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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

DOREEN MEYERS;)
JUANITA GIELAROWSKI, by and)
through her guardian;)
BARBARA OLSEN; and)
ALICE CALLAHAN;)
)

Class Action Complaint: Meyers v. Sebelius

on behalf of themselves and all others)
similarly situated)
)
Plaintiffs,)
v.)
)
KATHLEEN SEBELIUS, Secretary of)
the Dep't of Health and Human Services)
and WILLIAM HOGAN, Commissioner)
of the Alaska Dep't of Health and)
Social Services)
)
Defendants.)
)

CLASS ACTION COMPLAINT

INTRODUCTION

1. This action seeks a temporary restraining order and declaratory and injunctive relief to reverse a “moratorium” of indefinite duration, imposed by the Center for Medicare and Medicaid Services (CMS) of the United States Department of Health and Human Services, on new admissions or enrollments into four Home and Community-Based Services Medicaid waiver programs administered by the Department of Health and Social Services of the State of Alaska.

JURISDICTION AND VENUE

2. The United States District Court has jurisdiction of this civil action pursuant to 28 U.S.C. §§ 1331, 1343, 1346(a)(2), and 1361. As a source of authority for the remedies requested, plaintiffs rely in addition on the Administrative Procedure Act, 5 U.S.C. § 706, 28 U.S.C. §§ 2201-2202, 42 U.S.C. § 1983, 42 U.S.C. § 12133, 29 U.S.C. § 794a, and Rule 65 of the Federal Rules of Civil Procedure.

3. Venue is proper in the District of Alaska under 28 U.S.C. § 1391(b). A substantial part of the events or omissions giving rise to these claims occurred in the District of Alaska.

PARTIES

4. Plaintiff Barbara Olsen is a citizen of the State of Alaska and of the United States, currently residing in Cordova, Alaska.

5. Plaintiff Juanita Gielarowski is a citizen of the State of Alaska and of the United States, currently residing in Anchorage, Alaska. Plaintiff Gielarowski has a guardian, Janet Hansen, who was duly appointed by the superior court of Alaska. Ms. Hansen is a citizen of the State of Alaska and of the United States, currently residing in Anchorage, Alaska. Ms. Hansen has authorized that this suit be brought to protect Ms. Gielarowski's interests.

6. Plaintiff Alice Callahan is a citizen of the State of Alaska and of the United States, currently residing in Anchorage, Alaska.

7. Plaintiff Doreen Myers is a citizen of the State of Alaska and of the United States, currently residing in Anchorage, Alaska.

8. Defendant Kathleen Sebelius is the Secretary of the Department of Health and Human Services of the United States, the federal agency with responsibility for administering the federal aspects of the Medicaid programs.

9. Defendant William Hogan is the Commissioner of the Alaska Department of Health and Social Services, the state agency with responsibility for administering Alaska's Medicaid programs.

FACTUAL BACKGROUND

10. The Medicaid program is a cooperative state-federal program under which the federal government provides financial support to the State to provide medical assistance to low-income individuals in that State, under a "State Plan" which must include certain requirements under federal statute (e.g., 42 U.S.C. § 1396a).

11. State participation in the Medicaid program is voluntary, but once a state chooses to participate, it must comply with all federal statutory and regulatory requirements for the program (42 U.S.C. §§ 1396a-1396u-8). Alaska, like all 50 states, has chosen to participate in the Medicaid program.

12. Participating states must provide an array of mandatory medical services to Medicaid recipients, including nursing facility services for eligible individuals requiring long-term care (42 U.S.C. § 1396(a)(10)(A)).

13. Medicaid traditionally funded long-term care services only in institutional settings, like nursing homes and hospitals. However, Congress came to recognize the strong desire of most disabled individuals to remain in their own homes and communities instead of being institutionalized. Congress also recognized that providing a community-based alternative to institutional care is more cost efficient. Therefore, in 1981, Congress established the Home and Community-Based Services (HCBS) Waiver program, codified, as relevant here, at 42 U.S.C. § 1396n.

14. Under the HCBS Waiver program, participating states may request “waivers” from the federal government of some of the requirements normally attached to the Medicaid program in order to provide Medicaid-funded long-term care services to participants in the community, as an alternative to institutional care (42 U.S.C. § 1396n). Among the supportive services provided under the HCBS Waiver program are case management services, home health aid services, chore services, respite care services, habilitation services, and adult day health services (42 C.F.R. § 440.180).

15. In order to qualify for services under the HCBS Waiver program, an individual must be determined to require the level of care provided in a hospital, nursing facility, or intermediate care facility for the mentally retarded.

16. The Department of Health and Human Services has applied for and been granted waivers for four categories of Alaskans: older Alaskans (OA); adults with physical disabilities (APD); individuals with mental retardation or developmental disabilities (MR/DD); and children with complex medical conditions (CCMC).

