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

KATHRYN A. PRICE
next friend and Attorney-in-Fact for
GERALDINE A. SAUNDERS
502 Orchard Street
Ironton, OH 45638

And

MARILYN A. WENMAN, EXECUTOR FOR THE ESTATE OF BETTY HILLEGER, DECEASED
1038 Heron Point Way
Deland, FL 32724

PLAINTIFFS,

vs.

JOHN B. MCCARTHY
Ohio Department of Medicaid
In his official capacity as Director,
30 East Broad Street, 32nd Floor
Columbus, OH 43266-0423

And

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

DEFENDANTS.

CASE NO. 1:13-cv-74

Magistrate Judge Litkovitz

FIRST AMENDED CLASS ACTION COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

EXHIBIT B

INTRODUCTION

1. This action for declaratory and injunctive relief is brought by and on behalf of disabled Ohio citizens who, due to significant health care needs, low incomes, and depleted savings, qualify for the Medicaid Assisted Living Waiver Program ("Medicaid AL Waiver") and/or the state-funded Assisted Living Program ("State-Funded ALP"). In violation of federal Medicaid law and due process protections, Defendants fail to cover assisted living services in or after the third month prior to an individual's date of application, even though Plaintiffs are otherwise determined to meet eligibility requirements. Also, in violation of due process protections, Plaintiffs are not given an opportunity to apply for the State-Funded ALP, or if they have applied for the State-Funded ALP, Plaintiffs have not received written denial notices and the opportunity for a fair hearing. As a result of Defendants' actions, Plaintiffs are unable to pay for necessary assisted living services.

JURISDICTION

2. Defendants act in violation of the Constitution of the United States, federal Medicaid law, and the law of the State of Ohio, for which Defendants are liable to Plaintiffs under 42 U.S.C. § 1983.

3. Jurisdiction is conferred on this Court by the Supremacy Clause of the Constitution of the United States, and by 28 U.S.C. §§ 1331 and 1343.

PARTIES

4. Plaintiff Marilyn A. Wenman is the Executor of the Estate of Betty Hilleger, Deceased, Case Number 2013005056, in the Probate Court of Hamilton County, Ohio. Ms. Hilleger resided at The Lodge Care Center in Hamilton County, Ohio, which contains a licensed residential care facility certified to participate in the Medicaid AL Waiver and the State-Funded

ALP. Ms. Hilleger applied for the Medicaid AL Waiver, and was determined to meet eligibility requirements effective October 1, 2012, but her coverage under the Medicaid AL Waiver did not begin until January 1, 2013. She received no coverage under the State-Funded ALP.

5. Plaintiff Geraldine A. Saunders is a resident of Lawrence County, Ohio. She resided in Close at Home III (Ironton, Ohio), which is a licensed residential care facility certified to participate in the Medicaid AL Waiver and the State-Funded ALP. Ms. Saunders applied for the Medicaid AL Waiver and was determined to meet eligibility requirements effective June 1, 2012, but her coverage under the Medicaid AL Waiver did not begin until July 18, 2012. She received no coverage under the State-Funded ALP.

6. Defendant John B. McCarthy is the Director of the Ohio Department of Medicaid. He has acted and continues to act at all relevant times in his official capacity and under color of state law.

7. Defendant Bonnie Kantor-Burman is Director of the Ohio Department of Aging. She has acted and continues to act at all relevant times in her official capacity and under color of state law.

8. In this First Amended Complaint, Defendants McCarthy and Kantor-Burman are referred to as "Defendant ODM" and "Defendant ODA," respectively.

9. Defendant ODM is responsible for implementation of the Medicaid Program in the State of Ohio and is required, pursuant to Ohio Rev. Code § 5162.01, to provide Medicaid-funded medical assistance in accordance with federal Medicaid law (42 U.S.C. §§ 1396 – 1396w-5), Ohio law, and the Constitution of the United States.

10. Defendant ODM and Defendant ODA are jointly responsible for administration of the Medicaid AL Waiver.

11. Defendant ODA is responsible for the administration of the State-Funded ALP under the authority of Ohio Rev. Code §§ 173.543 through 173.544, and Ohio Admin. Code §§ 173-51-01 through 173-51-05.

