

**STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE COMMISSIONER OF HEALTH**

In the Matter of the Refusal of  
Blue Plus to Issue Provider  
Contracts to a Designated  
Essential Community Provider

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**RECOMMENDATION**

This matter is before the undersigned Administrative Law Judge for a recommendation to the Commissioner of the Minnesota Department of Health (the Department) on whether she should grant or deny a request for a stay of the Cease and Desist Order that she issued against Blue Plus on November 4, 1999.

On November 30, 1999, the Administrative Law Judge conducted a telephonic hearing on that subject. Audrey Kaiser Manka, Assistant Attorney General, Suite 1200 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2130, participated in the hearing on behalf of the Department. Gregory M. Weyandt, Attorney at Law, Rider, Bennett, Egan & Arundel, 333 South Seventh Street, Suite 2000, Minneapolis, Minnesota 55402, participated in the hearing on behalf of Blue Plus. At the ALJ's request, both parties also made written submissions in support of their respective positions, and the record relating to Blue Plus' request for a stay closed on November 30, 1999.

After considering everything in the record and the arguments of counsel, the Administrative Law Judge hereby respectfully RECOMMENDS to the Commissioner of Health that she DENY Blue Plus' request for a stay of the pending Cease and Desist Order for the reasons set forth in the attached Memorandum.

Dated this 2<sup>nd</sup> day of December, 1999.

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BRUCE H. JOHNSON  
Administrative Law Judge

## MEMORANDUM

### Background

Following an application by Lutheran Social Services of Minnesota (LSS) that was post-marked July 8, 1998, and received by the Department on July 10, 1998, the Commissioner designated LSS an essential community provider (ECP) on October 12, 1998.<sup>[1]</sup> Minnesota law requires Blue Plus to give direct access provider contracts to ECPs.<sup>[2]</sup> Subsequently, Blue Plus informed the Department that it would not be giving LSS a direct access provider contract to LSS, contending that the process by which the Commissioner had designated LSS as an ECP had been legally flawed.<sup>[3]</sup>

On November 4, 1999, the Commissioner issued a Cease and Desist Order directing Blue Plus to cease refusing to offer provider contracts to LSS or to any other ECPs located within Blue Plus' service area. On November 19, 1999, Blue Plus requested a hearing on the Cease and Desist Order. Since Minnesota law gives Blue Plus the right to request a stay of a cease and desist order pending a hearing,<sup>[4]</sup> Blue Plus also requested a stay. The statutory scheme requires that a request for a stay be heard in the first instance by an administrative law judge, who is then required to make a recommendation to the Commissioner on whether to grant or deny a stay. So, this proceeding ensued.

The legislature has addressed the issuance of stays of cease and desist orders directed at health maintenance organizations in Minn. Stat. § 62D.17, Subd. 4 (b), which provides in part:

To the extent the acts or practices alleged do not involve (1) violations of section 62D.08; (2) violations which may result in the financial insolvency of the health maintenance organization; (3) violations which threaten the life and health of enrollees; (4) violations which affect whole classes of enrollees; or (5) violations of benefits or service requirements mandated by law; if a timely request for a hearing is made, the cease and desist order shall be stayed for a period of 90 days from the date the hearing is requested or until a final determination is made on the order, whichever is earlier.

Blue Plus makes two arguments in support of its request for a stay. First, it argues that the Commissioner is required to issue a stay because none of the five exceptions listed in Minn. Stat. § 62D.17, subd. 4 (b) apply here. Second, it presents what is essentially an equitable argument that is largely constructed around the criteria that Minnesota's appellate courts use in determining whether a district court has abused its discretion by granting or denying a temporary injunction. The ALJ will set aside for the moment the question of whether any one of the five exceptions listed in Minn. Stat. § 62D.17, subd. 4 (b) apply and will consider the second argument first.

## **Both the ALJ and the Commissioner Lack Authority to Give Blue Plus Any Equitable Relief**

A stay is essentially the same as a temporary injunction, which is an equitable remedy and an exercise of discretion by a trial court of general jurisdiction.<sup>[5]</sup> Although the decision of whether or not to enter a temporary injunction is discretionary, Minnesota's appellate courts have developed guidance for district courts in determining how and when to exercise that discretion:

A court may grant a temporary injunction when it is apparent that the rights of a party will be irreparably injured before a trial on the merits is reached or where the relief sought in the main action will be ineffectual or impossible to grant. [Citation omitted.]\* \* \* The granting of a temporary injunction serves only to maintain the status quo until the case can be decided on the merits. [Citation omitted.]<sup>[6]</sup>

More specifically, our appellate courts expect district courts to weigh and balance five factors, namely:

(1) The nature and background of the relationship between the parties preexisting the dispute giving rise to the request for relief.

