

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS

IN THE UNITED STATE DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

JUL 25 2003

JAMES W. MCCORMACK, CLERK
U.S. DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS

TESSA G., A MINOR, BY AND THROUGH
HER FATHER AND NATURAL GUARDIAN,
MARK G.

PLAINTIFF

VS.

4-03-CV-00493GTE
CASE NO. _____

ARKANSAS DEPARTMENT OF HUMAN
SERVICES, KURT KNICKREHM, IN HIS
INDIVIDUAL CAPACITY AND IN HIS
OFFICIAL CAPACITY AS DIRECTOR OF
THE ARKANSAS DEPARTMENT OF
HUMAN SERVICES, AND JAMES GREEN,
PH.D., IN HIS INDIVIDUAL CAPACITY
AND IN HIS OFFICIAL CAPACITY AS
DIRECTOR OF THE DIVISION OF
DEVELOPMENTAL DISABILITIES
SERVICES OF THE ARKANSAS
DEPARTMENT OF HUMAN SERVICES

This case assigned to District Judge Swick
and to Magistrate Judge Avarean

DEFENDANTS

COMPLAINT

The plaintiff, Tessa G., a minor, by and through her father and natural guardian, Mark G., respectfully comes before this Court, by and through his attorneys, Armstrong Allen, PLLC, and for her Complaint against the defendants, Arkansas Department of Human Services, Kurt Knickrehm, in his individual capacity and in his official capacity as Director of the Arkansas Department of Human Services, and James Green, Ph.D., in his individual capacity and in his official capacity as Director of the Division of Developmental Disabilities Services of the Arkansas Department of Human Services, states:

STATEMENT OF JURISDICTION AND VENUE

DOCUMENT
NUMBER
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JAMES W. MCCORMACK
CLERK OF COURT

1. The plaintiff and her father are residents of Pulaski County, Arkansas.
2. Defendant Arkansas Department of Human Services ("ADHS") is an agency of the State of Arkansas.
3. Defendant Kurt Knickrehm is the Director of ADHS, and is a resident of Pulaski County, Arkansas.
4. Defendant James Green, Ph.D. is the Director of the Division of Developmental Disabilities Services ("DDS") of ADHS, and based on information and reasonable belief is a resident of Pulaski County, Arkansas.
5. The plaintiff seeks declaratory and injunctive relief pursuant to 42 U.S.C. § 1983, and contends that the defendants have violated, and continue to violate, her rights under 42 U.S.C. § 1396a(a)(8), 42 U.S.C. § 1396n(c)(2), 42 U.S.C. § 1396a(a)(3), and the procedural due process component of the Fourteenth Amendment to the Constitution of the United States.
6. The Court has federal question jurisdiction pursuant to 28 U.S.C. § 1331.
7. The Court has civil rights jurisdiction pursuant to 28 U.S.C. § 1343.
8. The Court has venue pursuant to 28 U.S.C. § 1391.

FACTS PRESENTED

9. Title XIX of the Social Security Act, 42 U.S.C. § 1396, et seq., commonly referred to as the Medicaid Act, is a joint federal and state program designed to provide medical assistance to qualified persons.
10. Under the Medicaid Act, if a state agrees to establish a Medicaid plan that satisfies the requirements of Title XIX, the federal government will pay a specified percentage of

the total amount expended as "medical assistance" under the plan.

11. Some Medicaid services are mandatory and must be provided under the plan, and other services are optional.

12. Participation in the Medicaid program is voluntary, but if a state chooses to participate, it must do so in accordance with federal statutes and regulations.

13. The federal Department of Health and Human Services is charged with administration of the Medicaid program, and has delegated much of its responsibility to Centers for Medicare & Medicaid Services ("CMS").

14. Arkansas participates in the Medicaid program, and ADHS is the state agency charged with administration of the Medicaid program in Arkansas.

15. Among the optional services available to states under the Medicaid Act are intermediate care facility services for mentally retarded or developmentally disabled individuals provided in an intermediate care facility for the mentally retarded ("ICF/MR program").