CLASS ALLEGATIONS

12. There are two subclasses:

Subclass I:

All Ohio individuals who meet eligibility standards for the AL Waiver for months occurring no earlier than three months prior to the month of application, but are denied coverage under the AL Waiver for all or some of those months.

Subclass II:

All Ohio individuals who apply 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 without receiving a written denial notice and an opportunity for a fair hearing.

13. The Named Plaintiffs do not know the exact number of class members but estimate it to be in the thousands. Approximately 4,000 individuals currently are enrolled in the Medicaid AL Waiver.

14. There are questions of law common to all class members; namely, whether Defendants' delay in implementing eligibility for the Medicaid AL Waiver violates federal Medicaid law and due process protections, and whether Defendant ODA's practice and procedure of not providing an opportunity to apply for the State-Funded ALP and denying eligibility for the State-Funded ALP without giving written notice of the denial and an opportunity for a fair hearing violates due process protections.

15. There are questions of fact that are common to all class members; namely, whether each class member's eligibility for the Medicaid AL Waiver has been delayed, and whether class members have been told about the State-Funded ALP and, if they have applied and been denied, whether they have been given a written denial notice and the opportunity for a fair hearing.

16. The claims of the Named Plaintiffs are typical of the claims of class members.

17. 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.

18. 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.

COVERAGE FOR ASSISTED LIVING SERVICES IN OHIO

Medicaid AL Waiver

19. A state is not obligated to participate in the Medicaid program but, once a state has agreed to participate, it must comply with all relevant requirements of federal Medicaid law. The State of Ohio, through Defendant ODM, has voluntarily agreed to participate in the Medicaid Program and accordingly must provide medical assistance in accordance with federal Medicaid law.

20. One provision of federal Medicaid law addresses the effective date of Medicaid eligibility. Retroactive eligibility is particularly important to Medicaid beneficiaries because they by definition have very limited financial resources, and because state Medicaid programs may require multiple months in order to process applications. To ensure that the application process does not result in a beneficiary being left without coverage for weeks or months, federal law requires a Medicaid program to provide medical assistance for up to three months prior to

the month of an individual's application, for any month during that period for which the applicant is found to have met eligibility requirements. 42 U.S.C. § 1396a(a)(34); 42 C.F.R. § 435.915.

21. Federal Medicaid law requires that medical assistance be provided with reasonable promptness. 42 U.S.C. § 1396a(a)(8); 42 C.F.R. § 435.930(a)-(b).

22. Federal Medicaid law requires that, when a Medicaid program makes a decision adverse to an applicant or beneficiary, he or she must be given a written notice of that decision and the right to seek a fair hearing, in accordance with constitutional standards of due process. 42 U.S.C. § 1396a(a)(3); 42 C.F.R. §§ 431.206, 431.206; *Goldberg v. Kelly*, 397 U.S. 254 (1970).

23. Under federal Medicaid law, specifically 42 U.S.C. § 1396n(c), a state may request permission from the federal government to offer a package of home and community-based services ("HCBS") to Medicaid beneficiaries who have care needs that otherwise would require admission to a nursing facility. ("Nursing facility" is the term used by federal law to refer to facilities that in the vernacular commonly are described as "nursing homes" or "convalescent hospitals.") Defendant ODM has requested and received such permission through the Medicaid AL Waiver, which authorizes provision of assisted living services.

24. The purpose of the Medicaid AL Waiver is to enable disabled Medicaid beneficiaries to live and receive necessary care in the more home-like environment of an assisted living facility, rather than a nursing facility.

25. The Medicaid AL Waiver is termed a "waiver" because 42 U.S.C. § 1396n(c) allows the federal government to waive three otherwise mandatory requirements for the waiver's operation. Under such waiver authority: 1) the waiver program need not be operated throughout

a state, 2) need not be made available to every Medicaid eligibility group, and 3) need not use the same income and resource rules applicable in other aspects of the Medicaid program. 42 U.S.C. § 1396n(c)(3).

26. The waiver authority under section 1396n(c)(3) does not authorize waiver of the provisions of federal Medicaid law which set the effective date of medical assistance, require that medical assistance be provided with reasonable promptness, and establish due process protections.

