1991 WL 11257337 (Colo.) (Appellate Petition, Motion and Filing)
Supreme Court of Colorado.

Duc VAN LE, on behalf of himself and the class of persons similarly situated, Plaintiff-petitioner,
v.
Irene M. IBARRA, in her official capacity as the Executive Director of the Colorado Department of Social Services; Henry Solano, in his official capacity as Executive Director of the Colorado Department of Institutions; Robert Bauserman, Robbie L. Bean; Susanne D. Dosh; Dennis Fisher; Mary Kyer; Peggy Stokstad; John P. Stone and Richard F. Walker in their official capacities as members of the Colorado Board of Social Services, Defendants-Respondents.

No. 91SC189.
March 21, 1991.

Petition for Certiorari to Court of Appeals Before Judgment, in Accordance with C.A.R. 50

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***1** Pursuant to C.A.R. 50(b) and 53 this Honorable Court is respectfully requested to review a very important welfare appeal in the mental health area now pending in the Colorado Court of Appeals. Petitioners prevailed in the District Court. The Assistant Attorney Generals representing the appealing state defendants have authorized petitioner's counsel to inform this court that respondents have no objection to this Court granting this Petition. Respondents' opening briefs are not due in the Court of Appeals until April 15, 1991.

INTRODUCTION

Petitioner Duc Van Le brought this action on behalf of himself and a class of all similarly situated persons. The class was certified by the trial court and defined as including all:

Low income mentally ill residents of Colorado who, because of their mental illness, qualify for skilled ***2** or intermediate care under Title XIX of the Social Security Act, but who have been and are being deprived by the State of Colorado of home and community based services under Title XIX of the Social Security Act, solely on the basis of their mental illness, although such services are provided to physically disabled adults, and who claim that this deprivation violates their rights under the Social Security Act, the Rehabilitation Act of 1973 and the Fourteenth Amendment of the United States Constitution.

This action was filed in 1988 to challenge the conduct of the Executive Directors of the Colorado Department of Social Services and the Colorado Department of Institutions as well as the members of the Colorado Board of Social Services who since 1985 have discriminated against petitioners by depriving them of Home and Community Based Services (HCBS) necessary to meet their needs *solely* on the basis of petitioners' mental disabilities. From 1982 to 1985 respondents did offer such services to class members under the identical federal waiver program involved in this case.

The Trial Court issued its decision on August 23, 1990 in petitioners' favor finding that the defendants had violated their rights under the federal and state Medicaid Acts, Section 504 of the Rehabilitation Act of 1973, and the Equal Protection and due process Clauses of the Fourteenth Amendment to the United States Constitution.

Pursuant to these findings, the Court enjoined the state defendants from continuing to deny home and community based benefits to petitioners solely on the basis that their primary diagnosis is mental illness, and ordered the state defendants to provide the same home and community based services benefits to plaintiff and class members as the state is currently providing ***3** to the elderly, blind, and physically disabled. The court below did, however, grant a post trial stay of its judgment awarding the class substantial equitable relief pending the outcome of appeals.

1. ADVISORY LISTING OF THE ISSUES TO BE PRESENTED FOR REVIEW

On November 9, 1990 defendants filed their Notice of Appeal. In this notice, at page 3, state defendants wrote that the issues they will be raising on appeal are the following:

"a. Whether the equal protection clause forbids Colorado to offer particular services to physically disabled individuals without offering precisely the same services to the mentally ill.

b. Whether Section 504 of the Rehabilitation Act forbids Colorado to offer particular services to the physically disabled individuals without offering precisely the same services to the physically disabled."

2. THE OPINION OR JUDGMENT OF THE DISTRICT COURT

Defendants have appealed from the fourteen page Decision and Order of the District Court issued on 8/23/90 by the Honorable Edward E. Carelli as well as from his October 16, 1990 Order resolving all post trial motions. These rulings are included in the Appendix. Also included in the Appendix is the extensive, 57 paragraph Stipulated Facts agreed to by the parties prior to trial. This Stipulation was extensively referred to or quoted from by the District Court in its 8/23/90 Decision and Order.

