

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

2010 MAY 13 PM 1:37
U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE, FLORIDA

MICHELE HADDAD,
Plaintiff

v.

Case No.

THOMAS ARNOLD, in his official
capacity as Secretary, Florida Agency for
Health Care Administration, and

3:10-cv-414-f-99mmh-tem

Dr. ANNA VIAMONTE ROSS,
in her official capacity
as Secretary, Florida Department of
Health,

Defendants.

COMPLAINT

JURISDICTION AND VENUE

1. The Court has jurisdiction over Plaintiffs' claims under 28 U.S.C. §§ 1331 and 1343(a)(3) and (4). Declaratory and injunctive relief is authorized by 28 U.S.C. §§ 2201 and 2202 and Fed. R. Civ. P. 65. Plaintiffs' causes of action for disability discrimination are authorized by 42 U.S.C. § 12133 and 29 U.S.C. § 794(a).

2. Venue is proper because a substantial part of the actions and omissions of which Plaintiffs alleges occurred in this District. 28 U.S.C. § 1391(b).

DEFENDANTS

3. Thomas Arnold, is the Secretary of the Florida Agency for Health Care Administration (AHCA), and is sued in his official capacity.

4. AHCA is the chief health policy and planning entity for the state and is responsible for administering Florida's Medicaid Program. Fla. Stat. § 20.42(3) (2006).

5. AHCA is the "single state agency" that operates Florida's Medicaid program, *see* 42 U.S.C. § 1396a(a)(5), and is the state agency responsible for administering Florida's nursing home and community-based long-term care system for people with disabilities.

6. Secretary Arnold is responsible for the oversight, supervision and control of AHCA and its divisions, and is ultimately responsible for ensuring that AHCA's services for people with disabilities are provided in conformance with federal law.

7. Defendant Dr. Anna Viamonte Ross is the Secretary of Florida's Department of Health (DOH) and is sued in her official capacity.

8. DOH is the primary state agency responsible for administering the Medicaid Traumatic Brain Injury/Spinal Cord Injury Waiver program for persons who require long-term care in the community.

9. DOH recommends legislative budget requests for programs and services for the state's population who have spinal cord injuries. The Traumatic Brain Injury/Spinal Cord Injury Waiver is supposed to prevent unnecessary institutionalization of persons like the Plaintiff who has quadriplegia.

PLAINTIFF MICHELE HADDAD

10. Michele Haddad is 49 years old.

11. On September 7, 2007, when she was 47 years old, she was in a motorcycle accident caused by an intoxicated car driver.

12. Ms. Haddad was hospitalized in Brooks Rehabilitation Hospital until January, 2008.

13. On or about November 2007, while she was still hospitalized, she applied to Defendants to receive home health care through the Spinal Cord Injury Medicaid Waiver. She has been on the "wait list" for services since then.

14. As a result of the accident, she became a quadriplegic, paralyzed from her breasts down.

15. She is unable to open her right hand and she cannot close her left hand. As a result she has minimal manual dexterity.

16. Ms. Haddad uses a motorized wheelchair for ambulation.

17. She has worked as a bank teller and has also done office work in an auto repair store.

18. Ms. Haddad was married for 24 years and has two adult sons, David, 29, resides in Miami and Anthony, 24.

19. In November, 2009, Ms. Haddad's husband divorced her but continued to reside with her until March 2010, when Anthony was able to move into her home.

20. Between January 2008, when she was discharged from Brooks Rehabilitation Hospital, and March 2010, when her husband left the house, Ms. Haddad's husband was her primary caregiver.

21. Her husband picked her out of bed, transferred her to a wheelchair, bathed her, helped her with her hygiene needs, dressed her, shopped for food, prepared meals, assisted her with eating, and at the end of the day performed the same functions to assist her to get into bed.

22. Ms. Haddad uses a catheter and requires a bowel program. Her husband was responsible for these toilet needs.

23. Since March 2010, when her husband left the house, her son, Anthony, has had to perform the exact same functions of providing care for Ms. Haddad.

24. Anthony graduated from Florida International University in December, 2009. He had majored in international relations and marketing and had planned to reside in Miami.

25. As a result of his parents' divorce and his mother having no one to care for her, Anthony has temporarily returned home but wants to move back to Miami as soon as his mother obtains assistance with her activities of daily living from some other person.

26. Ms. Haddad does not want to go into a nursing home but wants to continue residing in the community, where she has an active life.

