For Opinion See 843 P.2d 15 , 2 NDLR P 331

Supreme Court of Colorado.
Duc VAN LE, on behalf of himself and the class of persons similarly situated, Petitioner,
v.
Irene M. IBARRA et al., Respondents.
No. 91SC189.
July 5, 1991.

# Reply Brief of Respondents Irene M. Ibarra and Members of the Colorado Board of Social Services

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## ***1** *REPLY TO PETITIONER'S STATEMENT OF FACTS*

Petitioner sets forth (combined Answer Brief, pp. 3-10) several legal arguments in his Statement of Facts. The members of the Colorado Board of Social Services and Irene M. Ibarra, Executive Director of the Colorado Department of Social Services ("DSS") hereby respond to these legal arguments.

### A. No state offers HCBS to adult mentally ill patients.

Petitioner concedes (combined Answer Brief, p. 7) that "only one state has a waiver program for mentally ill persons." This concession, however, is disingenuous and petitioner fails to ***2** acknowledge the obvious significance of the concession.

First, the only state offering HCBS services to the mentally ill is Vermont (r. 354) and it only offers services to children (tr. 114). Federal funds are available for services rendered to children in an institution for mental disease ("IMD") but *not for adults*. 42 U.S.C.S. § 1396d(a)(4)(A) and (15) ( 1985 & 1990 Supp.). The Vermont HCBS program is therefore not relevant to this case, and if petitioner was candid he would admit that *no* state offers HCBS to the class of mentally ill adults which he represents.

Next, petitioner attempts to minimize this concession by saying (Combined Answer Brief, p. 7) "There are a number of reasons for this fact [i.e. no state offers HCBS to the mentally ill] ... (e.g.) many states have more generous basic medicaid programs than Colorado." This argument actually makes DSS's point. As was noted in DSS's Opening Brief (pp. 12, 16), there are many possible ways to attack the problem of providing appropriate services to the mentally ill. Petitioner, however, assumes the equal protection clause and § 504 mandate one and only one solution to the program: i.e. Colorado must provide the same HCBS to the mentally ill as it does to the elderly, blind and physically disabled. In reality, there are many solutions to the problem, including, *inter alia,* a more generous basic medicaid program. The legislative branch, and not the Courts, is ***3** the appropriate body to

decide which solution or solutions should be adopted.

Finally, petitioner refuses to face the obvious significance of the fact that no other state offers HCBS to the mentally ill. For example, petitioner argues it is irrational to offer HCBS to the elderly, blind and physically disabled but not to the mentally ill. If it is irrational, the same irrationality has seized every other state faced with the same choice. Petitioner also urges that federal funding is readily available for HCBS for the mentally ill. If it is readily available, every other state has neglected to avail itself of this ready source of funds.

B. Federal regulations require states to limit HCBS to specific target groups.

Petitioner admits (combined Answer Brief p. 9) that "Federal regulations governing the HCBS program limit waiver requests to one of three 'target groups.' ..." Once again, however, petitioner attempts to minimize this admission and does not squarely face the consequences of this admission.

First, petitioner disparages the Federal requirement as a mere "procedural regulation." Whether the requirement is viewed as procedural or substantive, it shows the Federal government anticipates a state may elect to serve one target group and not another, or a state may offer a package of HCB services to one ***4** group and very different package to another group. Moreover, the regulation recognizes the physically disabled have different needs and characteristics than the mentally ill and state agencies should develop different programs for each target group. The Federal regulation, 42 C.F.R. § 441.301(b)(6) (1989) harmonizes with the Federal statute, 42 U.S.C.S. § 1396n(c)(7) (Supp. 1990), which allows HCBS programs to be limited to "to individuals with a particular illness or condition...." In sum, the Federal regulations and statutes show HCBS can be offered to one group and not another, and show it is rational to distinguish between the target groups.

C. The Federal government will not authorize an HCBS program for mentally ill adults, and in any event, Colorado's decision not to apply for a waiver to offer such a program is not the issue in this case.

The court below found (r. 565) that Federal Funds were available to provide HCBS to mentally ill adults. DSS submits this finding is contrary to the weight of the evidence presented at trial, and in any event is irrelevant to the issues presented in this case.

The evidence at trial shows: (1) Colorado applied twice for a waiver renewal to offer HCBS to mentally ill adults, and the Federal government denied both requests, (2) no state currently***5** has Federal approval to offer HCBS to mentally ill adults, and (3) Federal officials have told state officials that a request for Federal Funds to offer HCBS to mentally ill adults would have "a snowball's chance in hell." These facts lead inevitably to the conclusion Federal Funds are not available. Against these facts, petitioner can only cite HCFA's letter saying an application for federal funds would be subject to "the same standards" as an application for Federal Funds to offer HCBS to the physically disabled. As pointed out in DSS's opening brief (pp. 6-7, 10), Federal restrictions on funding for services for the mentally ill mean that the "same standards" necessarily doom a request for Federal Funds to failure if it is for HCBS for mentally ill adults.