3. GROUNDS ON WHICH JURISDICTION OF THE SUPREME COURT IS INVOKED

As demonstrated in the next two sections of this petition, this case meets each of the three alternative grounds for jurisdiction and the discretionary grant of certiorari to the Court of Appeals before judgment under C.A.R. 50(a)(1), (2), and (3). Jurisdiction is also invoked pursuant to C.A.R. 21 and ***4** Section 3, Article VI of the Colorado Constitution as well as C.R.S. Section 13-4-109(3). In the alternative to C.A.R. 50, petitioner requests that this Court grant appropriate procedural relief so as to allow for a direct review and an immediate determination by this Court of the issues raised by this Petition, including specifically relief contemplated by the other sources of jurisdiction just cited.

4. STATEMENT OF THE CASE

An accurate statement of this largely agreed upon or stipulated case is most readily obtained by reference to the extensive pretrial Stipulated Facts agreed to by the parties and taken as true by the District Court for decisional purposes.

The particular facts pertinent to understanding Duc Van Le's individual history and claim are set forth in detail in Stipulated Facts 1-20. In essence these stipulations establish that this South Vietnamese refugee suffered severe emotional trauma as a result of being precipitously separated from his family. This trauma led to severe depression with psychotic features culminating in a suicide attempt. Duc Van Le was placed in a nursing home and briefly in Fort Logan. He is a diagnosed paranoid schizophrenic. He has severe learning disabilities, speech impediments in his native language and has tartive dyskinesia -- a motor defect. He suffers from hallucinations, anxiety and depression, which have made him a danger to himself and others.

In August, 1988 Duc Van Le applied for HCBS services on the basis that he required 24 hour five days a week skilled nursing supervised care, just like all other HCBS recipients. Stipulation ***5** 12. His application was duly processed by the Colorado Foundation for Medical Care (CFMC). As detailed in Stipulations 13 and 14, the CFMC concluded and the ALJ Moeller found that Duc Van Le met all the threshold medical requirements for Medicaid reimbursement for HCBS services and that he was also financially qualified for the HCBS program.

However, *solely* because Duc Van Le is mentally ill, the Colorado Department of Social Services, which previously (in 1985) had terminated such benefits for the mentally ill, denied Medicaid reimbursement for HCBS for Duc Van Le. Stipulation 16.

Duc Van Le timely appealed and the ALJ ruled that, although he was medically and financially qualified for HCBS under the screen performed by CFMC, there is no reimbursement for HCBS in Colorado for individuals designated as mentally ill. Stipulation 19.

Defendants have also stipulated below that they have denied at least 28 individual class members HCBS services in addition to Duc Van Le since 1987. They also admitted that others, for whom they cannot locate records, have been similarly denied. They further have stipulated that *635* persons whose primary diagnosis is mental illness currently live in skilled and intermediate nursing homes. Defendants have also acknowledged that their ?? termination of the HCBS program for mentally ill persons has deterred class members from even applying. Stipulations 45-49.

Defendants have overtly admitted in Stipulation 45 that there is *no alternative state program* which provides for Duc Van Le and the class of mentally ill persons he represents, the same ***6** HCBS services which are currently provided to elderly, blind and physically disabled persons.

Of critical import and as the District Court found, defendants have even stipulated that Duc Van Le and members of the plaintiff class by definition "meet all of the financial and medical screens for HCBS services" but are being denied these services *"solely on the basis that their primary diagnosis is mental illness."* Stipulation 46. Indeed appellants have agreed in Stipulation 17 that if Duc Van Le's admitted need for HCBS services *"had been based on physical disability instead of mental disability, he would have been granted HCBS services."*

Most importantly here, and quite atypically from most equal protection and Section 504 type cases wherein the very opposite is urged in justification of the challenged discrimination, defendants have candidly agreed, as the court found at page 7 of his August 23, 1990 Decision, that the provision of HCBS services *"would be of great benefit"* to Duc Van Le and the class of mentally ill persons he represents. Indeed as Judge Carelli expressly noted at p. 7, based on Trial Exhibit 3, defendants have admitted that such HCBS services are *"essential to the care and treatment* of the long term mentally ill population and to the containment of costs for skilled and intermediate nursing care for this population."