17. The expiration date for all four waivers is June 30, 2011.

18. On June 26, 2009, Defendant Sebelius's agent Barbara Richards, the Associate Regional Administrator for the Division of Medicaid and Children's Health Operations for Region 10 of the Centers for Medicare and Medicaid Services (CMS), wrote to Defendant Hogan, reporting preliminary observations and findings based on a focused review conducted by CMS staff in Anchorage the week of May 4 and a review of documents and evidence submitted by the State.

19. The letter reflected significant concerns regarding the implementation and State oversight of Alaska's four currently approved HCBS waivers.

20. The letter also stated "CMS is imposing a moratorium on new admissions or enrollments into Alaska's four HCBS waiver programs."

21. Commissioner Hogan has acquiesced in the CMS-imposed moratorium.

22. In an "e-alert clarification" issued July 15, 2009, the Alaska DHSS stated "To ensure that SDS [the Division of Seniors and Disabilities Services] can track and refer applicants in need of services during the moratorium, SDS will accept completed new applications. However, except for tracking and reviewing for completeness, no action will be taken to process them during the moratorium."

23. Plaintiffs, although not disagreeing with the numerous other directives and corrections being imposed on the State of Alaska's waiver programs by the CMS, are challenging the CMS-imposed moratorium.

24. Plaintiff Barbara Olsen is a 68 year-old Alaskan Native. She is fully disabled with intermittent paroxysmal atrial fibrillation and quadriparesis. She recently fell and broke her back. She is currently at the Cordova Hospital. Ms. Olsen is unable to care for herself on her own but wants to leave the hospital and return home. Ms. Olsen is eligible and applied to the State of Alaska's Waiver program in June 2009. She was informed by the State of Alaska by way of form letter dated July 27, 2009, that her Waiver application would be held in "pended status," i.e., not processed, because of the moratorium. The form letter is attached hereto as Exhibit 1. As a result, Ms. Olsen is stranded at Cordova hospital and cannot return home.

25. Plaintiff Juanita Gielarowski is a sixty-two year old woman who is fully disabled with both mental illness as well as a myriad of physical ailments. Her physical ailments are so extreme that she is bed-bound and cannot stand up. Ms. Gielarowski is unable to care for herself on her own but wants to leave the assisted living facility and return home. Ms. Gielarowski is eligible and applied to the State of Alaska's Waiver program in August 2009. Her guardian is informed and believes that, because of the moratorium, Ms. Gielarowski cannot be issued a Waiver. As a result, Ms. Gielarowski is stranded at the assisted living facility in Anchorage and cannot return home.

26. Plaintiff Doreen Myers is a 38 year-old Alaskan Native. She is fully disabled with end stage chronic COPD. She is currently at Providence Extended Care. Ms. Myers is unable to care for herself on her own but wants to leave Providence Extended Care and return home. Ms. Myers is eligible and applied to the State of Alaska's Waiver program in June 2009. She was informed by the State of Alaska that she her Waiver application would not be processed because of the moratorium. As a result, Ms. Myers is stranded at Providence Extended Care and cannot return home.

27. Plaintiff Alice Callahan is a 66-year-old Alaskan Native. She is fully disabled with terminal lung cancer. She is very short of breath and only speaks in a whisper. Ms. Callahan is

unable to care for herself on her own but does not want to leave her home and be institutionalized in a nursing home. Ms. Callahan is eligible and applied to the State of Alaska's Waiver program in June 2009. She was informed by the State of Alaska that her Waiver application would not be processed because of the moratorium. As a result, Ms. Callahan is in danger of institutionalization. She currently lives alone in her own home.

CLASS ALLEGATIONS

28. Plaintiffs bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedure, on behalf of themselves and all those similarly situated.

29. The class is defined as all present and future persons who have applied for services under one of Alaska's four Waiver programs - OA, APD, MR/DD, or CCMC - and the processing of whose applications has been delayed by the Alaska Department of Health and Social Services pursuant to the "moratorium" imposed by CMS.

30. The class is so numerous that joinder of all members is impracticable. The number of individuals in the above-defined class, although presently unknown, is believed to be numerous.

31. There are questions of fact and law common to the class, including: (1) Did Secretary Sebelius, in imposing a moratorium on new admissions or enrollments into Alaska's four Waiver programs, exceed her authority under the Medicaid Act? (2) Is Commissioner Hogan, in acquiescing to the CMS-imposed moratorium, violating the named plaintiffs' and putative class members' rights under the Medicaid Act? (3) Do the actions of Secretary Sebelius and Commissioner Hogan under the CMS-imposed moratorium, offering Medicaid coverage for institutional care while refusing to process applications for Medicaid coverage for home and community-based programs for those individuals who, like the named plaintiffs, would be eligible

for either but prefer to live in home or community-based settings, violate the antidiscrimination

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mandates of the Americans with Disabilities Act, 42 U.S.C. § 12132, or the Rehabilitation Act of 1973, 29 U.S.C. § 794?