In any event, Colorado's inability to obtain such a waiver is beside the point in this case. Petitioner does not seek an order directing Colorado to apply for a waiver authorizing HCBS for the mentally ill. After all, Colorado had such a waiver from 1982 to 1985 and it still did not provide the homemaker and personal care services that petitioner now seeks. What petitioner really wants, and what the court below ordered, is a declaration that petitioner and his class are eligible for the same programs and the same services offered to the physically disabled. Presumably, even if Colorado had an HCBS program for the mentally ill, petitioner would still insist on participat-

ing in the HCBS-***6** EBD program and, under the district court's decision, DSS would be required to allow such participation. Accordingly, any discussion of whether Colorado could obtain Federal Funds for other waivers is beside the point; the issue presented here is whether petitioner and his class are eligible for a program designed for the physically disabled.

D. The General Assembly expressly repealed the statutory authority to offer HCBS to the mentally ill.

Petitioner admits (combined Answer Brief, p. 5), but does not deal with, the repeal of the state statutes authorizing HCBS for the mentally ill. The repeal, however, makes it quite clear that: (1) The General Assembly is aware of the problems in finding Federal funds to provide services to this population and (2) The General Assembly is seeking methods *other than an HCBS medicaid waiver* to provide home based services to this population. The General Assembly's action should also be viewed in light of the contemporaneous adoption of the rehabilitation option program (§ 26-4-105(1)(t), C.R.S. (1990 Supp.)) which provides needed services to the adult mentally ill population.

***7** *ARGUMENT*

I.

PROVIDING HCBS-EBD TO THE ELDERLY, BLIND AND PHYSICALLY DISABLED WITHOUT PROVIDING EXACTLY THE SAME SERVICES TO OTHER NEEDY GROUPS DOES NOT VIOLATE CONSTITUTIONAL GUARANTEES OF EQUAL PROTECTION.

Petitioner contends that: (1) The mentally ill are a suspect class for equal protection purposes (Combined Answer Brief, pp. 21-24), (2) This case involves a fundamental liberty interest (Combined Answer Brief, pp. 24-29), and (3) There is no rational basis for distinguishing between the physically disabled and mentally disabled (Combined Answer Brief, pp. 29-32). None of these contentions are persuasive.

First, this case does does not involve a suspect class. As pointed out in DSS's opening brief, there is no reported case holding the mentally ill are a suspect class. In response, petitioner can only urge that the preamble to the Americans With Disabilities Act, Pub. L. 101-336, § 2 (July 26, 1990), ("ADA") transforms all persons with any kind of disability into a member of a suspect class. This argument is without merit. First, no substantive provisions of the ADA apply to the facts of this case. Second, there is no hint in the ADA or its legislative history that Congress intended to change any judicial decisions concerning "suspect classes" or equal protection jurisprudence. ***8** Third, the ADA applies with equal force to both the physically disabled and the mentally disabled, and yet petitioner's claim in this case is that DSS has discriminated against him and in favor of the physically disabled. Finally, the mentally ill cannot be considered a suspect class unless laws relating to the mentally ill are "likely to reflect deep seated prejudice rather than legislative rationality...." *Cunningham v. Beavers,* 858 F.2d 269, 273 (5th Cir. 1988), *cert. denied,* 109 S. Ct. 1343 (1989). Laws relating to the mentally ill, however, generally show solicitude for the mentally ill and provide services for this group not provided to the population generally. Accordingly, the courts have held and continue to hold that disability, including mental illness, is not a suspect classification. See *D'Amato v. Wisconsin Gas Co.,* 760 F.2d 1474, 1486-1487 (7th Cir. 1985); *Pendleton v. Jefferson Local School District,* 754 F. Supp. 570 (S.D. Ohio 1990).

Similarly, this case does not involve a fundamental interest. Petitioner attempts to equate the facts of this case to cases such as *Youngberg v. Romeo,* 457 U.S. 307 (1982), where the state has acted to place individuals in institutions. In this case, however, DSS has taken no action to place anyone in an institution. Petitioner asserts the

equal protection clause burdens the State with an affirmative duty to provide services to prevent institutionalization of its citizens. No such duty ***9** exists, and petitioner has cited no case where the courts have imposed such a duty. For example, petitioner relies on *Thomas S. by Brooks v. Flaherty,* 699 F. Supp. 1178 (W.D.N.C. 1988). This decision was affirmed in a decision reported as *Thomas S. by Brooks v. Flaherty,* 902 F.2d 250 (4th Cir. 1990). As the appellate decision makes clear, the court was only dealing with deficient treatment of patients in state hospitals, not with imposing a duty on the state to provide services to avoid hospitalization.

