UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT CINCINNATI

BETTY HILLEGER
Who resides at The Lodge Care Center
9370 Union Cemetery Road
Loveland, OH 45140,
By and through MARILYN WENMAN her next friend and Attorney-in-Fact
1038 Heron Point Way
Deland, FL 32724

And

GERALDINE A. SAUNDERS
Who resides at Close to Home
2812 South 9th Street
Ironton, OH 45638,
By and through KATHRYN A. PRICE her next friend and Attorney-in-Fact
502 Orchard Street
Ironton, OH 45638

PLAINTIFFS,

vs.

JOHN B. MCCARTHY
In his official capacity as Medicaid Director,
Office of Medical Assistance
Ohio Department of Job and Family Services
30 East Broad Street, 32nd Floor
Columbus, OH 43266-0423

And

BONNIE KANTOR-BURMAN
In her official capacity as Director,
Ohio Department of Aging
50 W. Broad Street
Columbus, OH 43215-3363

DEFENDANTS.

CASE NO. 1:13-cv-74

(Judge _____)

CLASS ACTION COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

INTRODUCTION

1. This action for declaratory and injunctive relief is brought by and on behalf of frail and disabled Ohio citizens who qualify for the Medicaid Assisted Living Waiver Program (hereinafter "Medicaid AL Waiver"), but whose coverage date is being artificially delayed by Defendants, and who are not given an opportunity to apply for the state-funded Assisted Living Program (hereinafter "state-funded ALP") or have applied for the state-funded ALP, but who do not receive a written denial notice and the opportunity for a fair hearing by Defendants in violation of the Constitution of the United States, the Social Security Act, and the law of the State of Ohio, for which Defendants are liable to Plaintiffs under 42 U.S.C. § 1983.

2. Jurisdiction is conferred on this Court by 28 U.S.C. § 1331 and 28 U.S.C. § 1343.

PARTIES

3. Plaintiff Betty Hilleger ("Betty Hilleger") is a resident of Hamilton County, Ohio, who applied for and was determined eligible for the Medicaid AL Waiver effective October 1, 2012, but whose coverage was artificially delayed until January 1, 2013, when the Defendants entered her eligibility into their computer system.

4. Plaintiff Geraldine A. Saunders ("Geraldine A. Saunders") is a resident of Lawrence County, Ohio, who applied for and was determined eligible for the Medicaid AL Waiver effective June 1, 2012, but whose coverage was artificially delayed until July 18, 2012, when the Defendants entered her eligibility data into their computer system.

5. Defendant John B. McCarthy ("McCarthy") is the Medicaid Director of the Office of Medical Assistance of the Ohio Department of Job and Family Services and is jointly responsible with Defendant Bonnie Kantor-Burman ("Kantor-Burman") for the administration of the Medicaid AL Waiver in Ohio.

6. Defendant McCarthy as the Medicaid Director of the Office of Medical Assistance of the Ohio Department of Job and Family Services is responsible for implementation of the Medicaid Program in the State of Ohio and is required, pursuant to O.R.C. § 5111.01, to provide medical assistance in accordance with the federal Medicaid statute, Title XIX of the Social Security Act, 79 Stat 286 (1965), Ohio law, and the Constitution of the United States.

7. Defendant McCarthy has acted and continues to act at all relevant times in his official capacity and under color of state law.

8. Defendants Kantor-Burman is jointly responsible with Defendant McCarthy for the administration of the Medicaid AL Waiver, and is responsible for the administration of the state-funded ALP under the authority found at Ohio Revised Code § 5111.89(D) and the Ohio Administrative Code Rules 173-51-01 *et seq.*

9. Defendant Kantor-Burman has acted and continues to act at all relevant times in her official capacity and under color of state law.

CLASS ALLEGATIONS

10. There are two subclasses:

Subclass I:

All Ohio individuals who are eligible for the Medicaid AL Waiver but whose Medicaid AL Waiver coverage is artificially delayed until the Defendants enter Plaintiffs' eligibility into their computer.

Subclass II:

All Ohio individuals who are applying for the Medicaid AL Waiver, and who are either not given an opportunity to also apply for the state-funded ALP, or who have applied and have been denied the state-funded ALP and who have not received a written denial notice and an opportunity for a fair hearing.

11. The Named Plaintiffs do not know the exact number of class members but estimate it to be in the thousands. According to Defendants' Application to the federal government for the Medicaid AL Waiver approval, the number of unduplicated participants in the program is estimated to be 1,800 per year.

12. All Medicaid AL Waiver applicants may also apply for the state-funded ALP.

13. There are questions of law that are common to all class members; namely, whether Defendants' practice and procedure of delaying the coverage date of eligibility for the Medicaid AL Waiver violates federal and state law and the Constitution of the United States, and whether Defendant Kantor-Burman's practice and procedure of not providing an opportunity to apply for the state-funded ALP and denying the state-funded ALP without giving written notice of the denial and the opportunity for a fair hearing violates due process of law.