27. 42 U.S.C. § 1396a(a)(34) and its implementing regulation, 42 C.F.R. § 435.915, require that Defendant ODM provide medical assistance, including services under the Medicaid AL Waiver, up to three months prior to the month of an individual's application, for any month during that period for which the applicant is found to have met eligibility requirements. This same requirement is set forth in Ohio law at Ohio Admin. Code section 5160:1-2-01.2(G)(1)(c)(iii), (e).

28. To the extent that Ohio Admin. Code § 5160-33-04(C) limits retroactive coverage under the Medicaid AL Waiver, the regulation is preempted by relevant federal law, specifically 42 U.S.C. § 1396a(a)(34) and 42 C.F.R. § 435.915.

29. In administering the Medicaid AL Waiver, Defendants do not offer retroactive coverage. Eligibility is based solely on the enrollment date and is established prospectively only. The notice given to applicants does not give adequate notice when an applicant is being denied coverage for months in which she met eligibility requirements but was not yet enrolled into the program, due to Defendants' prospective-only policies for operation of the Medicaid AL Waiver.

30. Defendants' practices penalize applicants seeking Medicaid coverage for assisted living services, as compared to those seeking Medicaid coverage for nursing facility services.

Consistent with 42 U.S.C. §§ 1396a(a)(34) and 42 C.F.R. § 435.915, Defendants extend Medicaid coverage for nursing facility services for up to three months prior to the month of application, for any months during that period in which an applicant has met eligibility requirements.

State-Funded ALP

31. The State-Funded ALP is administered by Defendant ODA pursuant to Ohio Rev. Code §§ 173.543 through 173.547, and Ohio Admin. Code §§ 173-51-01 through 173-51-05. The State-Funded ALP allows for coverage of assisted living services starting from on or about the date of application for the Medicaid AL Waiver, until coverage for the Medicaid AL Waiver is either initiated or denied. Ohio Rev. Code § 173.544; Ohio Admin. Code §§ 173-51-02(A)(3), 173-51-03(A)(2), (3). Coverage under the State-Funded ALP is limited to no more than 90 days, under the assumption that an applicant's eligibility for the Medicaid AL Waiver will be determined within that 90 days. Ohio Rev. Code § 173.543; Ohio Admin. Code § 173-51-02(C).

32. Defendant ODA is required to provide coverage under the State-Funded ALP if Defendant ODA 1) has determined that an individual meets the non-financial requirements of the Medicaid AL Waiver (needing an intermediate level of care, and residing in a certified residential care facility), and 2) Defendant ODA does not have reason to doubt that the individual meets the financial requirements of the Medicaid AL Waiver. Ohio Rev. Code § 173.544(B); Ohio Admin. Code § 173-51-02(A)(3), (4).

33. Defendant ODA must provide a written denial notice and the opportunity for a fair hearing when Plaintiffs are denied coverage under the State-Funded ALP, as required by the due process clause of the Fourteenth Amendment of the Constitution of the United States, Ohio Rev. Code § 173.545, and Ohio Admin. Code § 173-51-03(D).

34. Defendant ODA 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.

FACTS CONCERNING NAMED PLAINTIFFS

35. Betty Hilleger was a resident of the assisted living section of The Lodge Care Center beginning in 2008, eventually spending all of her savings on care expenses. Shortly before her death on September 19, 2013, Ms. Hilleger moved within The Lodge Care Center from the assisted living section to the nursing facility section.

36. Through a duly designated authorized representative, Ms. Hilleger applied for the Medicaid AL Waiver on October 19, 2012. At the time, she was 89 years old. Due to dementia and frailty, she could not handle her own affairs.

37. Ms. Hilleger was found by Defendants to meet the eligibility requirements for the Medicaid AL Waiver effective October 1, 2012, the first day of the month during which Ms. Hilleger had applied. Nonetheless, Defendant ODM established an eligibility enrollment date of January 4, 2013, almost three months after she had applied. As a result, Ms. Hilleger did not receive financial assistance to pay for assisted living services in October, November and December of 2012, despite the determination that during those months her savings had been spent below the Medicaid eligibility level of $1,500 and she was eligible for coverage during those three months.

38. Ms. Hilleger received a notice regarding the eligibility effective date, but that notice did not give her adequate notice that she was being denied coverage for months in which she met eligibility requirements.

