IN THE UNITED STATES DISTRICT COURT FOR

THE NORTHERN DISTRICT OF OKLAHOMA

FILED
OCT 3 2002
Phil Lombardi, Clerk
U.S. DISTRICT COURT

Katherine Fisher, Earlee Heath, and Karol Loy, on behalf of themselves and all others similarly situated,

Plaintiffs

v. Civil Action No. 02-CV-762P

Oklahoma Health Care Authority and Mike Fogarty, in his capacity as CEO of the Oklahoma Health Care Authority,

Class Action

Defendants

MOTION FOR PRELIMINARY INJUNCTION

Pursuant to Rule 65, F.R.C.P., named and class plaintiffs move this Court to issue a preliminary injunction and aver in support:

1. The three named plaintiffs and the class who seek relief are all disabled low-income persons who are able to and currently do live at home. If Defendants' recently promulgated Medical Assistance policy that limits their prescription medications to five per month is not enjoined, in order to stay alive Plaintiffs will be forced to go to inpatient hospitals and nursing homes to receive the prescription medications they need.

2. Named Plaintiffs are Earlee Heath, a 73 year old woman who is an insulin-dependant diabetic who also has hypertension, asthma, congestive heart failure, residual bilateral paresis and

deep vein thrombosis; Karol Loy, a 46 year old woman who has a seizure disorder and cardiac malfunction; and. Katherine Fisher, a 48 year old woman who has cerebral palsy and a history of multiple cerebrovascular accidents.

3. Named and class plaintiffs are all eligible for and enrolled in Defendants' federally-funded Medical Assistance program. They all currently reside in their own homes and apartments.

4. Named and class plaintiffs all also eligible for and enrolled in Defendants Medical Assistance Home and Community-Based Services Waiver Program (hereinafter "waiver program"), 42 U.S.C. § 1396n(c), which was intended to avoid the unnecessary institutionalization in nursing homes, hospitals and other segregated settings, all of which are more expensive than residing in the community. In order for Plaintiffs to participate in the waiver program, they must meet the "level of care" of the institution for which they would otherwise be institutionalized. In order for Defendants to receive federal reimbursements, they must file an application with the U.S. Department of Health and Human Services providing sufficient information to establish that the community-based waiver program services are less expensive than the institutional services.

5. Named and class plaintiffs all require more than five prescription medications per month, which Defendants paid for before October 1, 2002, when the new policy limited the number of prescriptions to persons.

6. Defendants will provide more than five prescription medications per month to named and class plaintiffs in nursing homes, hospitals and other institutions funded with federal medical assistance funds.

7. In order for named and class plaintiffs to receive the necessary prescriptions per

month they require, they will have to go to hospitals and nursing homes.

8. Named and class plaintiffs cannot live without their medications.

NOW WHEREFORE, named and class plaintiffs request this Court to issue a preliminary injunction prohibiting defendants from putting into effect the announced limitation on prescription coverage for participants in the HCBS Waiver Program, pending the final disposition of this matter.

Respectfully submitted,

Morris D. Bernstein
OBA # 16087
University of Tulsa Boesche Legal Clinic
407 S. Florence Avenue
Tulsa, OK 74104
918-631-5799
Attorney for Plaintiffs

Of Counsel:
Stephen F. Gold
Attorney ID # 09880

125 South Ninth Street

Suite 700

Philadelphia, PA 19107

215-627-7100

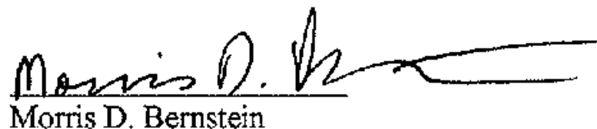
Date: October 3, 2002

CERTIFICATE OF SERVICE

I, Morris D. Bernstein, certify that on this 3rd day of October, 2002, I served a copy of this Motion and accompanying Brief by facsimile upon:

Courtney Shropshire
Legal Department
Oklahoma Health Care Authority
4545 N. Lincoln Blvd.
Oklahoma City, OK 73105

Fax #405-522-3444



Morris D. Bernstein

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Defendants

Memorandum of Law In Support of Motion for a Preliminary Injunction

The three named plaintiffs, and the class of persons whom they represent, i.e. medical assistance recipients who are on the Home and Community-Based Services waiver program (hereinafter "waiver program") and who require more than five prescription medications per month, seek a temporary restraining order and/or preliminary injunction to enjoin Defendants from implementing their newly promulgated policy that limits the number of prescriptions to five per month.

All of the plaintiffs are disabled, low-income, recipients of medical assistance, and have been found eligible and are enrolled in Defendants' Medical Assistance waiver program. They all

currently reside in the community in their own homes and apartments. Unless Defendants newly implemented policy is enjoined, in order for plaintiffs to stay alive they will be forced to move to a hospital or nursing home, where Defendants' medical assistance program will pay for as many prescription medications as plaintiffs require. That is, Defendants will provide more than five prescription medications per month, but only if plaintiffs reside in an institution, whether it be a hospital or nursing home, both of which Defendants will reimburse under its medical assistance program at an expense much greater than under the waiver program.

