UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

GERALD N., et al.,

Plaintiffs,

v. Case No. 04-C-1093

MILWAUKEE COUNTY, et al.,

Defendants.

BRIEF IN SUPPORT OF MILWAUKEE COUNTY'S MOTION FOR JUDGMENT ON THE PLEADINGS

This action was commenced on January 28, 2004. It is now before the court on the plaintiffs' Fourth Amended Complaint. Although the Fourth Amended Complaint is an improvement (at least from the defendants' perspective) over the Third Amended Complaint (41 pages, 234 paragraphs, 10 named plaintiffs), it still runs to 34 pages and 184 paragraphs and it sets out nine separate legal counts[1].

The defendants are filing motions at this stage of the proceedings to challenge the legal sufficiency of the plaintiffs' claims. Because of the number and complexity of those claims, and the interplay between the actual dimensions of the plaintiffs' substantive claims and their standing to raise them[2], it may be more useful to the court to address the allegations in the Fourth

[1] This is not quite as bad as it seems. The plaintiffs set out parallel claims under Title II of the Americans with Disabilities Act, 42 USC s. 12132, and s. 504 of the Rehabilitation Act, 29 U.S. C s. 794. Those claims will not require separate analysis, *Radaszewski v. Maram*, 383 F.3d 599, 607 (7th Cir. 2004) ("In view of the similarities between the relevant provisions of the ADA and the Rehabilitation Act and their implementing regulations, courts construe and apply them in a consistent manner . . . *see also Bruggeman, supra*, 324 F.3d at 912 (noting that the statutory and regulatory provisions concerning integrated care are 'materially identical'.)").

[2] *Bruggman v. Blagojevich*, 324 F.3d 906, 909 (7th Cir. 2003) ("Not that standing and the merits are always or in this case [which raised ADA, Rehabilitation Act and Medicaid claims] clearly distinct.")

Amended Complaint as they become relevant to the discussion rather than attempt to summarize them in a statement of facts.

I. Motion for Judgment on the Pleadings

At this stage of the proceedings, after multiple rounds of pleadings have been exchanged, a motion to challenge the legal sufficiency of the plaintiffs' claims is properly styled a motion for judgment on the pleadings under Rule 12(c), F.R.C.P.

The standard applied to a Rule 12(c) motion is the same as the standard for a motion to dismiss under rule 12(b). A moving defendant will succeed only if it is clear that the factual allegations of the complaint will not support the plaintiff's claim for relief. The court must view those factual allegations in the light most favorable to the plaintiff. However, the court is "not obliged to ignore any facts set forth in the complaint that undermine the plaintiff's claim or to assign any weight to unsupported conclusions of law", *R.J.R. Serv., Inc. v. Aetna Cas. & Sur. Co.*, 895 F.2d 279, 281 (7th Cir. 1989).

II. Standing.

To create a "case or controversy" sufficient to invoke the jurisdiction of the federal court under Article III of the Constitution, a party must show that he or she has suffered an "injury in fact" that is "concrete," distinct and palpable," and "actual or imminent," as opposed to "conjectural" of "hypothetical". *McConnell v. Federal Election Commission*, 540 U.S. 93, 225 (2003). In addition, the party must show that his or her injury is "fairly traceable" to the defendant's conduct and that there is a "substantial likelihood" that the requested relief will redress the harm. *Id.* Without such a showing, a federal court is without jurisdiction to entertain the party's arguments on the merits. *United States ex rel. Stevens*, 529 U.S. 765, 778 (2000).

III. ADA and Rehabilitation Act claims.

Each of the plaintiffs is a disabled person who resides in a community based residential facility (CBRF) and receives additional services, all paid for by the Family Care program administered by the Milwaukee County Department on Aging (MCDA). But for their various disabling conditions, they would be ineligible for the funding and services they receive through Family Care. It is therefore unsurprising that their attempts to articulate viable claims under the ADA and the Rehabilitation Act against the Family Care program present conceptual difficulties.

In *Washington v. Indiana H.S. Athletic Assn., Inc.*,181 F.3d 840, 847 (7th Cir. 1999), the Seventh Circuit Court of Appeals adopted a plain language standard which is helpful in analyzing the claims in this case: "In our view, the Sixth Circuit outlined correctly . . . the various methods of proof in s. 504 Rehabilitation Act or Title II ADA claims: discrimination under both acts may be established by evidence that (1) the defendant intentionally acted on the basis of the disability, (2) the defendant refused to provide a reasonable modification, or (3) the defendant's rule disproportionately impacts disabled people."

