IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

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| Peg Ball; Cree James, a minor person by and through her grandfather and guardian Bennie James; Jeanne Spinka; Vennetta Graham; Collin Phelan, a minor person by and through his mother Kim Bowman; Judeth Hinton; and Virginia Haskell, as individuals and as representatives of a class of person similarly situated,<br><br>Plaintiffs,<br><br>vs.<br><br>Anthony D. Rodgers, Director of the Arizona Health Care Cost Containment System; The Arizona Health Care Cost Containment System Administration; and the State of Arizona,<br><br>Defendants. | No. CV 00-67-TUC-EHC<br><br>**ORDER** |

A certified class of elderly, physically disabled, and developmentally disabled Medicaid beneficiaries brought this class action against the State of Arizona and director of the Arizona Health Care Cost Containment System ("AHCCCS"), Arizona's Medicaid program. Plaintiffs allege violations of the Medicaid Act, Americans with Disabilities Act ("ADA"), and Rehabilitation Act ("RA"). A bench trial was held in October 2003. (Dkts. 185-187 & 197.) This Court found that AHCCCS was operating in violation of federal law and granted injunctive relief. (Dkts. 212 & 248.) Defendants appealed to the Ninth Circuit.

## I. Ninth Circuit Opinion

On July 17, 2007, the Ninth Circuit affirmed in part, reversed in part, and remanded this Court's August 13, 2004 Findings of Fact, Conclusions of Law, and Order (Dkt. 212). Ball v. Rodgers, 492 F.3d 1094 (9th Cir. 2007). The Ninth Circuit reversed this Court's decision that Arizona violated 42 U.S.C. § 1396a(a)(30)(A), the Medicaid Act's equal access provision, pursuant to Sanchez v. Johnson, 416 F.3d 1051, 1060 (9th Cir. 2005).[1] Ball, 492 F.3d at 1119. The Ninth Circuit also held that 42 U.S.C. §§ 1396n(c)(2)(C) and (d)(2)(C), the Medicaid Act's free choice provisions, confer upon Medicaid beneficiaries individual rights that can be enforced under 42 U.S.C. § 1983. Ball, 492 F.3d at 1119-20. Further, the Ninth Circuit remanded so this Court can "(1) if appropriate make a factual determination as to which federal statutes apply in this case, (2) have the opportunity to decide whether there are other legal bases upon which to grant the Medicaid beneficiaries relief; and (3) amend the terms of the current injunction as needed." Id. at 1117.

The Ninth Circuit instructed this Court to determine "whether Arizona is bound to comply with the [Medicaid Act's] free choice provisions." Id. at 118, n. 33. The Ninth Circuit instructed this Court to consider:

> **first**, whether the state is entitled at this late juncture to oppose the free choice cause of action on the ground that § 1396n does not apply to Arizona... **Second**, if [the district court] concludes that the issue may be raised, [it] must make a factual determination regarding whether Arizona's [home and community based services ("HCBS")] waiver program is, in fact, authorized under § 1315. **Third** even if § 1315 proves to be the program's statutory basis, the district court must separately determine whether Arizona is nevertheless bound to comply with §§ 1396n(c)(2)(C) and/or (d)(2)(C) as a condition of receiving federal funds under § 1315, as the Medicaid beneficiaries maintain.

Id. at 1118 (emphasis added).

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[1]The Ninth Circuit held, in Sanchez, that Medicaid recipients do not have an individual right enforceable under § 1983, pursuant to the Medicaid Act's equal access provision. 416 F.3d at 1062. Sanchez was decided after this Court's August 12, 2004 Order.

The Ninth Circuit also instructed this Court to "revisit the Medicaid beneficiaries' ADA and Rehabilitation Act claims, the two claims that survived summary judgment and were litigated during the bench trial but which the district court did not address in its final judgment," and "determine whether Arizona violated those statutes in its administration of the HCBS program." Id. at 1118.

The Ninth Circuit further instructed this Court to "modify the terms of [the] injunction pursuant to a number of different considerations." Id. at 1119. The Ninth Circuit explained that this Court should amend the Injunction to "reflect the fact that Arizona can no longer be held liable under § 1396a(a)(30)(A)" and to "accord with any statutory or regulatory violations found on remand." Id. at 1119-20.