16. In addition, as an alternative to providing services in an institution under the ICF/MR program, the Medicaid Act gives states the option of providing home and community-based services for mentally retarded and developmentally disabled individuals ("HCBS program").

17. ADHS has chosen to provide services under the ICF/MR program, and an ICF/MR program is included in the Arkansas State Medicaid Plan ("State Plan").

18. ADHS has also chosen to provide services under the HCBS program, and an HCBS program is included in the State Plan.

19. The HCBS program in Arkansas is called the Alternative Community Services

Medicaid Waiver Program ("the ACS program") and is administered by DDS.

20. In its current form, the ACS program provides the full range of Medicaid benefits available under the State Plan.

21. In addition, the ACS program provides case management services, consultation services, crisis abatement respite care services, integrated support services, physical adaptation/adaptive aids, specialized medical supplies, and supported employment services.

22. Under the ACS program approved by CMS, ADHS has agreed to provide ACS services to 3,598 unduplicated recipients in state fiscal year 2002/2003, and the same number of "slots" for state fiscal year 2003/2004.

23. As of May 12, 2003, the defendants have filled only 2,631 of the 3,598 "slots" available in state fiscal year 2002/2003, and the remaining 967 "slots" have not been filled.

24. The Arkansas legislature has not placed any restriction on the filling of these "slots" by ADHS.

25. The plaintiff is a five-year-old girl with Down syndrome, and was born with congenital heart defects that have required surgery. She cannot speak or recognize dangers, resulting in a need for constant supervision. The plaintiff requires supplemental feeding through a gastrostomy tube in order to meet her nutritional needs, and has other developmental and physical disabilities resulting from her Down syndrome.

26. The plaintiff's father would like to enroll the plaintiff in the ACS program, and called ADHS in November of 2002 and requested an ACS enrollment application.

27. ADHS would not provide the plaintiff or her father with an ACS enrollment application, but told the plaintiff's father that he could submit a Client's Choice form in which he

could designate whether he was interested in obtaining services for his daughter under the ACS program or ICF/MR program.

28. ADHS sent a Client's Choice form to the plaintiff's father, which he prepared on her behalf and sent back to ADHS on November 22, 2002.

29. On January 8, 2003, ADHS wrote a letter to the plaintiff's father in which it acknowledged that it had received his Client's Choice form, and that his daughter "has been added to the Request List and currently is number 2285 on the waiver request list."

30. ADHS refuses to send an ACS enrollment application to the plaintiff or her father, and has merely placed the plaintiff on a "request list" for an indefinite period of time despite the fact that there are nearly 1000 unfilled "slots" under the ACS program.

31. Based on information and reasonable belief, ADHS has taken the same action in response to requests for ACS services made by thousands of other disabled individuals.

COUNT ONE: VIOLATION OF "OPPORTUNITY TO APPLY" PROVISION

32. Pursuant to 42 U.S.C. § 1396a(a)(8), the State Plan "must . . . 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".

33. The defendants, while acting under the color of state law, have violated this enforceable federal right by refusing to send an ACS enrollment application to the plaintiff, and by placing her on a "request list" for an indefinite period of time.

34. Although the defendants have allowed the plaintiff's father to submit a Client's

Choice form on behalf of the plaintiff, they have placed her on a "request list" for an indefinite period of time without determining if she is eligible for ACS services and entitled to one of the open "slots".

35. Under 42 U.S.C. § 1396a(a)(8), the plaintiff has a right to receive an ACS enrollment application from ADHS so that she can, in turn, submit the application to ADHS for appropriate consideration.

36. The defendants have violated this right by refusing to provide an ACS enrollment application to the plaintiff, by placing her on a "request list" for an indefinite period of time without determining if she is eligible for ACS services and entitled to one of the open "slots", and by otherwise failing to provide her with a meaningful opportunity to apply for ACS services.

