

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

SALLY HART AZ Bar. No. 13453
STEPHEN PALEVITZ AZ Bar No. 013356
ARIZONA CENTER FOR DISABILITY LAW
100 North Stone Ave., Suite. 305
Tucson, AZ 85701
(520) 327-9547

ANNE RONAN AZ Bar No. 006041
TAMI JOHNSON AZ Bar No. 017296
ARIZONA CENTER FOR DISABILITY LAW
3839 N. Third St., Ste. 209
Phoenix, AZ 85012
(602) 274-6287

THERESE YANAN
DNA PEOPLES LEGAL SERVICES
NATIVE AMERICAN PROTECTION & ADVOCACY PROJECT
P.O. Box 392
Shiprock, NM 87420
(520) 368-3216

BRUCE B. VIGNERY
SARAH LENZ LOCK
AARP LITIGATION
601 E. Street, NW
Washington, DC 20049

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

PEG BALL, CREE JAMES, a minor)
person by and through her)
grandfather and guardian, BENNIE)
JAMES, JEANNE SPINKA, VENNETTA)
GRAHAM, COLLIN PHELAN, a minor)
person by and through his mother)
KIM BOWMAN, JUDETH HINTON, and)
VIRGINIA HASKELL, as individuals)
and as representatives of a class)
of persons similarly situated,)
Plaintiffs,)
v.)
PHYLLIS BIEDESS, Director of the)
Arizona Health Care Cost)
Containment System, THE ARIZONA)
HEALTH CARE COST CONTAINMENT)
SYSTEM ADMINISTRATION, and the)
STATE OF ARIZONA,)
Defendants.)

No. CIV 00 - 67 TUC ACM
PLAINTIFFS= TRIAL BRIEF

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I. INTRODUCTION

This trial concerns the failure of Defendants= ALTCS Program Contractors to supply adequate numbers of home care workers for HCBS beneficiaries. Persons who qualify for ALTCS inpatient nursing facility care, based on their high care needs and limited financial means, are eligible for HCBS services. The goal of the HCBS program is to enable such fragile individuals to continue to live independently in the community, but Defendants= ongoing failure to supply adequate numbers of community care workers threatens that goal.

II. STATEMENT OF ISSUES

The specific claims to be resolved at trial are as follows:

- A. ACCESS TO SERVICES CLAIM
Have Defendants Adopted Methods And Procedures To Assure That HCBS Payment Rates Are Consistent With Quality Of Care And Supply Sufficient Numbers Of Home Care Workers (42 U.S.C. ' 1396a(a)(30)(A))?
- B. FREEDOM OF CHOICE CLAIM
Have Defendants enabled Plaintiffs to freely choose to receive medical assistance at home as an alternative to receiving institutional care (42 U.S.C. ' 1396n(c)(2)(C) and (D)(2)(C))?
- C. OLMSTEAD COMMUNITY INTEGRATION CLAIM
Have The Defendants Complied With The Community Integration Mandate Of The Americans With Disabilities Act, At 42 U.S.C. ' 12131-12134, And Implementing Regulations?
- D. OLMSTEAD REHABILITATION ACT CLAIM
Does The Defendants= Failure To Provide Home Care Services Prescribed In Plaintiffs= HCBS Care Plans Violate ' 504 Of The Rehabilitation Act of 1973, At 29 U.S.C. ' 794 And Implementing Regulations, At 28 C.F.R. ' 41.51 (d), And 42

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

C.F.R. ' 84.4(b)(1)(iii) And (b)(2).

III. ACCESS TO SERVICES CLAIM, 42 U.S.C. ' 1396(a)(30)(A).¹

This section of the Medicaid statute requires Defendants to: provide such methods and procedures relating to utilization of, and the payment for, care and services available under the plan . . . to assure that payments are consistent with efficiency, economy, and quality of care and are 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

¹ The Defendants restated this issue as follows in the Pretrial Order:

Do the defendants violate 42 U.S.C.'1396a(a)(30) due to inadequate payment rates for HCBS service providers?