**II. The Parties' Motions**

Defendants' "Motion for Summary Judgment Upon Remand" and Plaintiffs' "Motion for Judgment on Remanded Issues" are pending before the Court. (Dkts. 331 & 333.) These motions have been fully briefed. The parties' motions are based upon the Ninth Circuit's opinion discussed above.

Defendants contend that they have not violated either the ADA or RA. (Dkt. 331 at 1.) Defendants also argue that AHCCCS was authorized pursuant to the waiver provisions of 42 U.S.C. § 1315,[2] and therefore Defendants are not subject to the terms of the Medicaid Act's free choice provisions in § 1396n.[3] (Dkt. 341 at 2.) Defendants request that the Court "reexamine the record and enter summary judgment in their favor on the 'freedom of choice' argument" in view of the Ninth Circuit's analysis. (Dkt. 331 at 1-2.)

Plaintiffs contend that Defendants have waived any defense that Arizona is not bound to comply with the Medicaid Act's free choice provisions because Defendants never raised the defense "throughout the first seven years of this litigation." (Dkt. 334 at 5.) Plaintiffs also contend that Arizona must comply with the Medicaid Act's free choice provisions

[2] § 1115 of the Social Security Act is codified as 42 U.S.C. § 1315.

[3] § 1915 of the Social Security Act is codified as 42 U.S.C. § 1396n.

because Arizona's Medicaid state plan requires compliance with § 1396n, Arizona's § 1115 waiver allows Arizona Long Term Care System ("ALTCS") beneficiaries to choose to live in the community and choose HCBS as an alternative to institutionalization, and the Centers for Medicare and Medicaid Services ("CMS"), Department of Health and Human Services did not waive § 1396n when it approved Arizona's § 1115 waiver. (Id. at 10.) In addition, Plaintiffs contend that the evidence admitted at trial establishes that Defendants violated the integration mandate of the ADA and RA. (Id. at 16.)

## III. Discussion

### A. The Medicaid Act's Free Choice Provisions

First, the Court must determine whether Defendants are entitled at this late juncture to oppose the free choice cause of action on the ground that § 1396n does not apply to Arizona. Defendants raised this argument for the first time in a supplemental brief filed after argument before the Ninth Circuit. Ball, 492 F.3d at 1117. Defendants argue that Plaintiffs' suit cannot go forward under the Medicaid Act's free choice provisions because Arizona's waiver program was authorized under § 1315 and it is not bound to comply with any provision of § 1396n. (Dkt. 341 at 2-6.) Plaintiffs contend that Defendants waived any defense that Arizona is not bound to comply with the Medicaid Act's free choice provisions because Defendants did not raise the defense during the first seven years of this litigation and made substantive arguments that Arizona was in compliance with these provisions. (Dkt. 334 at 5-6.)

"Under the Federal Rules of Civil Procedure, a party, with limited exceptions, is required to raise every defense in its first responsive pleading, and defenses not so raised are deemed waived." Morrison v. Mahoney, 399 F.3d 1042, 1046 (9th Cir. 2005) (citing Fed.R.Civ.P. 8(c), 12(b), & 12(g)). A defendant may raise a defense of failure to state a claim upon which relief can be granted in a pleading, by motion, or at trial. Fed.R.Civ.P. 12(b) & (h). A defendant may raise an affirmative defense for the first time after filing a responsive pleading only if the delay does not unfairly surprise or prejudice the plaintiff. See Owens v. Kaiser Found. Health Plan, 244 F.3d 708, 713 (9th Cir. 2001) (defendant may raise

an affirmative defense for the first time in a motion for judgment on the pleadings, but only if the delay does not prejudice the plaintiff); Lowerison v. Yavno, 26 Fed.Appx. 720, 722 (9th Cir. 2002) (an affirmative defense is not waived if first raised in pretrial dispositive motions if the plaintiff is not unfairly surprised or prejudiced). The failure to raise a defense is prejudicial if the party against whom the issue is raised may have tried its case differently or advanced distinct legal arguments against the issue. See Sram Corp. v. Shimano, Inc., 25 Fed. Appx. 626, 629 (9th Cir. 2002)(citing U.S. v. Patrin, 575 F.2d 708, 712 (9th Cir. 1978)).

