteria possess a property right protected by the Due Process Clause. *See id.*; *see also Weaver v. Colorado Dept. Soc. Serv.*, 791 P.2d 1230, 1235 (Colo. Ct. App. 1990).

The Due Process Clause prohibits defendant from terminating this property right in an arbitrary manner. *Daniels v. Williams*, 474 U.S. 327, 331, 88 L. Ed. 2d 662, 106 S. Ct. 662 (1986) ("The touchstone of due process is protection of the individual against arbitrary action of the government") [*5] (quoting parenthetically *Dent v. West Virginia*, 129 U.S. 114, 123, 32 L. Ed. 623, 9 S. Ct. 231 (1889)); *see also Weaver*, 791 P.2d at 1235. The Due Process Clause was intended to prevent states "from abusing [their] power, or employing it as an instrument of oppression." *DeShaney v. Winnebago County DSS*, 489 U.S. 189, 196, 103 L. Ed. 2d 249, 109 S. Ct. 998 (1989) (quoting *Davidson v. Cannon*, 474 U.S. 344, 348, 88 L. Ed. 2d 677, 106 S. Ct. 668 (1986)).

Based upon these principles, "courts have concluded that, if an individual has once been determined to be eligible for social service benefits, due process prevents a termination of those benefits absent a demonstration of a change in circumstances, or other good cause. The pre-

sumption that a condition, once shown to exist, continues to exist..., requires a showing of some change in circumstances if the termination of benefits is not to be deemed arbitrary." *Weaver*, 791 P.2d at 1235. This Court agrees with *Weaver* that the Due Process protections and the reasoning in social service benefits cases apply equally to Medicaid cases. ¹

1 Plaintiffs characterize their claim as arising under the substantive component of the Due Process Clause, which protects individuals from "certain government actions regardless of the fairness of the procedures used to implement them." *Collins v. Harker Heights, Tex.*, 503 U.S. 115, 112 S. Ct. 1061, 1068, 117 L. Ed. 2d 261 (1992) (quoting *Daniels*, 474 U.S. at 331); *see Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1216 (6th Cir. 1992). Several situations create rights under the substantive component of the Due Process Clause including arbitrary action by a state either by legislative or administrative acts. *Pearson*, 961 F.2d at 1216 (citations omitted) (emphasis in original).

Whether plaintiffs' claim is properly brought under the Substantive Due Process Clause, as in *Weaver*, 791 P.2d at 1235, or under the Procedural Due Process Clause, as in *Goldberg*, 397 U.S. at 261-62, the principle plaintiffs seek to vindicate remains the same: A person who qualifies for government benefits may not lose them due to arbitrary state action.

[*6] Defendant correctly states the principal that the liberty component of the Due Process Clause does not confer citizens with an entitlement to government aid. *DeShaney*, 489 U.S. at 196. This, however, does little to assist defendant under the circumstances alleged by plaintiffs because where, as here, statutes create a property right to government benefits, the Due Process Clause prohibits arbitrary decisions to terminate benefits by the state. *See Goldberg*, 397 U.S. at 262; *see also Weaver*, 791 P.2d at 1235.

Ultimate resolution of plaintiffs' claim turns on whether plaintiffs have met their burden of proving that defendant has in fact terminated Medicaid benefits for any individual who previously qualified for benefits without a change in medical condition, or a change in level-of-care criteria, or other good cause. *See Weaver*, 791 P.2d at 1235. During the hearing on June 23, 1995, plaintiffs' counsel asserted that defendant arbitrarily terminated putative class action plaintiffs Rosie Richardson and Julia Robinson's Medicaid benefits in violation of the Due Process Clause. Plaintiff's counsel asserted that these individuals qualified for Medicaid [*7] benefits until defendants terminated their benefits with no change

in their medical conditions and with no change in the level-of-care criteria.