Introduction

Medicaid is a joint federal-state program designed to provide medical assistance to low income families and individuals "to help such families and individuals attain or retain capability for independence or self care." 42 U.S.C. § 1396. As part of the program, Congress reimburses for both nursing home care and inpatient acute hospitalization. When persons are institutionalized in either a nursing home or a hospital, they receive all the prescription medications that are medically necessary. There are no arbitrary limits on the number of prescriptions a person may receive in either a nursing home or hospital. They receive whatever is medically appropriate.

As part of its medical assistance statute, Congress also provides for Home and Community-based services ("HCBS") in its "waiver program." 42 U.S.C. § 1396n(c). In order for a person to be eligible to participate in the waiver program, they must meet the level of care for admission into an institution, whether a nursing home or hospital. Additionally, a state must certify that placement in the waiver program will be "cost neutral," that is, the aggregate costs for persons in the waiver program will be less than if those persons were in the institution.

Plaintiff Earlee Heath is a 73 year old woman who is currently enrolled in the Medicaid

Home and Community-Based Services (HCBS) Waiver Program administered by Defendant Oklahoma Health Care Authority (OHCA). She is an insulin-dependant diabetic who also has hypertension, asthma, congestive heart failure, residual bilateral paresis and deep vein thrombosis. Plaintiff Karol Loy is a 46 year old woman and current participant in the HCBS Waiver Program who has a seizure disorder and cardiac malfunction. Plaintiff Katherine Fisher is a 48 year old woman and current participant in the HCBS Waiver Program who has cerebral palsy and a history of multiple cerebrovascular accidents.

But for Defendants' HCBS Waiver Program, the named and class plaintiffs would all be unnecessarily segregated in nursing homes or other institutions. They all reside in the community with appropriate HCBS services, including prescription services in excess of five per month. Effective October 1, 2002, Defendants changed their medical assistance program so that persons on the HCBS Waiver Program would not be permitted to receive more than five prescription medications per month if they continued to reside in the community. If, however, they resided in an institution, they would receive more than five prescriptions per month. Thus, only if Plaintiffs relinquish their independence and live in a nursing home or hospital, both of which are far more expensive than residing in the community, will plaintiffs receive the appropriate number of prescription medications.

<u>The Standard for issue of a Temporary Restraining Order and/or Preliminary Injunction.</u>

The standard for issuance of a temporary restraining order or preliminary injunction requires that the Plaintiffs demonstrate (1) a probability of success on the merits of the claim; (2) the danger of irreparable harm; (3) that the balance of hardships tips in plaintiffs' favor; and (4) that the public interest will be further by the issuance of the order. <u>Federal Lands Legal</u>

Consortium ex rel.Robart Estates v. U.S. 195 F.3d 1190, 1194 (10th Cir.,1999).

This standard is a flexible one. If plaintiffs' probability of success is high, the severity of the irreparable injury need not be great. Conversely, if the injury to the plaintiff is great, plaintiffs need only demonstrate that their legal claims are so "serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation." Hamilton Watch Co. v. Benrus Watch co., 206 F. 2d 738, 740 (2nd Cir. 1953); accord, Continental Oil Co. v. Frontier Ref. Co., 338, F. 2d 780 (10th Cir. 1964); Alameda County v. Einberger, 520 F. 2d 344 (9th Cir. 1975); Wright & Miller, Federal Practice and Procedure: Civil section 2948 at pp 453-455.

Plaintiffs easily meet each of the above requirements.

ARGUMENT

1. The Plaintiffs Are Likely to Succeed On the Merits of their Claims:

The Americans with Disabilities Act, 42 U.S.C. § 12101 et seq., is a far reaching statute designed "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities. 42 U.S.C. § 12101(b)(1). Congress recognized that isolation, segregation and unnecessary institutionalization of individuals with disabilities are forms of discrimination that must be eliminated. 42 U.S.C. § 12101(a)(2),(3) and (5).

Congress noted specifically that discrimination persists in the provision of "health services," 42 U.S.C. § 12101(a)(3), and established as a national goal "to assure... independent living ... for such individuals." 42 U.S.C. § 12101(a)(8).

Congress directed the Attorney General to promulgate regulations implementing the

public services title of the ADA. 42 U.S.C. § 12134. The Attorney General's ADA public services regulations are codified at 28 CFR 35.101 et seq. The subpart of these regulations that is directly on point in the present action that Defendants violate is at 28 CFR 35.130(d) that provides that a public entity in providing any aid, benefit or service discriminates against persons with disabilities when it violates these regulations, including the following:

"(d) A public entity shall administer services, programs and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." (Emphasis added).

By limiting the number of prescription medications to five per month in the community and providing unlimited in the institution, Defendants discriminate against the named and class plaintiffs because they deny the services in community-based settings but provide it only in unnecessarily segregated settings.