Here, the Complaint was filed January 27, 2000. (Dkt. 1.) Plaintiffs alleged, among other things, that Defendants violated the Medicaid Act's free choice provisions, 42 U.S.C. §§ 1396n(c)(2)(C) and (d)(2)(C). (Dkt. 1 at ¶¶ 13 & 50.) Defendants did not assert that the free choice provisions did not apply to Arizona as an affirmative defense in their Answer or Answer to Interveners' Complaint. (See Dkts. 8 & 22.) Defendants did not file a motion to dismiss the free choice claims for failure to state a claim under these provisions. Defendants did not raise this issue in any pretrial motions, including their Cross-Motion for Summary Judgment. (See Dkt. 82.) Defendants did not raise this argument at the October 2003 bench trial. (See Dkts. 185-187, & 197.) It was not raised in Defendants' Motion for a New Trial. (See Dkt. 214.) Defendants never notified the Court or opposing party that they disputed whether the free choice provisions applied to Arizona. This issue was raised for the first time on appeal.[4]

Defendants' failure to raise this issue earlier has substantially prejudiced the Plaintiffs. If this issue was raised earlier it could have affected the course of the trial. See Kelly v. City of Oakland, 198 F.3d 779, (9th Cir. 1999) (defendant cannot wait until the last brief before the district court to present a defense that if properly placed in issue would have affected the course of the trial). Plaintiffs did not have an opportunity to specifically seek discovery

[4]Generally, a party cannot raise on appeal contentions that were not raised at the district court, because the trial court should have the first opportunity to address the issue. Morrison, 399 F.3d at 1046 (citing Beech Aircraft Corp. v. U.S., 51 F.3d 834, 841 (9th Cir. 1995)).

regarding whether Arizona must comply with the free choice provisions. Plaintiffs also did not have an opportunity to present evidence or legal arguments prior to or at trial that addressed this issue.[5]

Moreover, Defendants' failure to timely raise this issue has caused undue delay in this case because this issue could have been resolved earlier in the litigation. Defendants had ample opportunities to raise this issue before their appeal but failed to do so. The Court finds that Defendants' explanation, for why they failed to raise this issue earlier, is insufficient.[6] Defendants knew or should have known under which provision Arizona's Medicaid program was established and whether they could assert an affirmative defense to Plaintiffs' free choice claim. In addition, Defendants do not cite any authority that supports their position that the issue has not been waived.

The Court finds that Defendants are not entitled at this late juncture to oppose the free choice cause of action on the ground that § 1396n does not apply to Arizona. Therefore, the Court holds that Defendants are liable under the Medicaid Act's free choice provisions, 42 U.S.C. §§ 1396n(c)(2)(C) and (d)(2)(C), pursuant to the Court's August 13, 2004 Findings of Fact (Dkt. 212).

Because the Court finds that Defendants have waived any defense that § 1396n does not apply to Arizona, the Court need not address whether Arizona's HCBS waiver program is authorized under § 1315 nor determine whether Arizona is bound to comply with the free choice provisions as a condition of receiving federal funds.[7] See Ball, 492 F.3d at 1118.

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[5]This issue was briefed for the first time in Defendants' Motion for Summary Judgment and Plaintiffs' Motion for Judgment on Remanded Issues. (Dkts. 331 & 334.)

[6]Defendants merely assert that "[i]t only became clear that the statute did not apply when the Ninth Circuit asked for supplemental briefing on the 'freedom of choice' issue and the [D]efendants' in-house counsel pointed out that the AHCCCS waiver is under § 1115 rather than § 1396n. We thereupon advised the Ninth Circuit." (Dkt. 341 at 7.)

