IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DAVID GROOMS, Plaintiff, v. BARRY S. MARAM, Director, Illinois Department of Healthcare and Family Services Defendant.	)	No. 06 C 2211 Judge Rebecca Pallmeyer Magistrate Judge Martin C. Ashman

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON AFFIRMATIVE DEFENSES

I. INTRODUCTION AND FACTUAL BACKGROUND

This is an action brought by an individual plaintiff under Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §12132, and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a). The Complaint (attached hereto as Exhibit A) alleges a violation of the "integration mandate" as interpreted by the United States Supreme Court in *Olmstead v. L.C. ex rel. Zimring,* 527 U.S. 581, 592 (1999), which requires that an agency " 'administer its services, programs and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.' "

David Grooms, the Plaintiff, is a Medicaid recipient who, according to his Complaint, has Glycogen Storage Disease. Prior to his 21st birthday, David received Medicaid services in his home pursuant to the Medically Fragile and Technology Dependent ("MFTD") waiver program, at a cost of approximately $17,000, including $1,000 for respite services. Upon turning 21, David "aged out" of that waiver and sought benefits under the Illinois Home Services Program.

The State has elected to fund the Home Services Program through a Medicaid waiver, the Illinois Persons with Disabilities ("PWD") waiver, which is operated by the Division of Rehabilitation Services ("DRS") of the Department of Human Services ("DHS"). On his 21st birthday, David's benefits were reduced by approximately one half, to $8,660.

Although DHS operates the Home Services Program and the PWD waiver, the Department of Healthcare and Family Services ("HFS") is the lead Medicaid agency for the State of Illinois. 42 U.S.C. § 1396a(a)(5). David brought this action against Barry Maram in his official capacity as Director of HFS, to enjoin HFS from continuing to impose the rate cap that resulted in the reduction of his benefits when he reached the age of 21. That cap, called the Service Cost Maximum ("SCM"), imposed by HFS, is based on a nursing facility level of care for all persons in the PWD waiver.

Federal law requires that, as to every Medicaid recipient receiving services, only those services that are necessary and appropriate may be paid for by the State with Medicaid funds. See 42 U.S.C. 1396. Further, services provided in the home pursuant to waiver programs must be cost-neutral, i.e., the cost to the State must be equal to or less than the cost of serving the recipient in the institution that would provide him or her the appropriate level of care. *See* 42 C.F.R. § 441.302(e), *Radaszewski v. Maram*, 383 F. 3d. 599, 602 (7th Cir. 2004).

Pursuant to the Seventh Circuit's decision in *Radaszewski*, to prevail in this action, David will be required to prove that the level of care that he actually needs exceeds the level of care that Defendant has selected (nursing facility care at the exceptional care rate), and that the cost of serving his actual needs in an appropriate institution would be greater than the costs of providing his services in the home. Once that is proven, David claims, he will be entitled to be served in his home at Medicaid expense pursuant to the ADA's integration mandate.

These are matters that David intends to prove at trial, at which time Defendant will have the opportunity to present evidence to refute David's claims. David does not seek a ruling on those issues by this motion, as he recognizes that they are disputed and will require a trial.

In addition to denying David's allegations and denying that he is entitled to relief based on his claims, Defendant has interposed Affirmative Defenses that he claims defeat David's action even if David makes the above showings. (*See* Defendant's Amended Answer and Affirmative Defenses to Complaint, attached hereto as Exhibit B.) Defendant claims that providing relief to David in this case would result in a fundamental alteration to the State's Medicaid Program (Defendant's Affirmative Defense No. 1)) and would be inequitable because it would result in an undue burden on the State's resources needed to meet its responsibilities to other persons (Affirmative Defense No. 2.). Plaintiff's motion for partial summary judgment addresses these defenses only.

A motion for partial summary judgment is an appropriate vehicle for obtaining pre-trial dismissals of affirmative defenses. See *Petroff Trucking Co, Inv. V. Envirocon, Inc.,* 2006 WL 293866 (S.D. IL 2006) ("District Courts within the Seventh Circuit 'routinely entertain motions for partial summary judgment seeking the dismissal of affirmative defenses. *Wildey v. Springs*, 1993 WL 350195 (N.D. Ill. 1993).'").

Defendant has the burden of proof on his affirmative defenses. *Dole v. Chandler,* 438 F. 3d 804 (7th Cir. 2006). As we show below, based on the undisputed facts that are material to Defendant's Affirmative Defenses 1 and 2, and the applicable law, Defendant cannot meet his burden of proof, and his affirmative defenses should be dismissed with prejudice as a matter of law.