A. The defendants have not intentionally discriminated against the plaintiffs because of their disabilities.

This method of establishing a claim under the ADA or the Rehabilitation Act (essentially, "adverse treatment") is clearly absent from the plaintiffs' Fourth Amended Complaint. The plaintiffs have not alleged that the features of the Family Care program of which they complain are the result of any purposeful animus against them or against persons with disabilities generally, nor have they identified any "comparison class" of non-disabled persons singled out for preferable treatment.

B. The features of the Family Care program of which the plaintiffs complain do not disproportionately affect disabled persons.

The allegations of the Fourth Amended Complaint are not sufficient to establish a claim under the ADA or the Rehabilitation Act under a theory of disparate impact.

Any discussion of disparate impact logically requires the designation of a "comparison class" whose treatment under the rule or program under attack can be compared with the treatment received by the plaintiffs. When disabled plaintiffs assert claims under the ADA and the Rehabilitation Act, one might expect the comparison class to be persons who are not similarly disabled. However, there are no allegations in the complaint about any non-disabled persons. The plaintiffs' disparate impact theory must therefore be of a non-traditional sort for ADA and Rehabilitation Claims, and in fact it is.

Because the plaintiffs are eligible disabled persons over the age of 60, their community-based residential care and services are paid for by the Family Care program. Under that program (the basics of which are described with reasonable accuracy in the Fourth Amended Complaint), the MCDA (in its role as the Family Care CMO) receives a capitated monthly rate from the State for each beneficiary of the program. From that funding, MCDA pays for the care and treatment of each beneficiary, as determined by that beneficiary's individual needs and care plan. Eligible persons with similar disabilities under the age of 60 who reside in the community are served by the MCDHS Disabilities Services Division under the "traditional" Medical Assistance waiver programs (COP, CIP, etc., as described in the Fourth Amended Complaint). One consequence of the introduction of the Family Care as a program operated on an HMO model and administered separately from the Medical Assistance waiver programs is that the Family Care program pays some CBRF operators and other service providers a lower rate for persons over the age of 60

than those operators receive for similarly disabled persons under the age of 60 whose care is funded under the Medical Assistance waiver programs.

This, then, is the gravamen of the Fourth Amended Complaint: Family Care pays some CBRF operators and ancillary treatment providers at lower rates than those same providers would receive for the same beneficiaries if they were under 60 years old and, therefore, beneficiaries of the Medical Assistance waiver programs rather than Family Care.

The disparity upon which the plaintiffs rely (that is, between disabled persons over 60 whose care is paid by the defendants under Family Care and disabled persons under 60 whose care is paid for by the defendants under the traditional Medical Assistance waiver programs) will not support their claims under the ADA and the Rehabilitation Act.

The plaintiffs attempt to make more of this claimed disparity than the factual allegations of their complaint will bear. They allege that Family Care beneficiaries receive "substantially inferior treatment in regard to payment for services", (Paragraphs 143(A), (B) and (C) and 162(A), (B) and (C), Fourth Amended Complaint). But there is no factual allegation which will support an inference that the difference, even with respect to payment, is "substantial". More importantly, there is nothing in the factual allegations of the complaint from which the court can infer that the lower payments affect the quality of the treatment and services received by Family Care beneficiaries so substantially that the rights of the plaintiffs under the ADA and the Rehabilitation Act are implicated.

None of the named plaintiffs alleges that his or her own care or services have been substantially reduced. They allege only that they may face the prospect of moving to different community-based providers because their current providers are dissatisfied with their profits under the rates which Family Care pays them. The plaintiffs do not allege that the care they

would receive if that occurs will be "substantially inferior" to the care they currently receive, and there is no reason for the court to infer that it would be. Nor does any named plaintiff allege that he or she is receiving care or treatment which is substantially inferior to what he or she received when under age 60 as a beneficiary of a Medical Assistance waiver program. The complaint does not describe the case of a single Family Care beneficiary who has suffered any injury cognizable under the ADA or the Rehabilitation Act due to the "disparate treatment" alleged in Paragraphs 143 and 162.

In short, the claims of disparate treatment in Paragraphs 143 and 162 are mere unsupported conclusions and therefore insufficient to state a claim under conventional Rule 12(c) analysis. Moreover, even if they did state a claim, the Fourth Amended Complaint does not identify any Family Care beneficiary who has the standing to raise it.

C. The integration mandate.

The Fourth Amended Complaint charges that the defendants administer Family Care in a fashion which violates the mandate, derived from both the ADA and the Rehabilitation Act and their respect implementing regulations, that disabled persons be served in the "most integrated" (that is, typically, the least institutional) setting appropriate to their needs.

The case law is clear that "unjustified institutional isolation" of disabled individuals receiving care under the auspices of the state is actionable as a violation of the integration mandate of Title II of the ADA, *Olmstead v. L.C.*, 527 U.S. 581 (1999), *Radaszewski v. Maram*, 383 F.3d 599 (7th Cir. 2004). However, none of the named plaintiffs is in "institutional isolation", justified or otherwise. They are all in community placements, thanks to Family Care funding, and none has the standing to assert a claim under the integration mandate.