32. The claims of the named plaintiffs are typical of those of the class members.

33. The named plaintiffs will fairly and adequately represent the interests of the class members. The named plaintiffs have no interests antagonistic to the class members, have sufficient interest in the outcome of this litigation, and have qualified attorneys experienced in both Medicaid litigation and class action litigation.

34. During all relevant times, both the federal and state defendant have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the class as a whole.

FIRST CAUSE OF ACTION
(Medicaid Act Requirements, 42 U.S.C. §§ 1396 et seq.)

35. The Medicaid Act, in 42 U.S.C. § 1396a(a)(8), mandates that any state Medicaid plan shall “provide that all individuals wishing to make application for medical assistance under the plan shall have opportunity to do so, and that such assistance shall be furnished with reasonable promptness to all eligible individuals.”

36. The Medicaid Act, in 42 U.S.C. § 1396a(a)(3), mandates that any state Medicaid plan shall “provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness.”

37. Secretary Sebelius, in imposing the moratorium and thereby directing the Alaska DHSS to deprive plaintiffs of these rights, is exceeding her authority under the Medicaid Act and acting arbitrarily, capriciously, as an abuse of discretion, and otherwise not in accordance with law.

38. Commissioner Hogan, in implementing the moratorium, is acting under color of state law to subject plaintiffs to a deprivation of their rights as secured by the above-quoted laws of the United States.

39. Plaintiffs seek relief against Secretary Sebelius under the federal Administrative Procedure Act, 5 U.S.C. §§ 701-706, and against Commissioner Hogan under 42 U.S.C. § 1983.

SECOND CAUSE OF ACTION
(Americans with Disabilities Act, 42 U.S.C. §§ 12132)

40. Medicaid benefits are public services under Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131-12165, and the State of Alaska is a public entity providing those public services. Title II, in 42 U.S.C. § 12132, provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”

41. The current practice of the State of Alaska under the CMS-imposed moratorium, offering Medicaid coverage for institutionalized care while refusing to process applications for Medicaid coverage for home and community-based programs for those individuals who, like plaintiffs, would be eligible for either but would prefer to live in home or community-based settings, violates plaintiffs’ rights under the Americans with Disabilities Act to have the State provide options for community placements rather than favoring solely institutional placements.

42. Plaintiffs seek relief against Commissioner Hogan under Title II’s enforcement section, 42 U.S.C. § 12133.

THIRD CAUSE OF ACTION
(Rehabilitation Act of 1973, 29 U.S.C. §§ 791-794e)

43. The State's Medicaid program receives federal financial assistance, and Secretary Sebelius's supervision of that program is itself a program or activity conducted by a federal executive agency. Under the Rehabilitation Act of 1973, 29 U.S.C. § 794, "No otherwise qualified individual with a disability in the United States, as defined in section 705 (20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service."

44. The actions of the CMS and the State of Alaska under the CMS-imposed moratorium, offering Medicaid coverage for institutionalized care while refusing to process applications for Medicaid coverage for home and community-based programs for those individuals who, like plaintiff [which plaintiffs?], would be eligible for either but would prefer to live in home or community-based settings, violates plaintiff's rights under the Rehabilitation Act of 1973 to have options provided for community placements rather than favoring solely institutional placements.

45. Plaintiffs seek relief against Secretary Sebelius and Commissioner Hogan under the Rehabilitation Act's enforcement provision, 29 U.S.C. § 794a.

ATTORNEY'S FEES
(42 U.S.C. § 1988, 42 U.S.C. § 12133, and 28 U.S.C. § 2412)

46. Plaintiffs seek reasonable attorney's fees against Commissioner Hogan under 42 U.S.C. § 1988 and 42 U.S.C. § 12133.

47. The position of the United States in this matter not being substantially justified, plaintiffs seek attorney's fees against Secretary Sebelius under the Equal Access to Justice Act, 28 U.S.C. § 2812(d).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for the following relief:

1. An immediate temporary restraining order and an injunction lifting the moratorium and requiring the Secretary and the Commissioner to forthwith reinstate the processing of applications for home and community-based services;
2. A declaration that the Secretary's imposition of the moratorium is in excess of her authority, arbitrary, capricious, or otherwise contrary to law;
3. A declaration that the Commissioner's implementation of the moratorium deprives plaintiff of rights secured by the Constitution and laws of the United States.
4. All other relief the Court deems just and equitable.

Dated: August 17, 2009

Respectfully submitted,

/s/ Holly Johanknecht

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