Apparently Defendants would like to preclude the Court from considering whether they have violated the parts of 42 U.S.C. ' 1396a(a)(30)(A) that require them to have adopted methods and procedures to assure@ This is undoubtedly because they have not adopted any regulation or policy for determining HCBS home care worker rates, which has resulted in the devastating shortage of workers. Similarly, they have not adopted effective procedures for monitoring their Program Contractors, so they cannot assure@ that their contractors supply sufficient numbers of workers@. However, these issues are at the heart of the lawsuit and must be resolved at trial.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

general population in the geographic area.®

42 U.S.C. ' 1396a(a)(30)(A). There are three distinct requirements in this section. First, quality services must be available to beneficiaries to the extent available to others; second, payments must be sufficient to enlist enough providers; and third, Defendants must adopt methods and procedures to assure that requirements one and two are met. Defendants have failed to meet any of these three requirements.

A. Failure To Assure That ACare And Services Are Available At Least To The Extent That They Are Available To The General Population®.

As the evidence will show, named Plaintiffs as well as many other HCBS beneficiaries have experienced severe hardships as a result of Defendants= failure to reliably provide them with home care workers. Delays are often encountered in initially staffing beneficiaries= prescribed home care plans. Beneficiaries are frequently told by their HCBS case managers to recruit their own caregivers from among families and friends. When home care workers have been provided, they quit with little advance notice, and ALTCS program contractors do not promptly replace them. As a result, beneficiaries are left stranded in their beds or wheelchairs unable to meet their most basic needs, and some are forced to move into nursing homes.

The courts have found violations of 42 U.S.C. ' 1396a(a)(30)(A) in fact situations like those presented here.² The purpose of this

² More extensive briefing of the legal issues is set out in Plaintiffs= Memorandum in Support of Motion For Summary Judgment.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

section of the Medicaid law is to ensure adequate access and quality of care. Arkansas Medical Society v. Reynolds, 6 F.3d 519, 530 (8th Cir. 1993). The relevant comparison group for access to services is individuals with public or private insurance, not those with no resources to pay. Arkansas Medical Society, Id. at 527.

Factors in measuring compliance include: the level of provider participation in the Medicaid program, the level of reimbursement to providers, and whether providers are opting out of the program. Clark v. Kizer, 758 F. Supp. 572, 576 (E.D. Cal. 1990), aff'd in part, vacated in part on other grounds sub nom. Clark v. Coye, 967 F.2d 585 (9th Cir. 1992). The evidence will show that all three of these factors are present here. Furthermore, Defendants admitted in response to a Request For Admission that they have no documents relating to this requirement of equal access to services. Thus, they have made no effort to determine whether they have met the requirement.

B. Failure To Assure That Payments Are Sufficient.

For years, home care workers, HCBS beneficiaries, caregiver agencies, and labor force experts have identified low wages and benefits as the primary cause of the shortage of workers. Wage levels are set by the managed care organizations that contract with Defendants to provide ALTCS services in return for capitation payments that cover a package of services. Defendants have not established a statewide mandated wage or benefit package.

Program contractors are allowed to keep whatever part of their capitation payment they do not spend on providing services to

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

beneficiaries. Both Maricopa Managed Care and Pima Health System made profits of 5 to 7% on their ALTCS contracts in 1999 and 2000. Paying wages too low to attract and keep workers increases profits for Program Contractors, but underserves beneficiaries. Notwithstanding this obvious perverse incentive, however, Defendants have refused to require their program contractors either to pay market wages or to report the discrepancies between beneficiary care plans and services actually delivered.

The courts have held that these facts also violate ' 1396a(a)(30)(A). The level of reimbursement to providers is a significant factor in measuring a state's compliance with the section. Clark v. Kizer, 758 F. Supp. at 576.

C. Failure To AProvide Such Methods And Procedures@.

The Defendants have not adopted regulations or policies establishing a methodology for calculating the amounts of ALTC/HCBS capitation payments. The actual methodology used by Defendants varies from year to year. Thus, the amount included in the capitation payment for home care workers might be lower when state budgets are in deficit. Since the beginning of the program, ALTCS capitation payments have never been based on surveys of actual costs, nor have ALTCS actuaries based their calculations on the amount of services prescribed under care plans but not actually provided because of the lack of adequate numbers of workers.

The Defendants= methodology for monitoring its program contractors= performance appears to be deliberately superficial. It is ALTCS policy to let their Program Contractors Aself-monitor@ as to

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

whether services prescribed are actually provided. When performance reviews reveal a shortage in home care workers, Defendants impose no penalties.