II. ARGUMENT

THERE IS NO MATERIAL DISPUTE OF FACT REGARDING DEFENDANT'S FUNDAMENTAL ALTERATION AND INEQUITABLE BURDEN AFFIRMATIVE DEFENSES BASED ON COST, AND THEY SHOULD BE REJECTED AS A MATTER OF LAW

Defendant cannot meet his burden to prove a fundamental alteration or inequitable burden defense based on costs to the State. Defendant has asserted two affirmative defenses based on cost. Defendant contends that, if awarded, the relief sought by David Grooms would, by reason of the resultant cost to the State of Illinois, result in a fundamental alteration to the State's Medicaid Program (Affirmative Defense Number 1) and that it would be inequitable because it would constitute a burden on the State's resources that would unfairly impact its duties to other citizens (Affirmative Defense Number 2). Defendant's affirmative defenses cannot be sustained as a matter of law.

Defendant appears to be claiming that the relief David seeks would, if granted, have a two-fold impact: first, that many current nursing facility residents would also seek to be served in the community and Defendant would be required to pay for their services in the community at a significantly higher cost to HFS than the cost of the services provided in their nursing home placements; and second, that all of the current recipients of PWD waiver services in the home would seek--and would receive-- services at a cost to the State that exceeds their currently approved rate by the same amount (196%) that David Grooms' approved rate would be increased were he to prevail in this action.

The Menenberg Report

In support of his affirmative defenses, Defendant has disclosed the report of a purported expert, Todd Menenberg. ("Men. Rept.," attached hereto as Exhibit C). In his report, Mr. Menenberg described his assigned inquiry as follows:

> "I was asked by counsel to HFS to quantify the economic impact on the cost of the State's current Persons with Disabilities Waiver program, assuming David were to prevail on his request for additional home services *and then other individuals were then also able to access additional home services.* The two populations I was asked to evaluate are:
>
> 1) Current nursing facility residents who potentially would move from nursing facilities to community-based settings and receive services through the Persons with Disabilities Waiver program; and,
>
> 2) Current Persons with Disabilities Waiver recipients who currently use services at a cost that is *less than their SCM* [Service Cost Maximum]."

(Men. Rpt. p. 6) (emphasis supplied).

The Report further states:

> "[W]e were asked to specifically quantify the following:
>
> 1) the cost for additional individuals that [sic] would move from nursing facilities into the community, who would access Medicaid facilities though the Persons with Disabilities Waiver, and
>
> 2) the additional cost for current Persons with Disabilities Waiver recipients that [sic] would access additional HCBS services up to (and potentially in excess of) their SCMs."

(Men. Rept. p. 8)

As to this second group, the Report stated that Menenberg was

> "asked to calculate the cost that would be incurred if each service plan were increased by 196%, [1] which represents the difference between the

[1] Reading the report and its appendices, we think it is accurate to state that Mr. Menenberg meant to state that the potential cost would be 196% of the current cost, not that it would be increased by 196%. *See* Men. Rept. Exhibit 2.

> cost of services that David requested and the cost of the service plan developed for David for the Persons with Disabilities Waiver)."

(Men. Rept. p. 8-9)

Menenberg further states in his report regarding this group:

> "[t]he objective of this part of my analysis was to estimate the potential additional cost if the limitations imposed by the DRS utilization review and service plan development process were eliminated and the Persons with Disabilities Waiver recipients were able to receive services up to their SCMs, and beyond."

(Men. Rept. p. 8-9)

The Report indicates that Menenberg calculated that Group 1, consisting of nursing facility residents, would total approximately 1100 individuals.[2] He concluded that the additional cost of serving this group in the community, when contrasted with their nursing home costs, would be $33 million at January 2007 rates. (Men. Rept. p. 12).

For Menenberg's Group 2, current PWD waiver recipients, Menenberg concluded that the "additional cost" to the State of serving them in their homes at 196% of the cost of their current service plans would be between $206 million and $310 million annually. (Men. Rept. p. 13).

As we demonstrate below, Mr. Menenberg's Report is based on a misapprehension of the relief that David is actually seeking in this case, and its conclusions depend upon two legally erroneous assumptions. When the erroneous legal assumptions are removed from the analysis, and the report is viewed in light of the relief David Groom s actually seeks, Defendant's fundamental alteration and inequitable burden defenses collapse.