Finally, there is a rational basis for distinguishing between the physically disabled and the mentally ill. It is more difficult to attract Federal funding for services for the mentally ill. The mentally ill often require active treatment for their mental illness which is different from and in addition to services provided to the physically disabled. 42 U.S.C.S. § 1395r(b)(3)(F)(i) (1990 Supp.). See also *Doe v. Colautti,* 592 F.2d 704 (3d Cir. 1979); *Bernard B. v. Blue Cross and Blue Shield of Greater New York,* 528 F. Supp. 125 (S.D.N.Y. 1981). Finally, the choice "to remedy one phase of a social problem while neglecting others is Rot inconsistent with the mandates of equal protection...." *King v. Schweiker,* 647 F.2d 541, 547 (5th Cir. 1981) (footnotes omitted).

The case most nearly on point with the equal protection issues presented here is *Beckwith v. Kizer,* 912 F.2d 1139 (9th Cir. 1990). Petitioner's attempt to distinguish *Beckwith* is not ***10** impressive. First, petitioner asserts (Combined Answer Brief, pp. 32-33) this case involves a suspect class. As noted above, there is no reported case to support this assertion. Second, petitioner avers (Combined Brief, p. 33) that, in *Beckwith,* the state restrictions on HCBS were necessary for cost containment, while the restrictions are not necessary for cost containment here. There is no basis for this claimed distinction. For example, the *Beckwith* court said:

We have no doubt that if California were now to ask for approval of its original proposal, or another proposal not limited to individuals who enter its waiver program from a hospital, *the secretary could not reject it* on the same grounds the secretary used in 1987.

912 F.2d at 1143 (emphasis supplied). In other words, the Court believed California could have made the required showing of cost containment and obtained a waiver if it had chosen to do so. The Court, however, refused to second guess the state saying:

Definition of any waiver class necessarily involves difficult policy judgments concerning where services would most efficiently be used. We lack the qualifications or authority to pass upon the fiscal responsibility of California's waiver program in the manner plaintiffs request

912 F.2d at 1144. Accordingly, the court allowed California to restrict the class of those eligible for HCBS even though others might benefit from the services and it might be cost effective to offer the services to them. The court properly recognized that ***11** it was not the appropriate body to determine which classes should be served under an HCBS waiver.

II.

PROVIDING HCBS-EBD TO THE ELDERLY, BLIND AND PHYSICALLY DISABLED WITHOUT PROVIDING THE SAME SERVICES TO THE MENTALLY ILL DOES NOT VIOLATE § 504 OF THE REHABILITATION ACT BECAUSE THE MENTALLY ILL ARE NOT "OTHERWISE QUALIFIED" TO RECEIVE HCBS-EBD.

Petitioner avers he is "otherwise qualified" to receive HCBS-EBD. This is simply untrue. Petitioner is not elderly, blind or physically disabled. If he were, he could receive HCBS-EBD as long as his need for services arose from his physical disabilities rather than from his mental illness. DSS regulations make it clear that the mentally

ill are excluded from HCBS-EBD *only* when their need for care is based on a diagnosis of mental illness. 10 CCR 2505-10, § 8.400.16(b) and (c) (9-89). If the need for care arises from physical disability, they are eligible for HCBS-EBD. (Note, however, that Federal law requires such individuals to be screened to see if they also need active treatment for their mental illness in addition to medicaid long term care services. 42 U.S.C.S. 1396r(b)(3)(F)(i) (1990 Supp.)). The facts in this case, however, are clear that petitioner's need for services arises *only* from his mental illness.

Petitioner continues to rely (Combined Brief, pp. 13-14) on ***12** *Homeward Bound Inc. v. Hissom Memorial Center,* No. 85C437F (N.D. Okla. July 24, 1987) for the proposition that § 504 requires a state to provide HCBS to DD clients, and by analogy, to mentally ill clients. Actually, *Hissom* only says that the underdevelopment of community resources might be considered a continuation of discrimination already proved; *Hissom* does not say § 504, of itself, requires states to provide HCBS. In any event, this Court specifically declined to follow *Hissom* on this point and declined to hold that § 504 required a state to create new programs for disabled plaintiffs. *Goebel v. Colorado Department of Institutions,* 764 P.2d 785, 804-805 (Colo. 1988).

The case most nearly on point on the § 504 issues presented here is not *Hissom,* but *Knutzen v. Eben Ezer Lutheran Housing Center,* 815 F.2d 1343 (10th Cir. 1987). Petitioner's attempt to distinguish *Knutzen* are not persuasive. Petitioner claims there is no basis in the Federal medicaid statutes for distinguishing between the physically disabled and the mentally ill, but the pertinent statute actually permit states to limit HCBS to "individuals with a particular illness or condition...." 42 U.S.C.S. 1396n(c)(7) (1990 Supp.). Actually, petitioner ignores the gist of *Knutzen,* which is that § 504 is intended to allow individuals to participate in Federal programs in spite of their handicaps, not to allow individuals to receive benefits from every Federal program because of their handicap. Petitioner has ***13** cited no authority for the proposition that § 504 says a plaintiff with one type of disability can force his way into a program designed for persons with other kinds of disabilities.

CONCLUSION

Based on the above points and authorities, the decision of the district court should be reversed and this matter remanded with instructions to dismiss petitioner's complaint with prejudice.

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1991 WL 11034408 (Colo. ) (Appellate Brief )

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