Defendants further admitted and the Court below expressly found, that "under Section 1915(c) of the Social Security Act, they could at any time submit a waiver request for the mentally ill population under which they could provide the very same services that are currently being provided to the elderly, blind, ***7** and physically disabled." Stipulation 44. But instead of doing so, although admittedly retaining the power to do so administratively even without such legislation, these defendants also admitted that they and their counsel "drafted legislation and actively supported such legislation in the last term of the Colorado Legislature to expressly repeal language in C.R.S. 26-4.5-201 statutorily authorizing defendants to seek such benefits, on behalf of mentally ill persons, from the federal government. Stipulation 51. This ostrich-like action was overtly aimed at this lawsuit. Defendants admittedly have also refused to seek a waiver since 1985.

Although defendants urged the legislature to find that the federal government "would not approve Colorado's HCBS waiver request for the mentally ill," a finding an ill informed legislature made, they admit that in fact "no such communication from the federal government was presented to the General Assembly." Indeed, appellants admitted at trial that the last letter they received from the then federal Secretary of Health and Human Services concerning these issues was in 1985. In this 1985 letter, Secretary Heckler overtly acknowledged that HCBS is "authorized by Section 1915(c) of the Social Security Act to eligible mentally ill persons." See Stipulation 51.

??, defendents admitted below and the Court found that the current position of the U.S. Department of Health and Human Services regarding the ongoing availability of a Section 1915(c) HCBS waiver program for the mentally ill is reflected in Exhibit 6 to the Trial Stipulations, a May 17, 1990 letter to Congresswoman Schroeder from the HHS federal HCFA ***8** Administrator responsible for such programs. This case critical document makes crystal clear that the 1915(c) waiver program still is "the basis for states requesting and securing approval of a home or community based services program for the mentally ill . . ." "who would otherwise require the level of care provided in a hospital, nursing facility or intermediate care facility." This letter also states that *"there is no statutory prohibition to providing home and community based services for the mentally ill"* and the Court below so found. In this same letter, the HCFA administrator explained how Colorado previously misused the program for the mentally ill and failed to meet waiver requirements. The HCFA administrator also made clear to the Trial Court that "the Department applies *the same standards* to waivers for mentally ill as it does to all other requests for waivers."

Finally, defendants stipulated and the court found that petitioners "are protected handicapped persons within the meaning of 29 U.S.C. 794, which is popularly known as Section 504 and its implementing regulations *and* that the HCBS services, currently offered only to the elderly, blind, physically disabled and developmentally disabled, are substantially supported by "federal financial assistance." Indeed the federal government pays "between 50% and 75% of the ?? programs under the Medicaid Title XIX program." See Stipulated Facts 55, 56 and 28. The Court expressly found that substantial federal financial assistance is available for the mentally ill under the waiver program.

Based on all these and other stipulations as well as on the ***9** documentary and testimonial evidence before it, the trial court applied and reached the legal conclusion that appellants had violated petitioners' rights under 42 U.S.C. 1983, under Title XIX of the Social Security Act, under 29 U.S.C. 794 and under the due process and equal protection clauses of the United States Constitution. In so holding the Court relied upon this Court's related decision in *Goebel v. Colo. Department of Institutions, et al.*, 764 P.2d 785 and the cases cited therein, particularly *Homeward Bound Inc. v. Hissom Memorial Center*, No. 85-C-437-E (N.D. Okla, July 24, 1987) and *Pushkin v. Board of Regents of the University of Colorado*, 658 F.2d 1372. Based thereon, the trial judge concluded that 504 had been violated and that:

The State's current administration of services clearly segregate mentally ill persons from other handicapped persons. By failing to provide HCBS program services to mentally ill persons, the State has underdeveloped a community based services system for those suffering from mental illness, which perpetuates past discrimination against such persons. Such discrimination clearly violates plaintiff's and class members' rights under Section 504.

The District Court also concluded in a well reasoned opinion that class members' equal protection and due process rights were equally violated under "rational basis", "suspect class" and "fundamental right" analyses.

Specifically the Court found at pp. 13-14 of its August 23, 1990 decision as to the constitutional issues that:

Physically disabled persons and mentally ill persons are similarly situated with respect to the purposes of the Section 1915(c) waiver statute.

The mentally ill are a suspect class for equal protection purposes.