In order to assure access by paying sufficient rates, the Ninth Circuit has held that the state must use a methodology that considers the costs to providers of delivering quality services. To do so, the state must undertake responsible cost studies that will provide reliable data as to the [provider=s] costs in providing services³ Orthopaedic Hospital, 103 F.2d 1491, 1495-1500 (9th Cir. 1997), cert. denied, 522 U.S. 1044 (1998). The Seventh Circuit held that a cost study did not have to be completed before rates were set so long as the state conducted studies shortly thereafter to find out whether the prices elicited enough medical care⁴ and then adjusted rates based on the studies. Methodist Hospital v. Sullivan, 91 F.3d 1026, 1030 (7th Cir. 1996).

Defendants have not adopted methods and procedures for assuring adequate rates and delivery of services that meet the criteria set out in either Orthopaedic Hospital or Methodist Hospital.

IV. FREEDOM OF CHOICE CLAIM, 42 U.S.C. ' 1396n(c)(2)(C), 1396n(d)(2)(C), AND 42 C.F.R. ' 441.302(d).³

³ Again, Defendants insisted on restating this issue as follows:

Do the Defendants violate 42 U.S.C. '1396n(c)(2)(C) or 42 C.F.R.'441.302(d)(1)-(2) by denying ALTCS members freedom of choice between HCBS services and institutional care?

Plaintiffs= statement of this issue correctly places the burden on Defendants to assure that HCBS eligible individuals can freely chose care in the community.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

When HCBS beneficiaries complain about the failure of Defendants= program contractors to fill their home care plans, their case managers often tell them that they are not being denied services because care can be provided to them in nursing homes. The ALTCS Manager himself testified that sending a beneficiary into a nursing facility when home care workers are not available meets Medicaid requirements.

However, the Medicaid regulation implementing 42 U.S.C. ' 1396n(c)(2)(C) and 1396n(d)(2)(C) requires Defendants to Aprovide [a]ssurance@ that an HCBS beneficiary has the opportunity to freely choose care in the community. 42 C.F.R. ' 441.302(d). See also Cramer v. Chiles, 136 F.3d 709 (11th Cir. 1998), Martinez v. Ibarra, 759 F.Supp. 664 (D.Colo. 1991), Benjamin H. v. Ohl, No. 3:99-0338, 1999 US Dist. LEXIS 22454 and 1999 US Dist LEXIS 22469 (S.D.W.Va. July 15, 1999). Defendants= practice of substituting institutional services for unavailable HCBS services violates the Freedom Of Choice provision of the Medicaid statute and regulations.

V. OLMSTEAD COMMUNITY INTEGRATION CLAIMS, ADA, AT 42 U.S.C. ' 12131-12134, AND ' 504 OF THE REHABILITATION ACT OF 1973, AT 29 U.S.C. ' 794.⁴

⁴ Defendants chose to restate these two community integration causes of action in a single, combined issue, as follows:

Do the defendants violate the Americans with Disabilities Act or the Rehabilitation Act of 1973 by discriminating against individuals with disabilities by isolating and segregating ALTCS members in institutional settings rather than allowing these persons to live in the most integrated setting appropriate to their needs?

Defendants= statement of the community integration issues would impose a more onerous legal standard than is specified in the case law. Congress found, and the courts now assume, that institutional

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Plaintiffs will testify about the effect that the threat of institutionalization has on them, because they fear their lives will be over if they cannot live in the community. Unfortunately, as the cases of Peg Ball, Anderson Reid, and John Cardi show, the absence of adequate numbers of HCBS home care workers actually does force beneficiaries to move into nursing homes when home care workers are unavailable.

Some ALTCS beneficiaries who already reside in nursing facilities are desirous of moving out of the institutions and reestablishing lives in the community. The testimony of Ann Meyer, Director of the DIRECT independent living program in Tucson will explain that institutionalized persons are not able to move back in the community because of the Defendants' failure to provide reliable home care services.