39. Through her representative, Ms. Hilleger requested from Defendant ODA and its agent, the Council on Aging of Southwest Ohio, that she be determined eligible for the State-Funded ALP. Defendant ODA, however, had Ms. Hilleger (who, due to dementia, was incapable of handling her own affairs) sign a statement that she did not wish to enroll in the State-Funded ALP.

40. Defendant ODA then denied Ms. Hilleger eligibility for the State-Funded ALP but failed to mail the denial notice, thereby failing to give Ms. Hilleger a written denial notice and the opportunity for a fair hearing.

41. At the time Ms. Hilleger's application was submitted for the Medicaid AL Waiver, she had assets of less than $1,500 and countable monthly income less than $2,094. Had she been living in a nursing facility on October 1, 2012, and subsequently, Defendant ODM would have begun Medicaid coverage for nursing facility services effective October 1, 2012.

42. Ms. Hilleger met all eligibility requirements for the Medicaid AL Waiver on October 1, 2012 and subsequently.

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

44. Plaintiff Geraldine A. Saunders lived in her home in the early part of 2012, but she then suffered a stress fracture, which required hospitalization, followed by a stay in a nursing facility in order to receive necessary rehabilitation services. Following the nursing facility stay, she moved into the Close in Home residential care facility on June 25, 2012. On the same day, through a duly designated authorized representative, she applied for the Medicaid AL Waiver.

45. Plaintiff Saunders was found by Defendants to meet all eligibility requirements for the Medicaid AL Waiver effective June 1, 2012. Nonetheless, Defendants established an

enrollment date of July 18, 2012. As a result, Ms. Saunders did not receive financial assistance to pay for assisted living services for the period from June 1 through July 18, 2012, despite the determination that during that time her savings had been spent below the Medicaid eligibility level of $1,500 and she was eligible for Medicaid coverage.

46. Ms. Saunders received a notice regarding the eligibility effective date, but that notice did not give her adequate notice that she was being denied coverage for the period in which she met eligibility requirements but was not yet enrolled into the Medicaid AL Waiver.

47. Defendant ODA's agent, the Area Agency on Aging, had Ms. Saunders' representative, her daughter, sign a statement that Ms. Saunders did not wish to enroll in the State-Funded ALP. This document was presented to Ms. Saunders' representative with no explanation of what the State-Funded ALP is, or how the State-Funded ALP could cover months that would be uncovered by the Medicaid AL Waiver.

48. During June and July 2012, Plaintiff Saunders met all criteria for the State-Funded ALP.

49. When Plaintiff Saunders applied for the Medicaid AL Waiver, she had assets of less than $1,500 and countable monthly income less than $2,094. Had she been living in a nursing facility on June 1, 2012, and subsequently, Defendant ODM would have begun Medicaid coverage for nursing facility services effective June 1, 2012.

50. Plaintiff Saunders met all eligibility requirements for the Medicaid AL Waiver on June 1, 2012, and subsequently.

51. But for the Medicaid AL Waiver, Plaintiff Saunders would have been institutionalized in a nursing facility.

CLAIMS

CLAIM ONE: FAILURE TO ESTABLISH APPROPRIATE DATE OF ELIGIBILITY IN OPERATION OF MEDICAID AL WAIVER

(By Plainttifs Hilleger and Saunders, and Subclass I, Against all Defendants)

52. Plaintiffs reallege and incorporate each and every allegation and paragraph set forth previously.

53. Defendants' operation and administration of the Medicaid AL Waiver is subject to federal Medicaid law including but not limited to 42 U.S.C. § 1396a(a)(34) and 42 C.F.R. § 435.915. Accordingly, Defendants are obligated to offer coverage of Medicaid AL Waiver services up to three months prior to the month of application and subsequently, for applicants who meet eligibility requirements during those months.

54. By failing to begin Medicaid AL Waiver services during the first month in which Plaintiffs meet all eligibility requirements, up to three months prior to the month of application, Defendants violate 42 U.S.C. § 1396a(a)(34) and its implementing regulation, 42 C.F.R. § 435.915, for which they are liable to Plaintiffs under 42 U.S.C. § 1983.