14. There are questions of fact that are common to all class members; namely that each class member's coverage date for the Medicaid AL Waiver has been artificially delayed. Further, class members are not told about the state-funded ALP, so they do not apply for that program, and if they do apply and are denied, they are not given a written denial notice and the opportunity for a fair hearing.

15. The claims of the Named Plaintiffs are typical of the claims of the class.

16. The Named Plaintiffs will fairly and adequately protect the interests of the class. The Named Plaintiffs have no interests, which are antagonistic to those of other class members, and are represented by counsel experienced in class action litigation.

17. The Defendants have acted on grounds generally applicable to the class; thus, final injunctive and declaratory relief with respect to the class as a whole is appropriate.

FACTS

18. Defendant McCarthy, in his official capacity as the Medicaid Director of the Office of Medical Assistance of the Ohio Department of Job and Family Services, has voluntarily agreed to participate in the Ohio Medicaid Program, and as such, is required to provide medical assistance in accordance with the mandatory requirements of the Social Security Act.

19. Defendant McCarthy has entered into a contract with the United States Government to provide medical assistance to Medicaid-eligible frail and disabled Ohioans ("Plaintiffs") who live in assisted living facilities, under a Home and Community Based Waiver known as the Medicaid Assisted Living Waiver (Medicaid AL Waiver) pursuant to § 1915(c) of the Social Security Act, codified at 42 U.S.C. § 1396n(c).

20. The Medicaid AL Waiver is located on the Centers for Medicare/Medicaid Services website at

OH0446 /Medicaid-CHIP-Program-Information/By-Topics/Waivers/Downloads/OH0446.zip

21. The purpose of the Medicaid AL Waiver is to keep Plaintiffs out of nursing homes, to permit such individuals to live in the least restrictive environment possible given their physical and mental limitations, and to permit Plaintiffs to continue living in the community even though they meet the level of care necessary for Medicaid to pay for their care in the higher

level of care and higher cost environment of a licensed nursing facility. See Ohio Admin. Code § 5101:3-3-08.

22. The target population of the Medicaid AL Waiver consists of individuals who, but for the Waiver, will otherwise live in an institutional, i.e., "nursing home," environment.

23. As part of the contract to provide medical assistance to Plaintiffs under the Medicaid AL Waiver, Defendant McCarthy must follow all requirements of the Social Security Act, which are not otherwise "waived."

24. Only **three** otherwise mandatory federal requirements may be waived under the federal statute authorizing the Medicaid AL Waiver: the waiver need not be operated throughout the state (state-wideness), the population served under the waiver need not be comparable to all populations otherwise entitled to Medicaid ("comparability"), and the income and resource limits may be different from the income and resource rules applied to populations otherwise entitled to Medicaid. 42 U.S.C. § 1396n(c)(3).

25. The effective date of medical assistance is **not** otherwise "waived" under the Assisted Living Waiver contract referred to in Paragraph 19 herein.

26. The effective date of medical assistance is **not** one of the federal requirements that may be waived under the Social Security Act.

27. Furthermore, Defendant McCarthy has promised in the Medicaid AL Waiver contract that "[e]ntry to the waiver is offered to individuals based on the **date of application** for waiver services." Appendix B-3 f., Waiver Application (emphasis supplied).

28. Section 1902(a)(34) of the Social Security Act, 42 U.S.C. § 1396a(a)(34), **requires** that Defendant McCarthy provide medical assistance, including services under the

Medicaid AL Waiver, to Plaintiffs in the month they apply and retroactive three months from the date of application, if they qualify for the program during the retroactive period.

29. Defendant McCarthy has implemented the effective date and three-month mandatory retroactive provision referred to in ¶ 28 herein at Ohio Administrative Code section 5101:1-38-01.2(G)(1)(e) and (G)(1)(c)(iii) to require that Medicaid is effective on the first day of the first month for which Defendant McCarthy receives an application if the applicant is eligible, and eligibility can be retroactive three months.

30. "Medical assistance" includes services under the Medicaid AL Waiver under section 1905(a) of the Social Security Act, 42 U.S.C. § 1396d(a), and section 1915(c) of the Social Security Act, 42 U.S.C. § 1396n(c).

31. Defendants do not provide Medicaid AL Waiver services to eligible applicants beginning the first day of the month in which the individual is eligible and retroactive three months, if applicable, but rather, Defendants artificially delay such effective date.