While Defendants' failure to assure Plaintiffs access to home care services through adequate payment rates and the adoption of appropriate rules violates the Medicaid statute, those obligations

care is isolating and segregating so that no further proof of these effects of institutionalization is required to show violations of the ADA. Olmstead v. L.C., 527 U.S. 581, 119 S.Ct. 2176, 2181 (1999).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

are reinforced by the community integration mandate of the Americans With Disabilities Act (ADA) and the Rehabilitation Act of 1973.

In the ADA, Congress characterized the ~~Asegregation~~ of persons with disabilities as a ~~>form of discrimination,~~ ' ' 12101(a)(2),(3), (5).~~@~~ The Supreme Court applied the ~~Acommunity integration mandate~~@ of the ADA in its seminal Olmstead decision to hold that unnecessary institutionalization of disabled individuals like Plaintiffs constitutes prohibited discrimination. Olmstead v. L.C., 527 U.S. 581, 119 S.Ct. 2176.

A situation similar to this was presented in Helen L. v. Didario, 46 F.3d 325 (3d. Cir. 1995), cert. denied sub nom. Pennsylvania Sect-y of Public Welfare v. Idell S., 516 U.S. 813. Plaintiff was a 43 year old nursing home resident paralyzed from the waist down who was unable to reside in the community because the state did not fund its attendant care program adequately, and so she was placed on a waiting list. Helen L., 46 F.3d at 329. The Third Circuit held that the failure of the state to provide services to plaintiff in the community violated the integration mandate of the ADA.

The ADA was preceded by the Rehabilitation Act of 1973, 29 U.S.C. ' 794. The law developed under the Rehabilitation Act of 1973 is applicable to Title II of the ADA. Easley v. Snider, 36 F.3d 297 (3d Cir. 1994), 28 C.F.R. ' 35.103. Like the ADA, section 504 requires that services be provided in the most integrated setting appropriate to the person's needs. Makin v. Russell, 114 F.Supp.2d 1017, 1036 (D. Haw. 1999).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

V. SPECIFIC RELIEF REQUESTED

Evidence at trial will show that since this lawsuit was filed, the Defendants have taken some steps suggested by Plaintiffs to provide more home care workers. They raised the cap on HCBS services from 80 to 100% of the cost of inpatient care. They mandated that program contractors set up a back-up system to provide emergency substitutes for care givers who do not show up. They have recently been encouraging (but not requiring) program contractors to provide workers with job benefits such as health insurance and transportation pay.

Most importantly, in CYE 2002, for the first time since ALTCS= inception in 1989, AHCCCS finally successfully conducted a survey of HCBS costs in Arizona. After this cost survey, they significantly increased the portion of the ALTCS capitation for home care workers, by 11.7% in addition to the cost of living increase. At the same time, the legislature directed that this increase be passed through to the workers in CYE 2002. Although Defendants have not implemented the wage pass-through consistently, the crisis in home care staffing eased somewhat.

Unfortunately, the improvement will be short lived unless Defendants are ordered to permanently comply with federal requirements. For the current year, CYE 2003, Defendants have not conducted a labor cost survey and made only a token increase in the ALTCS capitation rate. They are not enforcing the requirement that wage increases be passed through to home care workers. Defendants still fail to provide such methods and procedures relating to the

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

utilization of, and payment for, care and services . . . sufficient to enlist enough providers,[@] and beneficiaries are still at risk of institutionalization.

Thus, Defendants continue to violate the payment rate and monitoring requirements of the Medicaid statute (42 U.S.C. ' 1396(a)(1)(A)(30)), as well as the community integration requirements of the ADA and the Rehabilitation Act of 1973.

The relief sought in this case is not burdensome. Plaintiffs ask the Court to order Defendants to adopt regulations that provide a methodology for setting annual ALTCS capitation rates that are consistent with quality care and sufficient to enlist enough home care providers. This methodology should be based on surveys of staffing costs and include a real pass-through of wage increases to workers. Plaintiffs also ask the Court to order the Defendants to adopt procedures for monitoring program contractors to assure quality of care and availability of sufficient services. These monitoring procedures should require program contractors to report discrepancies between HCBS services prescribed and services actually delivered to beneficiaries, and to eliminate such discrepancies.

DATED: _____, 2003.

Respectfully submitted,
ARIZONA CENTER FOR DISABILITY LAW
DNA PEOPLES LEGAL SERVICES
AARP LITIGATION

Sally Hart
Attorneys for Plaintiffs