[7]The Ninth Circuit instructed this Court to address these two additional issues, "if it concludes that the issue may be raised." Ball, 492 F.3d at 1103. The Court construes this instruction to mean that the Court should address these two additional issues only if it finds

**B. Americans with Disabilities Act and Rehabilitation Act**

Next, the Court must determine whether Arizona violated the ADA and RA in its administration of the HCBS program. Although Plaintiffs' ADA and RA claims survived summary judgment, the Court failed to explicitly address these claims in its August 13, 2004 Order. (See Dkt. 212.) The Court has considered the evidence, arguments, and objections from the October 2003 bench trial (Dkts. 190, 192, 193-96), the Court's August 13, 2004 Findings of Fact (Dkt. 212), and the parties' briefs filed after remand (Dkts. 331-35, 339, 340-42, 344-46, & 351).

Title II of the ADA states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. The RA, similarly, states that "[n]o otherwise qualified individual with a disability in the United States... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance..." 29 U.S.C. § 794(a). Because there is no significant difference in analysis of the rights and obligations created by the ADA and the RA, the Court will address these claims together. See Zukle v. Regents of Univ. of Cal., 166 F.3d 1041, 1045 n. 11 (9th Cir.1999).

To prove that a public service or program violates the ADA or RA, a plaintiff must show: (1) she is a "qualified individual with a disability;" (2) she was either excluded from participation in or denied the benefits of a public entity's services, programs, or activities or was otherwise discriminated against by the public entity; (3) the service, program, or activity receives federal financial assistance; and (4) such exclusion, denial of benefits, or discrimination was by reason of plaintiff's disability. Townsend v. Quasim 328 F.3d 511,

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that Defendants have not waived the defense and may contend that § 1396n requirements do not apply to Arizona.

516 (9th Cir. 2003); see also Duvall v. County of Kitsap, 260 F.3d 1124, 1135 (9th Cir. 2001) (listing factors to establish claim under the RA).

The unjustified institutional isolation of persons with disabilities is "properly regarded as discrimination based on disability" because it perpetuates unwarranted assumptions and diminishes participation in everyday life activities. Olmstead v L.C. ex rel. Zimring, 527 U.S. 581, 597 & 600-01 (1999). Further, "denying individuals a choice between institutional and home-based care violates the ADA non-discrimination policy since it unnecessarily segregates the individuals." Makin ex rel. Russell v. Hawaii, 114 F.Supp.2d 1017, 1034 (D. Haw. 1999) (citing Cramer v. Chiles, 33 F.Supp.2d 1342, 1354 (S.D.Fla. 1999)).

Here, the Plaintiffs are qualified individuals with disabilities. (See Dkt. 212, Findings of Fact, ¶¶ 2, 4, 5.) AHCCCS is a public entity, which receives federal funding to provide health care services to Medicaid recipients in Arizona. (Id. at ¶ 1.) AHCCCS failed to properly monitor the HCBS program. (Id. at ¶¶ 58-60.) AHCCCS repeatedly failed to provide the personal care services required in Plaintiffs' case management plans. (Id. at ¶¶ 62-64; Pls' Trial Exhs. 115 & 118.) There was a shortage of attendant care workers, which prevented Plaintiffs from receiving all of the needed and authorized services in their care plans. (Dkt. 212 at ¶¶ 38-40, 49, 62-64.) Plaintiffs were unable to participate in everyday life activities, such as bathing, dressing, cleaning, and shopping, because they did not receive the services they needed. (Id. at ¶¶ 28, 33-50.) It was the policy of AHCCCS that HCBS beneficiaries assume the risk, by choosing to remain at home rather than being institutionalized, that services that they are dependant upon will not be delivered. (Id. at ¶ 61.)[8]

Plaintiffs depend upon the services provided by the HCBS program in order to maintain their social and economic independence. (See, e.g., Dkt. 193 at 33-37.) AHCCCS' failure to provide Plaintiffs with the necessary services caused Plaintiffs to suffer grave

[8]The Court does not offer an opinion, at this time, regarding whether these deficiencies have been corrected or whether these practices continue today.

consequences, such as complete immobility, hunger, thirst, muscle aches, and other physical and mental distresses. (Dkt. 212 at ¶ 64.) AHCCCS' failure to provide Plaintiffs with the necessary services threatened Plaintiffs with institutionalization, prevented them from leaving institutions, and in some instances forced them into institutions in order to receive their necessary care. (See, e.g., Dkt. 193 at 37, 41, & 106.)

