UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

GERALD N., et al.,

Plaintiffs,

v. Case No. 04-C-1093

MILWAUKEE COUNTY,

Defendant.

DEFENDANT MILWAUKEE COUNTY'S BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

The plaintiffs are disabled individuals over the age of 60 who are clients of the Family Care program, *see*, Wis. Stat. ss. 46.2805-2895, administered by the Milwaukee County Department on Aging. Family Care is a pilot program which the State of Wisconsin has implemented in five counties and, for eligible disabled persons enrolled in the program, it essentially replaces a variety of Medicaid waiver programs as a mechanism to fund the care and services necessary to maintain those persons in community placements.

The owner of the CBRF where the plaintiffs are placed requested an increase in the monthly payment he receives from Family Care to serve the plaintiffs. When that request was denied, he served notice that he would evict the plaintiffs, and the Family Care program proceeded to locate alternative community placement for than and to plan for their transition to those placements. The plaintiffs, by their guardians, have sued, claiming that the refusal of the Family Care program to increase payments to the CBRF owner and the fact that he receives higher payment for some under-60 residents whose care is financed by the traditional Medicaid waiver programs constitute violations of various federal statutory and constitutional rights.

The Family Care program has advised the plaintiffs and their guardians that the program intends to move them to their new residences in the near future, and the plaintiffs now seek a preliminary injunction to prevent those moves.

I. To obtain preliminary injunctive relief, plaintiffs must prove each element of a five-part test.

The standard applicable to a motion for a preliminary injunction is well settled:

> The Court of Appeals for this circuit has held that a party seeking preliminary injunctive relief must show that (1) no adequate remedy at law exists; (2) the moving party will suffer irreparable harm absent injunctive relief; (3) the irreparable harm suffered in the absence of injunctive relief outweighs the irreparable harm the defendant will suffer if the injunction is granted; (4) the moving party has a reasonable likelihood of success on the merits; and (5) the injunction will not harm the public interest. *United States v. Rural Electric Convenience Co-Op. Co.*, 922 F.2d 429, 432 (7th Cir. 1991*); Somerset House, Inc. v. Turnock*, 900 F.2d 1012, 1014 (7th Cir. 1990); *Baja Contractors, Inc. v. City of Chicago*, 830 F.2d 667, 675 (7th Cir. 1987), cert. denied, 485 U.S. 993, 99 L. Ed. 2d 511, 108 S. Ct. 1301 (1988). In order to prevail, the plaintiff must satisfy each element of this five-part test. *Somerset*, 900 F.2d at 1015 (citing *Roland Machinery Co. v. Dresser Industries, Inc.*, 749 F.2d 380, 386-87 (7th Cir. 1984)).

Davids v. Coyhis, 857 F.Supp. 641, 646 (E.D. Wis. 1994).

In practice, the "reasonably likelihood of success on the merits" standard presents a fairly modest threshold, and the amount of "irreparable harm" required to obtain relief is, to some extent, a function of the countervailing harm which will be suffered by the defendant if the injunction is granted. However, those factors do not convert the plaintiffs' motion into the functional equivalent of an "order to show cause", requiring the defendant to prove that the plaintiffs are *not* entitled to an injunction. The burden remains on the plaintiffs to establish each and every element of the test.

II. Plaintiffs cannot establish that they have no adequate remedy at law.

The essence of the complaint is this case is that the guardians of the named plaintiffs do not want their wards moved from the CBRF's in which they now reside to different CBRF's where (the evidence will show) they will receive care and services equivalent to the care and

services which they now receive. The proposed moves were precipitated by the stated intention of the owner of the CBRF's where the plaintiffs now live to evict the plaintiffs because the Family Care program denied his request for more money. For reasons discussed in the succeeding sections of this memorandum, this scenario does not implicate the federal statutory rights of the plaintiffs. However, the court does need not reach that issue because there are adequate state law procedures which will permit the plaintiffs to interpose their objections if the proposed moves do not result in the least restrictive placements commensurate with their needs of if they operate to deprive the plaintiffs of necessary care, treatment or support items.