COUNT TWO: VIOLATION OF "REASONABLE PROMPTNESS" PROVISION

37. As stated above, 42 U.S.C. § 1396a(a)(8) provides that the State Plan "must . . . 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".

38. The defendants, while acting under the color of state law, have violated this enforceable federal right by refusing to send an ACS enrollment application to the plaintiff, and by placing her on a "request list" for an indefinite period of time.

39. Although the defendants have allowed the plaintiff's father to submit a Client's Choice form on behalf of the plaintiff, they have placed her on a "request list" for an indefinite period of time without determining if she is eligible for ACS services and entitled to one of the

open "slots".

40. Under 42 U.S.C. § 1396a(a)(8), the plaintiff has the right to receive an ACS enrollment application from ADHS, to submit the application to ADHS, and to have ADHS consider her application with reasonable promptness.

41. The defendants have violated these rights by refusing to provide an ACS enrollment application to the plaintiff, by placing the plaintiff on a "request list" for an indefinite period of time without determining if she is eligible for ACS services and entitled to one of the open "slots", and by otherwise failing to provide ACS services to the plaintiff with reasonable promptness.

COUNT THREE: VIOLATION OF "FREEDOM OF CHOICE" PROVISION

42. Pursuant to 42 U.S.C. § 1396n(c)(2), when a state, such as Arkansas, participates in both the ICF/MR program and the HCBS program, it must inform eligible individuals about feasible alternatives for the appropriate level of care, and recipients must be allowed to choose to receive care under the ICF/MR program or the HCBS program.

43. The defendants, while acting under the color of state law, have violated this enforceable federal right by refusing to send an ACS enrollment application to the plaintiff, and by placing her on a "request list" for an indefinite period of time.

44. Although the defendants have allowed the plaintiff's father to submit a Client's Choice form on behalf of the plaintiff, they have placed her on a "request list" for an indefinite period of time without determining if she is eligible for ACS services and entitled to one of the open "slots".

45. Under 42 U.S.C. § 1396n(c)(2), the plaintiff has the right to choose between services under the ICF/MR program and services under the HCBS program.

46. The defendants have violated this right by failing to provide an ACS enrollment application to the plaintiff, by placing her on a "request list" for an indefinite period of time without determining if she is eligible for ACS services and entitled to one of the open "slots", and by otherwise depriving her of the freedom to choose between services under the ICF/MR program or HCBS program.

COUNT FOUR: VIOLATION OF "FAIR HEARING" PROVISION

47. Pursuant to 42 U.S.C. § 1396a(a)(3), the State Plan "must . . . 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".

48. The defendants, while acting under the color of state law, have violated this enforceable federal right by not providing the plaintiff with an opportunity for a fair hearing before ADHS after they refused to send her father an ACS enrollment application, and by placing her on a "request list" for an indefinite period of time.

49. Although the ADHS Office Policy Manual provides a fair hearing with respect to "decisions regarding the eligibility of or receipt of services", there is no provision of that manual, or any other state law or regulation, that provides a fair hearing if ADHS refuses to provide an opportunity to apply for ACS services, or fails to act on a request for ACS services with reasonable promptness.

50. The letter sent by ADHS to the plaintiff's father on January 8, 2003, in which the

defendants notified him that the plaintiff was being placed on a "request list", does not make reference to any right she has to a fair hearing if her father believes that ADHS has not given her an opportunity to apply for ACS services, or that ADHS has failed to consider her request with reasonable promptness.

51. Under 42 U.S.C. § 1396a(a)(3), the plaintiff has a right to a fair hearing if her father believes that ADHS has failed to give her an opportunity to apply for ACS services, or that ADHS has failed to consider her request with reasonable promptness.

52. The defendants have violated this right by failing to provide a fair hearing to the plaintiff after they refused to send her an ACS enrollment application, and placing her on a "request list" for an indefinite period of time.

COUNT FIVE: VIOLATION OF PROCEDURAL DUE PROCESS

53. Under the procedural due process component of the Fourteenth Amendment to the Constitution of the United States, the plaintiff is entitled to notice and an opportunity for a fair hearing with respect to her request for ACS services.