AHCCCS' failure to prevent unnecessary gaps in service and properly monitor the HCBS program improperly discriminated against persons with disabilities by limiting their ability to maintain their social and economic independence and depriving them of a real choice between home and institutional care. AHCCCS' failure to provide adequate services to avoid unnecessary gaps in service and institutionalization was discriminatory, and AHCCCS' discrimination was by reason of the Plaintiffs' disabilities. See Olmstead, 527 U.S. at 597 (unjustified isolation is "properly regarded as discrimination based on disability")

Therefore, the Court finds that Defendants' actions discriminated against Plaintiffs based upon their disabilities in violation of the ADA and RA.

**C. Injunction**

Defendants can no longer be held liable under the Medicaid Act's equal access provision, based upon the Ninth Circuit's decision. Ball, 492 F.3d at 1119. The Court has found that Defendants are liable under the ADA, RA, and the Medicaid Act's free choice provisions. Therefore, the Court must modify the Injunction accordingly. See id. The Court modifies the Injunction,[9] as follows:

(1) the Court strikes any reference to the Medicaid Act's equal access provision, 42 U.S.C. § 1396a(a)(30)(A), in its August 12, 2004 Findings of Fact, Conclusions of Law, and Order (Dkt. 212); and

[9]The Court's June 28, 2005 Order modified the Court's original August 12, 2004 Injunction. (Dkt. 248.) The Court's December 23, 2008 Order extended the Injunction through June 30, 2009. (Dkt. 389.)

(2) the Court incorporates by reference the Court's August 12, 2004 Order (Dkt. 212), June 28, 2005 Order (Dkt. 248) and December 23, 2008 Order (Dkt. 389) with this Order.

The previous injunctive remedies remain the same, although the legal basis on which Defendants are liable has been modified. The Court finds that the relief granted in the Injunction helps to ensure that Defendants are given an actual choice between in-home and institutional care and prevent violations of the ADA, RA, and Medicaid Act's free choice provisions.

Because it is unclear whether Defendants have fully complied with the Court's Injunction, the Court cannot make a determination, at this time, regarding whether to further revise the Injunction and extend its jurisdiction beyond June 30, 2009. (See Dkts. 387-89.)

**IV. Conclusion**

In conclusion, the Court finds that Defendants waived any defense that § 1396n does not apply to Arizona. Defendants are, therefore, liable under the Medicaid Act's free choice provisions, 42 U.S.C. §§ 1396n(c)(2)(C) and (d)(2)(C), as previously stated in the Court's August 12, 2004 Order. See Ball, 492 F.3d at 1101 n. 9 (noting that this Court's judgment rests in part on the free choice provisions). The Court further finds that Defendants are liable under the Americans with Disabilities Act, 42 U.S.C. § 12132, and the Rehabilitation Act, 29 U.S.C. § 794. Based upon these findings, the Court modifies the Injunction as necessary and withholds judgment on whether to further modify the Injunction.

Accordingly,

**IT IS ORDERED** that Plaintiffs' Motion for Judgment (Dkt. 333) is **granted** according to this Order.

**IT IS FURTHER ORDERED** that Defendants' Motion for Summary Judgment (Dkt. 331) is **denied**.

**IT IS FURTHER ORDERED** striking any reference to the Medicaid Act's equal access provision, 42 U.S.C. § 1396a(a)(30)(A), in the Court's August 12, 2004 Findings of Fact, Conclusions of Law, and Order (Dkt. 212).

**IT IS FURTHER ORDERED** that the Court incorporates by reference the Court's August 12, 2004 Order (Dkts. 212), June 28, 2005 Order (Dkts. 248) and December 23, 2008 Order (Dkts. 389) with this Order.

**IT IS FURTHER ORDERED** that a Status Conference is set for **Monday, June 1, 2009 at 3:00 p.m.** to discuss, among other things, Defendants' monthly Gap Reports, whether Defendants have complied with the Injunction (Dkts. 212 & 248), whether the Court should extend its jurisdiction beyond June 30, 2009 (Dkts. 389), and whether the Court needs to further revise the Injunction in light of this Order and/or any changes in circumstances.

DATED this 24th day of April, 2009.

Earl H. Carroll
United States District Judge