[2] Plaintiff disputes the accuracy of Menenberg's calculation that 1100 current nursing facility residents would seek to be served in the community. However, for purposes of this motion and the analysis contained herein, Plaintiff assumes that this number is correct.

Group 1: Nursing Facility Residents

As noted above, Menenberg concludes that, if David Grooms prevails in this case, 1100 current nursing facility residents would be permitted to leave the nursing home to be served in the community, at a rate higher than the rate Medicaid was paying the nursing facility, for a total increased cost to the state of about $33 million. This conclusion is fatally flawed.

First, it necessarily presumes that David's relief would include an injunction barring assessment of cost neutrality. But David seeks no such injunction, either for himself or for others. Rather, he seeks only that his current Service Cost Maximum, the "cap," which has been arbitrarily based on nursing home level of care for everyone regardless of need, be lifted if he proves that the actual level of care that he needs is a greater than a nursing home level of care. Then, *if and only if* he demonstrates that the cost of the home services he actually needs is less than the cost of providing the same services and care he requires in the *appropriate* institution, e.g. hospital, he would be entitled to receive those services in the home. *See, e.g., Sidell v. Maram,* No. 05-1001, p. 13-14. (C.D. Ill May 14, 2007)(attached hereto as Exhibit D).[3]

[3] Contrary to the views espoused by Defendant, under the ADA cost neutrality is not assessed by resort to the requirements of the particular waiver under which HFS elects to deliver services. Thus, although the waiver application by HFS in this case limited the waiver to nursing facility rates, as the Seventh Circuit in *Radaszewski* made clear, and the *Sidell* court reiterated, neither federal nor state law requires that a waiver application for adult home services be limited to "nursing facility" rates: "What mattered to the Court in *Radaszewski* was cost. Since the cost to the State of institutionalizing the disabled [person] could be even more than the cost of in-home care, it did not matter that the State did not have an explicit waiver program in place for 'hospital level care.'" *Sidell v. Maram,* No. 05-1001 (C.D. Ill., May 14, 2007) at p. 15. In *Sidell*, the State had argued that Gretchen Sidell did not "qualify" for the Adult Disabled Waiver Program because she was "actually seeking a waiver program for hospital level care reimbursement," and "Illinois does not offer a waiver program for Hospital level care." *Id.* The Court in *Sidell* rejected this argument, ("the fact that Gretchen may require "hospital level care" does not mean that she is ineligible for the HSP program"), and it should be rejected here.

Menenberg's conclusions assume that his Group 1 recipients would not be subject to the same cost neutrality assessment that David is prepared to meet.[4] This assumption is legally unsupportable. Indeed, David acknowledges that he himself cannot prevail without showing cost-neutrality as to the appropriate institutional level of care with all needed services. Defendant may not ignore cost neutrality either as to its selected 1,100 nursing home residents or as to David himself. Accordingly, Defendant cannot base his defense on cost projections that do exactly that.

What the Menenberg report leaves out is this: If the appropriate level of care for the nursing facility residents addressed in the Menenberg report is in fact a nursing facility, then for each and every person whose cost of care in the home would exceed the cost of serving him or her in the nursing facility, waiver services would appropriately be *denied*. Only those who could be served in the community at the same or lower cost as the cost of serving them in a nursing facility (regardless of the existence of a "cap"), i.e. in a cost-neutral manner, would have to be approved for waiver services under *Radaszewski*. The "additional" cost to the State of serving that group in the home would therefore be $0, not $33 million.

In sum, Menenberg's conclusion that serving current nursing home residents in the home would be required if David prevails in this case, and would cost the state an additional $33 million, depends upon the State ignoring federal law by ignoring the cost neutrality requirement. David Grooms does not seek, and this Court could not countenance, such a result.

[4] Alternatively, one could postulate that Defendant has asked Menenberg to assume that everyone in Group 1 actually needs and can prove that they, too, actually need a higher level of care than they are receiving, e.g. a hospital level of care. But nothing in the expert Report or in Defendant's pleadings suggest that Defendant believes that current nursing home residents are being inappropriately or inadequately served in the facilities in which they reside.