Plaintiff's and class members' interest in living ***10** in a community setting, and being free from undue bodily restraint in institutional setting such as hospitals and nursing homes, is a fundamental liberty interest which is infringed by the State's failure to provide HCBS benefits to persons who are mentally ill.

On the basis of the stipulated facts and evidence presented, state defendants have shown no compelling governmental interest to support the unequal and discriminatory treatment of plaintiff and class members in this case.

Even assuming that the denial of HCBS benefits to mentally ill persons does not involve a suspect class or a fundamental right or interest, state defendants have not shown that such denial of HCBS benefits is rationally related to any legitimate

governmental interest.

Therefore, the State's failure to provide HCBS benefits to mentally ill persons solely on the basis of the nature of their handicap, i.e. mental illness, constitutes a violation of equal protection.

Based on these findings and conclusions the District Court held that:

. . . plaintiff Duc Van Le and members of the class, as previously certified, are entitled to meaningful access to the same HCBS program services which are currently provided to elderly, blind and physically disabled persons.

He further ordered that:

1. State defendants, their agents and employees are permanently enjoined from denying plaintiff and class members HCBS benefits solely on the basis that their primary diagnosis is mental illness.

2. So long as state defendants provide HCBS benefits to elderly, blind and physically disabled persons, they shall provide the same services for plaintiff and class members

See August 23 Decision, page ??.

5. ARGUMENTS IN SUPPORT OF ALLOWANCE OF THE WRIT

As this Court knows from its previous rulings in *Goebel v. Colo. Department of Institutions, et. al.*, 764 P.2d 785, extensive efforts are required of the State defendants if the protective ***11** laws concerning to the chronically mentally ill are to be made meaningful. A second petition in the closely related *Goebel* case is also about to be filed with this Court pursuant to C.A.R. 50 to review the latest round of lower court proceedings in that seminal case.

This case clearly involves a number of matters "of substance not heretofore determined by the Supreme Court of Colorado . . ." within the purview of C.A.R. 50(a)(1). Additionally, upon the appeal now pending before the Court of Appeals, that court is being asked to decide a number of important questions of federal statutory and constitutional law, all of which questions have not been, but should be, determined by the Supreme Court. From the findings and conclusions of the District Court above reviewed and from this Court's own 1988 extensive findings, holdings and analyses in the *Goebel* case, it also appears clear that this case is of such imperative public importance as to justify deviation from normal appellate processes and to require the earliest possible determination by this Court.

The basic life necessities of hundreds of people are literally at stake. As the District Court expressly found at pp. 2-3 of the August 23, 1990 decision, the benefits at issue in this case involve:
1. Personal care services, homemaker services, medication monitoring in the home, and non-medical transportation, which are services currently provided under the HCBS Program for the elderly, blind and physically disabled, are [also] services which are necessary to maintain plaintiff and class members in a stable condition in the community, and to avoid institutionalization of such persons in hospitals and nursing homes.

2. No public or private agency currently has ***12** a program to provide these essential services to plaintiff and class members, although such services are provided by the Department of Social Services to elderly, blind and physically disabled adults whose incomes and medical needs are virtually identical with those of plaintiff and class members.

3. Without these home and community based services, plaintiff and class members will continue to experience the revolving door syndrome of hospitalization, nursing home placement, placement in the community, de-stabilization and re-hospitalization. Thus, the availability of HCBS is an essential ingredient of normal living patterns for a substantial number of persons who are mentally ill. The failure to provide such services operates to exclude persons who are mentally ill from living in the community, and to return them into more restrictive environments.

Petitioners can not more cogently express the poignant urgency of this matter.

Although the District Court has emphatically ruled in their favor, the simple truth in this case is that since 1985 the certified class of persons now before this Court have been illegally, intentionally and systematically excluded by defendants from the available HCBS Federal Medicaid Waiver program. As a consequence, they have received no meaningful programatic relief in this baseline survival area for six years. A two year additional delay to complete two appeals would be unjust. The granting of this petition is essential to timely vindicate class members' rights.

Just as in the *Goebel* case ?? viewed in terms of the importance of the legal issues presented, the public policies implicated, or the basic human needs and suffering at stake, this case cries out for the invocation of this Court's jurisdiction and the Court is respectfully asked to grant this Petition and promptly hear the pending appeal.

Appendix not available.