1992 WL 12044268 (Colo.) (Appellate Petition, Motion and Filing)
Supreme Court of Colorado.

DUC VAN LE, on behalf of himself and the class of persons similarly situated, Petitioner,
v.
Irene M. IBARRA, in her official capacity as Executive Director of the Colorado Department Of Social Services; Henry Solano, in his official capacity as the Executive Director of the Colorado Department of Institutions et al., Respondents.

No. 91SC189.
December 28, 1992.

Appeal from the District Court of the City and County of Denver Honorable Edward E. Carelli, Judge

Petition for Rehearing

Opinion Per Curiam, Gale A. Norton, Attorney General, Raymond T. Slaughter, Chief Deputy Attorney General, Timothy M. Tymkovich, Solicitor General, Paul Farley, Deputy Attorney General.

En Banc, Wade Livingston*, First Assistant Attorney General, Stacy L. Worthington*, Assistant Attorney General, Human Resources Section, Attorneys for Respondents, 1525 Sherman Street, 5th Floor, Denver, Colorado 80203, Telephone: 866-5448.

***1** Respondents, pursuant to C.A.R. 40, request that this Court grant a rehearing in this case, and as grounds therefore state:

I.

THERE ARE NO APPROPRIATED BUT UNSPENT FUNDS THAT COULD BE USED TO PURCHASE HCBS-EBD FOR THE MENTALLY ILL.

The Court may have believed that the General Assembly has appropriated sums that could have been spent for HCBS-EBD for the mentally ill, but were for some reason not spent. Nothing could ***2** be further from the truth.

The General Assembly no longer appropriates money for specific medicaid programs. Instead, medicaid funds are appropriated as a single item. Thus, funds for the HCBS-EBD program, as for all other Medicaid programs, must come from this single appropriation. The growth of the Medicaid appropriation in the recent past has been nothing less than astronomical, and there are no unspent or discretionary funds in that appropriation.

A few figures will suffice to make this point. In fiscal year 1989, the General Assembly appropriated a little less than $450 million for Medicaid, an amount representing 10% of the state budget. Colo. Sess. Laws, ch. 1, part XXI, pp. 86, 91 (1988). By fiscal year 1991, this amount had increased to over $665 million, an amount representing 13% of the state budget. Colo. Sess. Laws, ch. 1, part XXI, pp. 83, 88 (1990). In the current fiscal year, this amount has increased to over $1.1 billion, representing nearly 18% of the state budget. Colo. Sess. Laws, ch. 340, part XX, pp. 2639, 2648.

These numbers demonstrate the increasing demand placed on the Medicaid program to provide more and more people with more (and increasingly costly) services. This increasing demand has led the General Assembly to allocate an ever increasing share of the state's fiscal resources to Medicaid. The decision in this case requires the Medicaid program to provide services

to yet another ***3** group of needy individuals. At some point, we must face the reality that Medicaid cannot provide all needed services to everyone, and that there are other legitimate demands on the limited financial resources of the taxpayers.

The decision in this case prevents the General Assembly from performing one of its most basic Constitutional duties, that of deciding how best to allocate scarce public funds. This is not a case where the General Assembly has appropriated funds and the Executive Branch has refused to spend them. This is a case where the General Assembly has appropriated a significant portion of the state's budget for medicaid, but the courts have declared it is not enough.

II.

THE DECISION IN THIS CASE REQUIRES RESPONDENTS TO DO MUCH MORE THAN SEEK A WAIVER.

The dissenting opinion to the withdrawn April 20, 1992 decision in this case argued that respondents violated the Equal Protection Clause and §504 by failing to seek a waiver to serve the mentally ill. Slip op. at 12, 17. Indeed, Petitioner's Supplemental Reply Brief concludes by urging this Court to "require respondents to apply for a waiver from the federal government that will allow the provision of HCBS services to the ***4** mentally ill." (Brief, p. 17). If the decision in this case merely required respondents to apply for a waiver, it would not be very significant. Respondents would simply have to waste the resources necessary to prepare the waiver request, and after the request was denied the case would be over.

The decision, however, is more far reaching. It provides, without qualification, that:

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

Thus, respondents must provide the same benefits to the mentally ill even if a waiver is not granted, even if matching federal funds are not available, or indeed even if there are not sufficient state funds to purchase these additional services.

The decision simply does not address itself to the difficult task of finding the funds to pay for the services, of deciding what services or programs must be cut to pay for HCBS for the mentally ill. These difficult choices are usually reserved for the legislature, but in this case, the court has offered almost no choice and has not looked beyond the narrow needs of the petitioners in this case to the broader problems of attempting to provide adequate health care to greatest number of needy individuals.

****5 CONCLUSION***

Based on the above points, the Court should grant the petition to rehear this case and enter a decision on the merits.

Footnotes

[*] Counsel of Record.