(2) The harm to be suffered by plaintiff if the temporary restraint is denied as compared to that inflicted on defendant if the injunction issues pending trial.

(3) The likelihood that one party or the other will prevail on the merits when the fact situation is viewed in light of established precedents fixing the limits of equitable relief.

(4) The aspects of the fact situation, if any, which permit or require consideration of public policy expressed in the statutes, State and Federal.

(5) The administrative burdens involved in judicial supervision and enforcement of the temporary decree.<sup>[7]</sup>

Much of Blue Plus' argument was directed at attempting to establish a likelihood that it will prevail on the merits of its hearing before the Commissioner. It also argued that if a stay were not issued, it would immediately have to begin a lengthy credentialing process for 83 LSS clinics and 180 individual providers. That, in turn, would involve considerable staff time and resources and cost as much as \$350,000. Blue Plus contends that if it ultimately prevails on the merits, all of that time and money will have been wasted. In other words, Blue Plus argues that when one balances the five factors

that courts commonly consider when deciding whether to issue a provisional remedies, the balance favors its position.

First, neither the Commissioner nor the Administrative Law Judge possess any inherent equitable powers. Any powers that the Commissioner possesses must have been directly given to her by the legislature, and the Administrative Law Judge's powers are essentially derivative of the Commissioner's. If the legislature had explicitly or implicitly given the Commissioner the discretion to decide whether or not to grant a stay in this kind of case, it might be entirely appropriate to look to some kind of balancing test, such as the one used by the courts in determining whether a temporary injunction is appropriate. But far from giving the Commissioner discretion, the legislature actually eliminated any discretion that she might otherwise have by specifying only five narrow situations where she is at liberty to deny a stay. So, here, Blue Plus is entitled to a stay unless this situation fits one of the five where the legislature has permitted the Commissioner to deny one.

### **Blue Plus Has Not Yet Violated a Service Requirement Mandated by Law**

Minn. Stat. § 62D.17 (b) (5) allows the Commissioner to deny a stay where the acts and practices alleged involve “violations of benefits or service requirements mandated by law.” Minn. R. pt. 4688.0050 establishes a service requirement by providing, among other things, that:

[a] health plan company that contracts with providers shall offer a provider contract to all designated ECPs located within the health plan company’s approved plan service area.

The Department argues that Blue Plus has violated that particular service requirement by refusing to contract with LSS. On the other hand, Blue Plus contends that there is no evidence that it has refused to contract with other designated ECPs in its service area, and that since LSS’s designation was legally flawed, it has done nothing to bring it within Minn. Stat. § 62D.17 (b) (5).

The parties’ respective positions on this issue are simply expressions that each believes that it is likely to succeed on the merits. At least as between Blue Plus and the Department, the question of whether LSS is now a legally designated ECP is still an open question because the Commissioner has yet to make a final decision on the merits of that issue. Were the ALJ now to conclude that Blue Plus has violated a mandated service requirement, he would, in effect, be recommending that the Commissioner make a final decision on the merits before a hearing even occurs, thereby making the hearing superfluous.<sup>[8]</sup> The legislature clearly intended for health maintenance organizations to have an effective right to a hearing in disputes such as this. Statutes should be construed to give effect to the legislature’s intent, and interpretations that lead to unreasonable results should be avoided.<sup>[9]</sup> The ALJ therefore concludes that the legislature did not intend that Minn. Stat. § 62D.17 (b) (5) should apply in a situation such as the one presented here.

### **Blue Plus’ Acts Do Affect A Whole Class of Enrollees**

Minn. Stat. § 62D.17 (b) (4) also allows the Commissioner to deny a stay where the alleged acts and practices involve “violations which affect whole classes of enrollees.” The question then is whether Blue Plus’ refusal to contract with LSS has affected any “classes of enrollees.” Chapter 62D does not define “class of enrollees.” Blue Plus therefore argues that whether there is a class of enrollees that has been affected by its decision is a question of fact and that there is currently insufficient evidence in the record to support a finding to that effect. The Department, on the other hand, essentially argues that the existence of an affected class of enrollees is implicit in the Commissioner’s decision to designate LSS as an ECP. It contends that the legislature has elsewhere defined the classes of persons who are to be served by

ECPs, as well as the criteria for determining which organizations may serve those classes of enrollees. The Department's argument goes on to suggest that findings by the Commissioner that LSS meets the criteria for an ECP service provider are not in dispute here. So, to the extent that LSS is not now providing services to those Blue Plus enrollees who also fall within the legislature's description of targeted ECP recipients, "classes of enrollees" are being affected by Blue Plus' actions.