32. Defendants begin Medicaid AL Waiver services on the date their designated agent, the county department of job and family services' caseworker, enters the eligibility approval into Defendant McCarthy's computer system, which is usually months later than the date Plaintiffs are eligible for services under § 1902(a)(34) and § 1915(c) of the Social Security Act, 42 U.S.C. §§ 1396a(a)(34) and 1396n(c), leaving a gap in coverage.

33. Defendants artificially delay the Plaintiffs' coverage for services under the Medicaid AL Waiver until the date the Defendant McCarthy's caseworker enters the Medicaid eligibility date into his or her computer system, even though Plaintiffs are eligible for such coverage the first day of the first month they meet all of the Medicaid eligibility criteria, including, when applicable, the three-month period prior to the application date.

34. Defendants‘ agents, when approving Plaintiffs for Medicaid AL Waiver services, change the date of application from the actual date Plaintiffs apply to the date the caseworker physically enters the approval into Defendant’s computer system, and sometimes, to the first day of the month the caseworker completes the approval paperwork.

35. The Defendants’ agents can take months to process the approval paperwork.

36. Defendant McCarthy has an interagency agreement with Defendant Kantor-Burman to coordinate the determination of Plaintiffs’ eligibility for the Medicaid AL Waiver.

37. Defendant McCarthy determines the Plaintiffs’ financial eligibility for the Medicaid AL Waiver.

38. Defendant Kantor-Burman determines the Plaintiffs’ non-financial eligibility for the Medicaid AL Waiver.

39. Defendant Kantor-Burman is required to notify Plaintiffs of the availability of the “state-funded” ALP, and to provide coverage to Plaintiffs if Plaintiffs are eligible for this program, in accordance with Ohio Administrative Code § 173-51-02 as authorized by O.R.C. §§ 173.01, 173.02, and Chapter 5111.

40. Defendant Kantor-Burman must provide a written denial notice and the opportunity for a fair hearing when Plaintiffs are denied the state-funded ALP, as required by the due process clause of the Fourteenth Amendment of the Constitution of the United States and Ohio Administrative Code § 173-51-03(D).

41. Defendant Kantor-Burman fails to notify Plaintiffs of the availability of the state-funded ALP, and if Plaintiffs apply for this program, fails to provide written notice of denial and the opportunity for a fair hearing to Plaintiffs if they are denied the state-funded ALP.

42. Plaintiff Betty Hilleger is a resident of The Lodge Care Center assisted living section and has lived there since 2008, spending all of her assets and all of her income on her care. She is 89 years of age.

43. Betty Hilleger applied for the Medicaid AL Waiver on October 19, 2012.

44. Betty Hilleger was found by Defendants to meet all eligibility requirements for the Medicaid AL Waiver effective October 1, 2012.

45. Defendant McCarthy's agent entered Betty Hilleger's approval for the Medicaid AL Waiver into Defendants' computer system on January 7, 2012, approximately three months after she had applied.

46. Defendants artificially delayed Betty Hilleger's Medicaid AL Waiver coverage until January 1, 2013, even though Defendants' agents determined she met all requirements for coverage effective October 1, 2012.

47. Betty Hilleger requested from Defendant Kantor-Burman and her agent, the Council on Aging of Southwest Ohio, that she be determined eligible for the state-funded ALP in accordance with Ohio Administrative Code § 173-51-02.

48. Defendant Kantor-Burman erroneously denied Betty Hilleger the state-funded ALP.

49. Defendant Kantor-Burman failed to provide Betty Hilleger with a written denial notice and the opportunity for a fair hearing of the denial of the state-funded ALP.

50. When Betty Hilleger applied for the Medicaid AL Waiver, she had assets less than $1,500 and countable monthly income less than $2,094.

51. Had Betty Hilleger been living in a nursing home on October 1, 2012, Defendant McCarthy would have begun Medicaid coverage effective October 1, 2012.

52. Betty Hilleger met all eligibility requirements for the Medicaid AL Waiver on October 1, 2012.

53. But for the Medicaid AL Waiver, Betty Hilleger would have been institutionalized in a nursing home.

54. Defendants wrongly changed Betty Hilleger's Medicaid AL Waiver application date from October 1, 2012 to January 1, 2013, the first day of the month the caseworker entered the Medicaid AL Waiver approval into Defendants' computer system.

55. Geraldine A. Saunders applied for the Medicaid AL Waiver on June 25, 2012.

56. Geraldine A. Saunders was found by Defendants to meet all eligibility requirements for the Medicaid AL Waiver effective June 1, 2012.

57. Defendant's agents entered Geraldine A. Saunders' eligibility for the Medicaid AL Waiver into their computer system on July 18, 2012.

58. Defendant Kantor-Burman's agent, the Area Agency on Aging, failed to inform Geraldine A. Saunders about the state-funded ALP in accordance with Ohio Administrative Code § 173-51-02, nor was she given an opportunity to apply for that program.