As clients of the Family Care program, the plaintiffs have a specific statutory right to object, and to obtain a hearing on their objection, if Family Care benefits are denied or terminated or if the "plan of care" (which describes the array of services the program proposes to provide) is "unacceptable because the plan of care requires the enrollee to live in a place that is unacceptable to the enrollee or the plan of care provides care, treatment or support items that are insufficient to meet the enrollee's needs, are unnecessarily restrictive or are unwanted by the enrollee," Wis. Stat. s. 46.287(2)(a)1.f. Moreover, as persons subject to orders for guardianship and protective placement under Wis. Stat. chs. 880 and 55, the plaintiffs are entitled to an annual review by the probate court, *State ex rel. Watts v. Combined Community Services*, 122 Wis. 2d 65, 362 N.W.2d 104 (1985). This procedure provides an opportunity for periodic judicial review of the adequacy and appropriateness of the plaintiffs' placements.

III. The plaintiffs have no reasonable likelihood of success on the merits.

The plaintiffs have chosen to rely on their claims under the Americans With Disabilities Act (ADA), 42 U.S.C. s. 12132 et seq., and the Rehabilitation Act, 29 U.S.C. s. 794(a), in support of their motion for preliminary injunctive relief.

The viability of the of those claims depends upon the proposition that the ADA and the Rehabilitation Act, and in particular the "integration principle" articulated in the implementing regulations, 28 CFR s. 35.130(d) and 28 CFR s. 41.51(d), empower the federal courts to micromanage programs for the disabled. They do not. "The purpose of the regulation is not to constitute the federal courts the supervisors of the care and treatment of disabled persons. It is to prevent the isolation or segregation of the disabled." *Bruggeman v. Blagojevich,* 324 F.3d 906, 911 (7th Cir. 2003).

The evidence in this case will not support a finding that the policies of the Family Care program threaten to isolate or segregate the plaintiffs or any other disabled person. The Family Care program has served notice that it intends to move the plaintiffs from the CBRFs where they currently live to other CBRF's, where they will have the same plans of care and will receive the same array of treatment, services and support they are receiving now. There is no plan or intention to institutionalize or re-institutionalize the plaintiffs or anyone else, and there is no basis for a finding that a move from one CBRF to another will result in confinement in a more restrictive institution.

The plaintiffs' brief quotes dicta from the *Bruggeman* decision in which the Court of Appeals admits the theoretical possibility that if an aging parent of an adult disabled child is unable adequately to care for that disabled child, placement in the parent's home may "realistically" be more restrictive that an appropriate institutional placement. In that hypothetical circumstance, which is not presented in this case, the disabled adult child's entitlement to the least restrictive environment consistent with his needs might be implicated. However, that aside by the Court of Appeals is insufficient to support the plaintiffs' claim that a move from one CBRF to another functionally identical CBRF can be characterized as a "more restrictive"

placement (and therefore a violation of the Rehabilitation Act and the ADA as explicated in *Olmstead v. L.C.,* 527 U.S. 581 (1999)) merely because it would place a disabled person in a temporarily unfamiliar environment. There is no authority which holds that the right to the "least restrictive" environment is that broad.

This is not, as plaintiffs suggest, a "reasonable accommodation" case. A "reasonable accommodation" is one that gives an otherwise qualified plaintiff with disabilities "meaningful access" to a program or service. *Alexander v. Choate,* 496 U.S. 287, 301 (1985). That concept cannot reasonably by applied to the operation of the Family Care program as it affects the plaintiffs in this case because the benefits of the Family Care program are available *only* to the disabled, and the plaintiffs are currently receiving those benefits. The plaintiffs are arguing that they are entitled to a "reasonable accommodation" which would permit them to remain in the same CBRF forever, irrespective of cost or any other factor. Milwaukee County does not offer any program or service to the non-disabled, or to anyone else, which guarantees perpetual placement in the same residential facility.

Moreover, even if the notion of "reasonable accommodation" were applicable in this case, Milwaukee County cannot be compelled to make that accommodation. Under the ADA, a public entity is not required to make an accommodation which "would fundamentally alter the nature of the service, program, or activity," 28 CFR s. 35.130(b)(7). Similarly, under the Rehabilitation Act, a requested accommodation is not required if it "creates a fundamental alteration in the nature of the program" or creates "undue financial or administrative burdens".