The allegations of Fourth Amended Complaint which describe the named plaintiffs (Par. 65-Par. 127) do not show any concrete "injury in fact" to the those plaintiffs, and certainly no injury which implicates their rights under the integration mandates of the ADA and the Rehabilitation Act. Viewing those allegations in the light most favorable to the plaintiffs, they establish no more than conjectural or hypothetical injury.

Four of the six named plaintiffs reside in CBRF's run by the same business entity, Homes for Independent Living (HIL). HIL demanded higher rates from MCDA. When MCDA declined, HIL gave notice that it would cease doing business with MCDA, which forced MCDA to make other arrangements for the plaintiffs. At length, due to interim stipulations, HIL agreed to keep those plaintiffs at the existing rates and it was not necessary to move them. The other named plaintiffs are placed in a CBRF which, according the operator, is insufficiently profitable at the rates paid by the Family Care Program. Therefore, if the program does not increase those rates, those plaintiffs may have to move because that operator will stop doing business with the Family Care program. The action has been pending for a year and a half, and that has not yet happened.

The worst thing that could happen to the plaintiffs, even in the absence of the stipulation in this action, would be a move to a different CBRF, perhaps with different ancillary service providers. Significantly, it is not even alleged that MCDA plans to move any of the plaintiffs to a "less integrated" nursing home or other institutional placement (in which event, the plaintiffs might have an arguable claim under the integration mandates of the ADA and the Rehabilitation Act).

The plaintiffs allege that any move would be so stressful as to result in a nursing home or similar institutional placement, but such conclusory allegations are "hypothetical" and

"conjectural" and therefore inadequate to confer standing. Indeed, the allegations of the complaint itself tend to refute that proposition. Plaintiff Bzdawka has been transferred to "a succession of group homes in Milwaukee County", and then she was transferred from one HIL facility to another (Fourth Amended Complaint, Par. 82). Plaintiff Nelson was also transferred from one HIL CBRF to another HIL CBRF (Fourth Amended Complaint, Pars. 66-67). Plaintiff Gorton (one of the two plaintiffs not in HIL facility) was in "several assisted living facilities" before moving to his current placement. In none of those cases did the moves result in nursing home or other institutional placements. The only inference which flows logically from the allegations of the complaint is that, for a variety of reasons, disabled persons move from one facility or treatment provider to another (which, in fact, they do), and that those moves are *not* typically so traumatic as to cause placement in less integrated institutional settings.

The substantive right which the plaintiffs are really asserting is a right to remain indefinitely, at state and county expense, in a particular CBRF with a particular array of additional service providers, irrespective of cost or any other factor. No such right exists under the ADA or the Rehabilitation Act. The law will not support federal court intervention to regulate the administration of a program for the disabled at that level of specificity. "The purpose of the [integration mandate] 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).

D. Reasonable accommodation requirement.

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, insofar as they pertain to the plaintiffs, 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, which guarantees perpetual placement in the same residential facility.

Moreover, even if the notion of "reasonable accommodation" were applicable in this case, the defendants 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. MCDA, 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. What the plaintiffs characterize as a "reasonable accommodation" would permit particular providers of residential services 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 offer 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 very doubtful 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.

The Supreme Court has explicitly recognized that in reasonable accommodation cases (as in all cases of this kind), there is only so much money to go around. Accordingly, the Court refused to adopt an interpretation of the reasonable modifications regulation which "would leave the State virtually defenseless once it is shown that the plaintiff is qualified for the service or program she seeks," *Olmstead*, 527 U.S. 581 at p. 603. Rather, the Court stated that, "[s]ensibly construed, the fundamental-alteration component of the reasonable-modifications regulation would allow the State to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population" of persons with disabitilites", *id.*

The goal of the Family Care program is to allocate the available resources as efficiently as possible in order to fund community placements for all eligible disabled persons for whom such placements are appropriate, as an alternative to leaving people in institutions on waiting lists (which, if properly administered, would be perfectly legal under the ADA and the Rehabilitation Act, *Bruggeman v. Blagojevich*, 324 F.3d 906, 913 (7th Cir. 2003)). To require the Family Care program to pay whatever rates a particular CBRF or other provider which is serving a particular enrollee or group of enrollees may demand would permit those enrollees and providers to absorb an inequitable share of the available resources. In fact, it could delay or

eliminate the possibility of more integrated community placements for other eligible individuals, and thus frustrate the larger purpose or the ADA and the Rehabilitation Act.