59. Defendants artificially delayed Geraldine A. Saunders' Medicaid AL Waiver coverage until July 18, 2012, even though Defendant McCarthy's agents determined she met all requirements for coverage effective June 1, 2012.

60. Geraldine A. Saunders met all criteria for the state-funded ALP in accordance with Ohio Administrative Code § 173-51-02.

61. When Geraldine A. Saunders applied for the Medicaid AL Waiver, she had assets less than $1,500 and countable monthly income less than $2,094.

62. Had Geraldine A. Saunders been living in a nursing home on June 1, 2012, Defendant McCarthy would have begun Medicaid coverage effective June 1, 2012.

63. Geraldine A. Saunders met all eligibility requirements for the Medicaid AL Waiver on June 1, 2012.

64. But for the Medicaid AL Waiver, Geraldine A. Saunders would have been institutionalized in a nursing home.

65. Defendants wrongly changed Geraldine A. Saunders' Medicaid AL Waiver application date from June 1, 2012 to July 18, 2012, the date the caseworker entered the Medicaid AL Waiver approval into Defendants' computer system.

CLAIMS

CLAIM ONE: ELIGIBILITY DATE

66. By failing to begin the Medicaid AL Waiver as of the date Plaintiffs meet all eligibility requirements (and retroactive three months, if applicable), and by changing the application date to the date the approval is entered into Defendants' computer system, Defendants artificially delay the effective date of Medicaid in violation of § 1902(a)(34) of the Social Security Act, 42 U.S.C. § 1396a(a)(34), for which they are liable to Plaintiffs under 42 U.S.C. § 1983.

CLAIM TWO: DUE PROCESS

67. Defendant Kantor-Burman fails to provide Plaintiffs with the opportunity to apply for the state-funded ALP, and fails to provide Plaintiffs with written notice and the opportunity for a fair hearing when Plaintiffs are denied state-funded ALP, in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States and Ohio

Administration Code § 173-51-03(D), for which she is liable to Plaintiffs under 42 U.S.C. § 1983.

WHEREFORE, Named Plaintiffs and the proposed class pray that the Court:

A. Assume jurisdiction of this case;

B. Certify this as a class action under Rule 23(b)(2) of the Federal Rules of Civil Procedure;

C. Enter a declaratory judgment that:

i. Defendants' policy of artificially delaying the coverage date of the Medicaid AL Waiver until the caseworker enters the date into Defendants' computer system and Defendants' practice of changing the application date violates 42 U.S.C. § 1396a(a)(34);

ii. Defendant Kantor-Burman's failure to provide an opportunity to apply for the state-funded ALP and the failure to give written denial notices and the opportunity for a fair hearing violates the due process clause of the Fourteenth Amendment of the Constitution of the United States;

D. Enter a permanent injunction enjoining Defendants from artificially delaying Plaintiffs and all class members' coverage under the Medicaid AL Waiver;

E. Enter an order requiring Defendants to identify and provide written notice to Plaintiffs and all class members that their Medicaid AL Waiver coverage will begin the date they meet all eligibility criteria;

F. Require Defendants to identify all class members whose coverage did not begin on the date of Medicaid eligibility, re-determine their eligibility for Medicaid AL Waiver, begin coverage on the date they meet the eligibility criteria for Medicaid,

and provide written notice and the opportunity for a fair hearing of the redetermination to all such identified class members;

G. Enter an order requiring Defendant Kantor-Burman to provide Plaintiffs and all class members the opportunity to apply for the state-funded ALP, and to give written notice and the opportunity for a fair hearing for all Plaintiffs and all class members who are denied the state-funded ALP;

H. Award Plaintiffs attorneys' fees and costs, pursuant to 42 U.S.C. § 1988; and

I. Award Plaintiffs any other just and equitable relief this Court deems appropriate.

Respectfully submitted,

/s/ Janet E. Pecquet
Janet E. Pecquet (#0013411)
Peter L. Cassady (#0005562)
Ashley J. Shannon (#0084964)
BECKMAN WEIL SHEPARDSON LLC
The American Book Building
300 Pike Street, Suite 400
Cincinnati, OH 45202
Telephone: 513-621-2100
Facsimile: 513-621-2100
jpecquet@beckman-weil.com
petercassady@beckman-weil.com
ashannon@beckman-weil.com

Attorneys for Plaintiffs

PRAECIPE FOR SERVICE

Service is to be made upon Defendants JOHN B. MCCARTHY and BONNIE KANTOR-BURMAN by certified mail, returnable according to law, at the address set forth on the first page above.

/s/ Janet E. Pecquet
Janet E. Pecquet (#0013411)

T:\Hilleger\Betty - 23.0973\Class Action\Complaint Revised 1.28.13.doc