This regulation is the ADA's "Integration Mandate." In Olmstead v. L.C. 527 U.S. 119 S.Ct 2176 (1999), the Supreme Court specifically considered the Title II integration mandate and concluded, not only that it was within the scope the Attorney General's rulemaking discretion, but that it was virtually required by the underlying purpose of the ADA and its text. As the Court explained:

> Recognition that unjustified institutional isolation of persons with disabilities is a form of discrimination reflects two evident judgments. First, institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life...Second, confinement in an institution severely diminishes life activities of individuals, including family relations, social contact, work options, economic independence, educational advancement and cultural enrichment. Olmstead at 2187.

Virtually on all fours with the present case, the Supreme Court went on to hold that "Dissimilar treatment correspondingly exists in this key respect: In order to receive needed medical services, persons with disabilities must, because of those disabilities, relinquish participation in community life they could enjoy given reasonable accommodations." Olmstead at 2187.(Emphasis added).

In the present case, all of the plaintiffs seeking preliminary relief have been screen and evaluated by the Defendants for medical assistance services in the community and all have been determined to be qualified for such services in the community. As the Olmstead court noted, there can be "no genuine dispute concerning the status of [the plaintiffs] as individuals 'qualified' for non-institutional care. Olmstead 119 S.Ct. at 2188; see also Kathleen S. v. Dept of Public Welfare, 10 F. Supp. 2d 460, 470-474 (E.D. Pa. 1998).

Lower courts which have considered whether states must provide appropriate medical assistance services to persons able to reside in the community with such services have determined that the integration mandate requires provision of such services. Helen L. v. DiDario, 46 F. 3d 325, 336-339 (3d Cir. 1995; see also, Sanon v. Wing, 2000 N.Y. Misc. LEXIS 139 at 12-24 (Sup. Ct. N.Y.2000). In Helen L, the Third Circuit determined that where Pennsylvania had a program to provide personal care services in the nursing home, it could not deny or delay providing those services in the community to an individual who qualified for them.

The Court emphasized that "The fact that it is more convenient, either administratively or fiscally, to provide services in a segregated manner, does not constitute a valid justification for separate or different services under Section 504 ... or under [title ii of the ADA]." Helen L., 46 F. 3d at 338 (quoting H.R.Rep. 485 (III), 101st Cong. 2d Sess.50 (emphasis in original)).

In the present case, Defendants will pay for more than five prescription medications per month, but only if the person is in a segregated setting – a nursing home or a hospital. The irony is that Defendants pay substantially more for persons in these institutions than they do for persons in the community.

2. The Balance of Harms Tips Decidedly in Favor of Granting the Requested Relief

The harm to plaintiffs if an injunction is not granted is palpable. Without the requested relief, the plaintiffs will either die or go unnecessarily into the hospital or nursing facility – not because they need to reside in those institutions, but only because those are the only settings where they can receive their medically necessary prescriptions. Those are the draconian harms that the disabled plaintiffs will face.

Not surprisingly, courts which have considered the question have concluded readily that "the possibility that the plaintiffs would be forced to enter nursing homes constitutes irreparable harm." McMillan v. McCrimon, 807 F. Supp. 475 (C.D.Ill 1992); see also, Kathleen S., 10 F. Suppp. 2d at 481("these class members are irrepara bly injured every day they remain unnecessarily segregated in violation of the ADA"); Daniel B. v. White, 1991 U.S. Dist. LEXIS 4925 at 7 (E.D. Pa. 1991)("Continued institutionalization of the class members, even for a short period of time, will cause irreparable harm."). Plaintiffs easily satisfy the irreparable injury requirements for issuance of a preliminary injunction.

Measured against the severe and irreparable harm that will befall the plaintiffs in the absence of court intervention, the hardship to the defendants is virtually non-existent.

If the Plaintiffs are denied their prescription medications in the community, they will be forced to enter either a hospital or a nursing home to obtain such services. They currently qualify

for such services, by dint of being eligible for the HCBS Waiver services. Defendants will certainly expend substantially more for the class members in the institutions than what they presently spend on the same persons in the community.

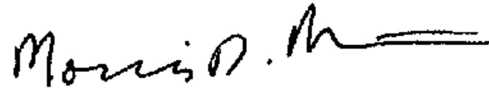
Granting the requested relief will save the state substantial funds.

The balance of hardships tips decidedly in favor of the plaintiffs.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that this Court enter a temporary restraining order and/or a preliminary injunction enjoining the defendants from failing or refusing to provide the named and class plaintiffs with Medicaid coverage in the community as it provides to persons in institutions, pending the hearing and determination of this action.

Respectfully submitted,



Dated: 103/02

Morris D. Bernstein

OBA # 16087

University of Tulsa Boesche Legal Clinic

407 S. Florence Avenue

Tulsa, OK 74104

918-631-5799

Attorney for Plaintiffs

Of Counsel:

Stephen F. Gold

Attorney ID # 09880

125 South Ninth Street

Suite 700

Philadelphia, PA 19107

215-627-7100