The record in the instance case is void of evidence in support of the facts alleged by plaintiffs. The record indicates that on December 15, 1994 Richardson obtained a favorable ruling in her administrative appeal which overturned a state hearing decision terminating her Medicaid benefits. *See* doc. no. 57, Exhs. 28, 29. These documents do not support the conclusion asserted by plaintiffs -- that Richardson lost benefits in an arbitrary manner -- since the documents indicate that the decision to terminate her benefits was overturned on administrative appeal. The record also fails to indicate that defendant arbitrarily denied Julia Robinson's benefits. On November 17, 1994 a state hearing officer determined that Robinson qualified for Medicaid benefits to support an intermediate level of care. *See id.* at Exhs. 18.

Plaintiffs have pointed the Court to no other evidence in the record indicating that any individual qualifying for Medicaid benefits has lost their benefits without a change in medical conditions or a change [*8] in the level-of-care criteria.

Accordingly, plaintiffs' Substantive Due Process Clause in Count Five of the second amended complaint lacks merit.

III.

Plaintiffs seek an Order establishing a class consisting of all past, present, and future Ohio residents subject to the level-of-care criteria in Ohio Admin. Code §§ 5101:3-3-05, 5101:3-3-06, 5101:3-3-08, and in the interdepartmental memorandum issued March 3, 1994.

Having previously determined that plaintiffs' challenges to defendant's amended level-of-care criteria lack merit, except as to plaintiffs' procedural due process claim, the Court finds that plaintiffs' amended motion for class certification is moot. Plaintiffs' motion is also moot as to those individuals who received constitutionally deficient notice between March 31, 1995 and June 23, 1995 because the parties have reached an agreement regarding the constitutionality of defendant's revised notice. *See* Joint Exhs. A-D, attached. The Court finds that defendant's new notices, *see id.* at Exhs. A, B, satisfy the requirements of the Due Process Clause and therefore do not violate the Due Process Clause.

Accordingly, plaintiffs' amended motion to [*9] certify class is moot.

ORDER

The Court hereby **ORDERS** that;

(1) Plaintiffs' motion to amend the Court's Order of March 31, 1995 (doc. no. 64) is **GRANTED** to the extent plaintiffs seek a ruling on their substantive due process claim under Count five of their second amended complaint, and the Court's previous Order (doc. no. 63) is incorporated in full by reference into this Order;

(2) Plaintiffs' motion for summary judgment on their substantive due process claim (doc. no. 49) is **DENIED** as moot;

(3) Defendant's motion for summary judgment on plaintiffs' substantive due process claim (doc. nos. 13, 47) is **DENIED** as moot;

(4) Plaintiffs' substantive due process claim in Count Five of their second amended complaint is **DISMISSED with prejudice**; and

(5) Plaintiffs' amended motion to certify class (doc. no. 16) is **DENIED** as moot.

The case is terminated on the docket of this Court.

IT IS SO ORDERED.

Herman J. Weber, Judge

United States District Judge

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered. [*10]

IT IS ORDERED AND ADJUDGED THAT Plaintiffs' motion to amend Court's order of March 31, 1995 is **GRANTED**. Plaintiffs' motion for summary judgment on their substantive due process claim is **DENIED** as moot. Defendant's motion for summary judgment on plaintiffs' substantive due process claim is **DENIED** as moot. Plaintiffs' substantive due process claim in Count Five of their second amended complaint is **DISMISSED with prejudice** and Plaintiffs' amended motion to certify class is **DENIED** as moot. This case is terminated on the docket of this Court.

Date: December 22, 1995

STATE OF WEST VIRGINIA
BEFORE THE SUPREME COURT OF APPEALS

PATSY A. HARDY,
Secretary of the Department of
Health and Human Resources,

Petitioner,

vs.

Case No. 101540

BENJAMIN H.,
A Minor, by his next friend and
mother, GEORGEANN H.

Respondent.

Certificate of Service

The undersigned hereby certifies that a true and accurate copy of the foregoing
SUPPLEMENTAL RESPONSE ON BEHALF OF BENJAMIN H. was served upon the parties, by
U.S. mail, first class postage pre-paid, to the following address:

Michael R. Bevers
Assistant Attorney General
Bureau for Medical Services
350 Capitol Street, Room 251
Charleston, WV 25301

All of which was done on June 29, 2011.

A handwritten signature in black ink, appearing to read 'B Perrone', written over a horizontal line.

Bruce Perrone (WVSB #2865)