The Department correctly observes that the legislature provided for the designation of ECPs in order to ensure that the particular needs of "high risk and special needs populations,"<sup>[10]</sup> among others, would be adequately met by nonprofit organizations having "a commitment to serve low-income and underserved populations"<sup>[11]</sup> and that have "a demonstrated ability to integrate supportive and stabilizing services with medical care."<sup>[12]</sup> And in Minn. Stat. § 62Q.07, subd. 2 (e), the legislature defined in the following way the "high risk and special needs populations" toward whom providers were to aim ECP services:

"High risk and special needs populations" includes, but is not limited to, recipients of medical assistance, general assistance medical care, and MinnesotaCare; persons with chronic conditions or disabilities; individuals within certain racial, cultural, and ethnic communities; individuals and families with low income; adolescents; the elderly; individuals with limited or no English language proficiency; persons with high-cost preexisting conditions; homeless persons; chemically dependent persons; persons with serious and persistent mental illness; children with severe emotional disturbance; and persons who are at high risk of requiring treatment.

Additionally, on October 12, 1998, the Commissioner specifically found that LSS met the criteria for an ECP provider,<sup>[13]</sup> And in her Cease and Desist Order of November 4, 1999, the Commissioner implicitly found that there are Blue Plus enrollees at whom ECP services need to be aimed.<sup>[14]</sup> Blue Plus has challenged neither fact in its appeal from the Cease and Desist Order, and neither appears to be the subject of a genuine dispute. So, since LSS services are currently unavailable to Blue Plus enrollees falling within the classes that the legislature has defined as being targeted to receive services from ECP providers, there are "classes of enrollees" who are currently being "affected" by Blue Plus' decision not to contract with LSS. Blue Plus also argues that the Department is obliged to show that there are no other ECP providers with which Blue Plus does have direct service contracts available to serve its enrollees. But that is immaterial. To the extent that LSS services are unavailable to those enrollees, their service options are narrowed and they are thus "affected."

For the reasons expressed above, the ALJ concludes that Minn. Stat. § 62D.17 (b) (4) applies to this request for a stay and that the Commissioner is therefore obliged to deny it.

B. H. J.

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<sup>[1]</sup> Exhibit B to the Department's letter submission of November 30, 1999 (hereafter Exhibit B).

<sup>[2]</sup> Minn. Stat. § 62Q.19, subd. 3. (Unless otherwise specified, all references to Minnesota Statutes are to the 1998 edition.)

<sup>[3]</sup> Exhibit A to the Department's letter submission of November 30, 1999 (hereafter Exhibit A) at p. 2.

<sup>[4]</sup> Minn. Stat. § 62D.17, subd. 4 (b).

<sup>[5]</sup> *Dahlberg Bros., Inc. v. Ford Motor Co.*, 137 N.W.2d 314, 321 (Minn. 1965).

<sup>[6]</sup> *Pickerign v. Pasco Marketing Inc.*, 228 N.W.2d 562, 564 (Minn. 1975).

<sup>[7]</sup> *Dahlberg Bros., supra*, 137 N.W.2d at 321-22; see also *OT Industries, Inc. v. OT-tehdas Oy Santasalo-Sohlberg Ab*, 346 N.W.2d 162, 165 (Minn. App. 1984).

<sup>[8]</sup> On the other hand, if the Commissioner concludes after a hearing that LSS was properly designated an ECP, it would then be reasonable to conclude that Blue Plus had been violating a service requirement mandated by law.

<sup>[9]</sup> *In the Matter of the Application of Minnegasco*, 565 N.W.2d 706, 712 (Minn. 1997).

<sup>[10]</sup> Minn. Stat. § 62Q.19, subd. (1).

<sup>[11]</sup> Minn. Stat. § 62Q.19, subd. (2).

<sup>[12]</sup> Minn. Stat. § 62Q.19, subd. (1).

<sup>[13]</sup> Exhibit B.

<sup>[14]</sup> Exhibit A at p. 2.