IV. Medicaid Act claims.

The Fourth Amended Complaint includes a claim under 42 U.S.C. s. 1396a(a)(30)(A), a section of that portion of the federal Medicaid Act which prescribes the components of the medical assistance plan which a state must have in order to participate in the Medicaid program. The plaintiffs allege that provider payments under the Family Care program are not "sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographical area," within the meaning of that provision of the Act.

The complaint alleges that the plaintiffs have a private cause of action under s. (30)(A), enforceable under 42 U.S.C. s. 1983. (Par. 182, Fourth Amended Complaint). This is an unsupported legal conclusion which the court should not consider in assessing the viability of the claim. *R.J.R. Serv., Inc. v. Aetna Cas. & Sur. Co.,* 895 F.2d 279, 281 (7th Cir. 1989). Although there is authority from other circuits allowing such a cause of action for Medicaid beneficiaries, *see, e.g., Evergreen Presbyterian Ministries Inc., v. Hood,* 235 F.3d 908 (5th Cir. 2000), the Seventh Circuit Court of Appeals has not recognized such a cause of action[3]. Even if such authority would be found, it is not clear what the relevant "general population" or "geographical area" would be in this action.

[3] Nor is there any reason to suppose the Seventh Circuit is in a hurry to create such a cause of action. The court has shown a salutary reluctance to turn Medicaid state plan requirements into causes of action, *see*, *Bruggeman v. Blagojevich*, 324 F.3d 906, 911 (7th Cir. 2003), wherein the court refused to find a private cause of action in the "best interests" provision of 42 U.S.C. s. 1396a(a)(19), citing "the Supreme Court's hostility, most recently and emphatically expressed in *Gonzaga University v.Doe*, 536 U.S. 273 . . . to implying such rights in spending statutes."

The Seventh Circuit Court of Appeals has recognized a cause of action under s. (30)(A) in favor of Medicaid *providers*, *Methodist Hospitals, Inc. v. Sullivan*, 91 F.3d 1026, 1029 (7th Circuit). However, the plaintiff providers in that case, although they had the theoretical basis for a claim, were unsuccessful because they were unable to establish a violation of s. (30)(A). Based upon the allegations in the Fourth Amended Complaint, the plaintiffs in this action would fail for the same reasons, even if they could assert a cognizable cause of action.

In *Methodist Hospitals*, the Seventh Circuit Court of Appeals held that a state does not violate s. (30)(A) if it "behave[s] like other buyers of goods and services in the market place" in setting Medicaid reimbursement rates. A state can experiment with reimbursement methods and rates to test what the market will bear. If an experiment fails and sufficient providers are not forthcoming, s. (30)(A) may require the state to raise the rates, but the experiment itself does not subject the state to a private cause of action, *id.*, 91 F.3d 1026 at 1030.

Based upon the allegations in the Fourth Amended Complaint, the impact of Family Care rates on the availability of CBRF's and ancillary service providers for program beneficiaries has not been sufficiently adverse to support a claim under s. (30)(A). In dismissing the claims of the plaintiff providers in *Methodist Hospitals,* the court noted that the plaintiffs themselves had not withdrawn from the market as a result of the challenged reimbursement system. "Indeed, they have not offered to show that *any* provider withdrew, anywhere in the state." The plaintiff providers offered only "dire predictions", which did not come to pass, *id.*, 91 F.3d 1026 at 1030. The allegations of the Fourth Amended Complaint are very similarly deficient. The providers serving the named plaintiffs complain and threaten, but during the year and a half that this action has been pending neither has stopped serving Family Care beneficiaries. Indeed, like the unsuccessful provider plaintiffs in *Methodist Hospitals*, the plaintiffs in this action have alleged

only “dire predictions”. As alleged in paragraphs 50 and 130 of the Fourth Amended Complaint, Family Care has been operating since 2000 and serves nearly 5,700 enrollees, but the plaintiffs have not offered to show that *any* provider has withdrawn from the program or that there has been any contraction in the relevant market for services which would suggest a violation of s. (30)(A).

CONCLUSION

For the foregoing reasons (together with the reasons which are cogently and persuasively argued in the brief of the State of Wisconsin defendants), Milwaukee County respectfully urges the court to dismiss the Fourth Amended Complaint under Rule 12(c), on the grounds that the named plaintiffs do not state claims upon which relief can be granted because the claims as stated are not cognizable or, with regard to those sections of the complaint which may describe viable private causes of action, the plaintiffs lack the standing to raise them.

Dated at Milwaukee, Wisconsin this 15th day of June, 2005.

OFFICE OF CORPORATION COUNSEL

By:_____

John Jorgensen
Principal Assistant Corporation Counsel
State Bar No. 01017484
Attorneys for Defendant Milwaukee County

P.O. Address:
Milwaukee County Courthouse
901 North 9th Street, #303
Milwaukee, WI 53233
Telephone: (414) 278-4302
Fax: (414) 223-1249