CLAIM TWO: DENIAL OF DUE PROCESS IN OPERATION OF MEDICAID AL WAIVER

(By Plaintiffs Hilleger and Saunders, and Subclass I, Against All Defendants)

55. Plaintiffs reallege and incorporate each and every allegation and paragraph set forth previously.

56. Defendants' operation and administration of the Medicaid AL Waiver is subject to federal Medicaid law including but not limited to 42 U.S.C. § 1396a(a)(3) and 42 C.F.R.

§§ 431.205 and 431.206. Accordingly, Defendants are obligated to provide applicants with written notice of eligibility determinations, including notice of the right to a fair hearing.

57. By failing to adequately notify Plaintiffs that they have been denied coverage under the Medicaid AL Waiver for the time between the effective date of Medicaid eligibility and the date in which they are enrolled into the Medicaid AL Waiver, Defendants violate 42 U.S.C. 1396a(a)(3) and its implementing regulations, 42 C.F.R. §§ 431.205 and 431.206, for which they are liable to Plaintiffs under 42 U.S.C. § 1983.

CLAIM THREE: FAILURE TO PROVIDE MEDICAL ASSISTANCE WITH REASONABLE PROMPTNESS IN OPERATION OF MEDICAID AL WAIVER

(By Plaintiffs Hilleger and Saunders, and Subclass I, Against All Defendants)

58. Plaintiffs reallege and incorporate each and every allegation and paragraph set forth previously.

59. Defendants' operation and administration of the Medicaid AL Waiver is subject to federal Medicaid law including but not limited to 42 U.S.C. § 1396a(a)(8) and 42 C.F.R. § 435.930(a)-(b). Accordingly, Defendants are obligated to provide medical assistance to Plaintiffs with reasonble promptness.

60. By failing to begin Medicaid AL Waiver services during the first month in which Plaintiffs meet all eligibility requirements, up to three months prior to the month of application, Defendants violate 42 U.S.C. § 1396a(a)(8) and its implementing regulation, 42 C.F.R. § 435.930(a)-(b), for which they are liable to Plaintiffs under 42 U.S.C. § 1983.

CLAIM FOUR: DENIAL OF DUE PROCESS

IN OPERATION OF STATE-FUNDED ALP

(By Plaintiffs Hilleger and Saunders, and Subclass II, Against Defendant ODA)

61. Plaintiffs reallege and incorporate each and every allegation and paragraph set forth previously.

62. Defendant ODA's operation and administration of the State-Funded ALP is subject to the due process clause of the Fourteenth Amendment to the Constitution of the United States, and to Ohio Admin. Code § 173-51-01 through 173-51-05.

63. By failing to provide Plaintiffs with the opportunity to apply for the State-Funded ALP, and failing to provide Plaintiffs with written notice and the opportunity for a fair hearing when Plaintiffs are denied State-Funded ALP, Defendant ODA violates the due process clause of the Fourteenth Amendment to the Constitution of the United States, and Ohio Admin. Code § 173-51-03(D), for which Defendant ODA 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 case as a class action under Rule 23(b)(2) of the Federal Rules of Civil Procedure;

C. Enter a declaratory judgment that:

i. Defendants' failure to grant retroactive eligibility for the Medicaid AL Waiver violates 42 U.S.C. § 1396a(a)(3), (a)(8), and (a)(34), and implementing regulations 42 C.F.R. §§ 431.205, 431.206, 435.915, and 435.930(a)-(b);

ii. Defendants' failure to notify applicants that they are being denied coverage for months in which they met eligibility requirements, violates the due process clause of the Fourteenth Amendment of the United States Constitution.

iii. Defendant ODA'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 denying Plaintiffs eligibility for the Medicaid AL Waiver for months in which they are determined to meet eligibility standards, for as to early as three months prior to the month in which an application is made;

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 in the month in which they meet all eligibility criteria, up to three months prior to the month of application;

F. Require Defendants to identify all class members whose coverage did not begin in the first month in which all eligibility requirements were met (up to three months prior to the month of application), redetermine their eligibility for the Medicaid AL Waiver with coverage beginning on the first day of the month in which all eligibility criteria were met, and provide written notice and the opportunity for a fair hearing of the redetermination to all such identified class members, with the notice explaining the reasoning for setting the month in which coverage starts;

G. Enter an order requiring Defendant ODA 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 to all Plaintiffs and all class members who are denied eligibility for 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,

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