54. The defendants, while acting under the color of state law, have deprived the plaintiff of her federal constitutional right to procedural due process by not providing her with an opportunity for a fair hearing after they refused to send her an ACS enrollment application, and placing her on a "request list" for an indefinite period of time.

55. Although the ADHS Office Policy Manual provides a fair hearing with respect to "decisions regarding the eligibility of or receipt of services", there is no provision of that manual, or any other state law or regulation, that provides a fair hearing if ADHS refuses to provide an

opportunity to apply for ACS services, or fails to act on a request for ACS services with reasonable promptness.

56. The letter sent by ADHS to the plaintiff's father on January 8, 2003, in which the defendants notified him that his daughter was being placed on a "request list", does not make reference to any right she has to a fair hearing if her father believes that ADHS has not given her an opportunity to apply for ACS services, or that ADHS has failed to consider her request with reasonable promptness.

57. Under the procedural due process component of the Fourteenth Amendment to the Constitution of the United States, the plaintiff has a right to a fair hearing if her father believes that ADHS has failed to give her an opportunity to apply for ACS services, or that ADHS has failed to consider her request with reasonable promptness.

58. The defendants have violated this right by failing to provide a fair hearing to the plaintiff after they refused to send her an ACS enrollment application, and placing her on a "request list" for an indefinite period of time.

JURY DEMAND

59. The plaintiff hereby demands a jury trial with respect to all issues of fact, triable by jury, which may arise herein.

WHEREFORE, the plaintiff, Tessa G., a minor, by and through her father and natural guardian, Mark G., prays for the following relief:

a. That the Court determine that the defendants have violated, and continue to violate, the plaintiff's rights under 42 U.S.C. § 1396a(a)(8), 42 U.S.C. § 1396n(c)(2), 42 U.S.C. §

1396a(a)(3), and the procedural due process component of the Fourteenth Amendment to the Constitution of the United States, as alleged herein;

b. That the Court issue an injunction that requires the defendants to give the plaintiff an application for ACS services so that her father can prepare and submit the application on her behalf;

c. That the Court issue an injunction that requires the defendants to process with reasonable promptness the application for ACS services to be submitted by the plaintiff;

d. That the Court issue an injunction that requires the defendants to issue a decision with reasonable promptness in response to the application for ACS services to be filed by the plaintiff;

e. That the Court issue an injunction that requires the defendants to promptly notify the plaintiff of the decision made by ADHS with respect to her application for ACS services;

f. That the Court issue an injunction that requires the defendants to place the plaintiff in the ACS program with reasonable promptness if she subsequently is determined by ADHS to be eligible for ACS services;

g. That the Court issue an injunction that requires the defendants to provide the plaintiff with a fair hearing, consistent with federal constitutional principles of procedural due process, with respect to any adverse decision made by ADHS;

h. That the Court issue an injunction that requires the defendants to notify the plaintiff of her right to a fair hearing, and any rules issued by ADHS with respect to the filing and prosecution of appeals;

i. That the Court award the plaintiff and her father their costs herein expended;

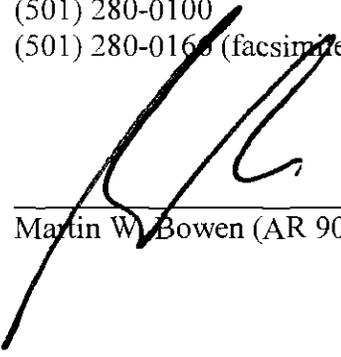
j. That the Court award the plaintiff and her father their reasonable attorney fees pursuant to 42 U.S.C. § 1988; and

k. That the Court award the plaintiff and her father all other relief to which they may be entitled.

Respectfully submitted,

TESSA G., A MINOR BY AND THROUGH
HER FATHER AND NATURAL GUARDIAN,
MARK G., Plaintiff

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