The essential and defining feature of the Family Care program is that it is a managed care program. The Department on Aging, in its capacity as the "care maintenance organization" administering the program, receives a capitated (per enrollee-per month) payment from the State of Wisconsin, and it is required to meet the identified needs of all eligible persons through the

judicious purchase of residential and support services and the like with that limited source of funds. The plaintiffs are asking the court to permit a particular provider of residential services (in this case, a provider who is already the most expensive CBRF provider in the program) to, in effect, extort higher rates from Milwaukee County by threatening to evict Family Care clients if those higher rates are not paid. If the court empowers providers to engage in such conduct by forbidding the Family Care program to provide alternative appropriate residential and support services on the theory there is a federal right under the ADA and Rehabilitation Act to remain in the same CBRF forever (which is, for the reasons discussed above, a dubious proposition), the program's ability to manage care and control costs would be eliminated. That would certainly "fundamentally alter" the nature of the program and would create "undue financial or administrative burdens" within the meaning of the applicable regulations.

IV. "Irreparable harm".

The plaintiffs have offered no authority which relieves them of the requirement to prove "irreparable harm" as a condition precedent to obtaining preliminary injunctive relief in a case under the ADA or the Rehabilitation Act. Whether they meet that burden will, of course, depend upon the evidence adduced at the hearing. However, if "irreparable harm" means anything, it must mean more than mere inconvenience or the temporary disruption of settled routine. The court should not assume that moving one of the plaintiffs from one CBRF to another will result in trauma so profound, permanent and debilitating as to constitute "irreparable" harm unless that harm is established by compelling, relevant expert testimony.

The evidence will establish that, in the case of a Family Care client who faced the same situation as the plaintiffs and who has already been relocated to a new CBRF, there has been no

irreparable harm. On the contrary, the client appears to be receiving more attentive care in the new facility

V. Harm to defendant Milwaukee County.

To claim, as the plaintiffs do, that granting temporary injunctive relief to them will do no harm to Milwaukee County is to ignore the true nature and objective of this case. This is not a case about the integration mandate of the ADA and the Rehabilitation Act. The plaintiffs are already deinstitutionalized and will remain so. The plaintiffs are attempting to package an attack on the managed care aspect of the Family Care program as an ADA case. Milwaukee County respectfully urges the court to decline the plaintiffs' invitation to litigate the fiscal and policy judgments of the State of Wisconsin and Milwaukee County which are inherent in the formulation and implementation of that program.

Courts have recognized that even cases which involve genuine ADA issues raise "complex medical, social and fiscal issues not easily addressed by litigation" and implicate "both fiscal and policy choices that are difficult to make", *Williams v. Wasserman*, 164 F. Supp. 2d 591, 595 and 637 (D. Md. 2001). A state's obligation to comply with the integration mandate of the ADA and the Rehabilitation Act is limited to the resources available in the state's mental health budget, and, in allocating that budget among numerous disabled individuals who need care and services, the state "is entitled to wide discretion in adopting is own systems of cost analysis", *Olmstead*, 527 U.S. at 615.

The State of Wisconsin and Milwaukee County have chosen to allocate the limited resources available for community-based residential services, care and treatment of disabled persons over the age of 60 by means of a managed care system known as Family Care. That choice is well within the ambit of the discretion permitted to state and local authorities under *Olmstead* and subsequent cases. The fact that the program may, in some cases, provide a lower

rate to a particular CBRF provider than he receives for disabled persons under 60 years of age whose care is financed under the traditional Medicaid waiver programs does not violate the ADA or the Rehabilitation Act, and it does not warrant judicial intervention in the administration of that program.

CONCLUSION

For the foregoing reasons, Milwaukee County respectfully submits that that the plaintiffs have not met the standards necessary to demonstrate that they are entitled to the extraordinary remedy of preliminary injunctive relief. Accordingly, Milwaukee County urges the court do deny the plaintiffs' motion for a preliminary injunction.

Dated at Milwaukee, Wisconsin this 13th day of April, 2004.

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