Group 2: Current Persons with Disabilities ("PWD") Waiver Recipients

As noted above, Menenberg estimates that, if the relief sought by David Grooms in this action were awarded, all of the current recipients of waiver services under the Persons with Disabilities Waiver would receive benefits at 196% of their current benefits, thus subjecting the State to an additional cost of $258-310 million annually. This contention also depends upon a legally unfounded assumption, i.e. that relief in this case would require the State to abandon "utilization review" and the medically necessary requirement of waiver services and would provide services to everyone who asks without regard to actual individual need.[5]

Even if, for purposes of his motion, Plaintiff assumes that every current recipient of PWD waiver services would, after learning of a victory for David in this case, apply for a higher level of services, lifting the SCM "cap" could not lawfully result in increased services for *any* of those individuals unless the recipients proved what David is prepared to prove in this case. That would be that:

1) their actual level of need is higher than can be met by benefits provided under the current cap on their benefits; *and*

2) the cost of meeting their actual level of need is equal to or less than the cost of providing them the appropriate institutional level of care.

Thus, only if the Defendant jettisoned the "needs" assessment and medical necessity altogether, i.e. "utilization review," and gave everyone whatever they asked for, would the financial horrors proclaimed in the Menenberg report conceivably occur.

[5] The factual premise of the analysis (that virtually all current recipients would seek to increase their benefits, and would ask for nearly twice, i.e. 196% their current levels) is itself unsupported by any studies or other foundation and thus should be rejected.

Plaintiff submits that the relief he seeks in this case would actually have little or no effect on other current waiver recipients. It is utterly illogical to assume that anyone who is currently receiving, without objection, benefits at a level *lower* than their current SCM would, as a result of lifting a cap that has to date had no adverse effect on him, suddenly seek a higher level of benefits because David's cap was enjoined. Moreover, unless and until any additional benefits approved by the State as a result of such request exceeds the individual's previous SCM, the lifting of the cap could not be the cause of the "increase." Finally, even if a Group 2 recipient seeking an increase proved a level of need that exceeds the rate previously paid for home services, and even if that new rate exceeded his former SCM, the State would be obliged to deny him the increase to the extent it was not cost-neutral as to the appropriate institutional cost. Accordingly, unless each and every current PWD waiver recipient actually needs and seeks a level of care higher than a nursing facility level of care, the costs projected by Menenberg could never materialize.

In sum, even if this court accepts Mr. Menenberg's assumption that all of the PWD waiver recipients would seek to raise their level of benefits to 196% of their current levels, the conclusion that the State would incur the cost of paying benefits at that level as a result of David Groom prevailing in this lawsuit is legal error. This is because the Report proceeds not only on the unproven and illogical assumption that all recipients would seek services that they do not currently receive, but, more important, on the assumption that the Defendant would in each and every case pay benefits without regard to whether they were necessary and appropriate or cost-neutral, in violation of the law.

III. CONCLUSION

Defendant has taken the situation of one of a tiny minority of the most medically complex of recipients, equated his claimed needs with the aspirations of every waiver recipient and many current nursing home recipients, and used that "equation" to deny David Grooms his much-needed services. Defendant does not suggest or believe that every recipient actually has the same needs or needs as serious as those of David. Nevertheless, to buttress his "sky is falling" defense, Defendant assumes that, without a benefit cap, every recipient will ask for--and receive-- the same level of benefits David seeks in this case, regardless of need. He can offer no evidence to support the assumption that they will ask, and—more important—no legal basis for assuming they would receive, those benefits.

David Grooms does not seek the enjoining or abandonment of either the cost neutrality requirement or the "utilization review" needs assessment and medical necessity requirement, but, to the contrary, intends to be held to his burden of proof on those very issues. Likewise, should David Grooms prevail in this case and obtain the relief he seeks in this single-plaintiff case, other recipients seeking additional benefits based on the ADA would be subject to those same requirements. Defendant's cost projections, which depend entirely on those critical requirements being ignored, must be rejected. Defendant cannot therefore meet his burden of proof on his affirmative defenses, and they must be rejected as a matter of law.

WHEREFORE, for the foregoing reasons, Defendant's Affirmative Defenses 1 and 2 should be rejected as a matter of law and dismissed with prejudice.

Respectfully Submitted,

KAREN I. WARD

/s/ Karen I Ward
One of the Attorneys for Plaintiff

Karen I. Ward
Byron L. Mason
Steven Giebelhausen
Laura J. Miller
Barry Taylor
EQUIP FOR EQUALITY, INC.
20 North Michigan Avenue, Suite 300
Chicago, Illinois 60602
Tel: (312) 341-0022
Fax: (312) 341-0295