27. In the community, she attends church, goes to the movies, visits friends and goes shopping.

28. Ms. Haddad uses the gymnasium at Brooks Rehabilitation Hospital's outpatient unit for exercise.

29. She owns a home that is accessible with a ramp, roll-in shower, and a hooyer lift. Her sole source of income is her monthly Social Security Disability Insurance, and she is eligible for, and receives, both Medicare and Medicaid.

30. Without community-based Spinal Cord Waiver services, Ms. Haddad is at risk of being institutionalized, even though she desperately does not want to reside in a nursing facility.

31. Defendants' Brain and Spinal Cord Injury Program was contacted by telephone in early March, 2010. They were told that Ms. Haddad's husband had moved out and that Ms. Haddad desperately required Medicaid Waiver services because the only help she was receiving was from her son, Anthony.

32. Defendants' employee did not know when, or if, Ms. Haddad would receive Waiver services. To date, Ms. Haddad receives no Waiver services.

33. Florida's Medicaid Spinal Cord Waiver provides many of the same services Ms. Haddad would receive in a nursing facility.

34. Florida's reimburses nursing homes for eligible Medicaid residents \$206.09 a day (statewide average) or \$6,182.70 a month and reimburses \$15.62 an hour for in-home Spinal Cord Waiver services.

35. Because Ms. Haddad would require about seven hours a day for all her activities of daily living, her community-based services would cost \$109.34 a day or \$3,280.20.

36. Many persons who have spinal cord injuries, paralysis, and quadriplegia and who have the same or similar daily living activity impairments and needs as Ms. Haddad reside in the community and their own apartments, with appropriate community-based, Medicaid-funded long-term care services.

37. The same Medicaid-funded personal care, assistance with activities of daily living and health care services that Ms. Haddad would receive in a nursing facility could be provided in the community.

38. Defendants provide Medicaid funding for the personal care, assistance with activities of daily living and health care services in the community without conditioning

receipt of such services on placement in a nursing facility but are available only for a very limited number of people who are similar to Ms. Haddad.

39. People with spinal cord injuries (like Ms. Haddad), for whom Defendants do not provide these services in the community, either must go into a nursing facility to receive these services or are placed on a “waiting list” for services.

40. For more than two years, Ms. Haddad has applied for Medicaid’s home health services, but Defendants have not provided her with any home and community-based services.

41. Instead they have placed her on a “wait list” and have told her to be “eligible” for these services, she will have to enter a nursing home for 60 days.

42. Defendants have Medicaid funded services which would permit Ms. Haddad to continue to live successfully at home and to participate in church, family and community life.

43. Since July 1, 2007, Defendants have provided community-based Medicaid services to 375 people with spinal cord injuries. Defendants will continue to limit those services to 375 people through June 30, 2012.

44. According to the recently released Kaiser Commission “Medicaid Home and Community-Based Service Programs: Data Update,” at Table 11, there were 434 people with spinal cord injuries on a “wait list” in FY 2008 for Medicaid community-based services.

45. These people could reside in the community with appropriate Medicaid-funded services and not be forced to enter a nursing home.

46. Based on information and belief, in December 2008, the waiting list for persons with spinal cord injuries had increased to 554 people.

47. Despite the number of people with spinal cord injuries on a wait list for home and community-based Medicaid services, Defendants have not increased the number of people with spinal cord injuries who will receive community-based services.

48. Defendants have recently stated that there are “no funded slots open” in the spinal cord waiver program.

49. Defendants violate the Americans with Disabilities Act (ADA), Title II, 42 U.S.C. § 12132, and its implementing regulations, and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a), and its implementing regulations. Among other things, these laws require the Department to administer its services and programs, including Medicaid, “in the most integrated setting appropriate” to the needs of the individual with disabilities.

50. Plaintiff Haddad seeks declaratory and injunctive relief to receive Medicaid services which will allow her to continue to reside in the community and not require her institutionalization.

THE AMERICANS WITH DISABILITIES ACT

51. Title II of the Americans with Disabilities Act (ADA) provides that “no qualified individual with a disability shall, by reason of 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 such entity.” 42 U.S.C. § 12132.

52. Regulations implementing Title II of the ADA require that a public entity administer its services, programs and activities in “the most integrated setting

appropriate” to the needs of qualified individuals with disabilities. 28 C.F.R. § 35.130(d).

53. Regulations implementing Title II provide that “a public entity may not, directly or through contractual or other arrangements, utilize criteria or other methods of administration: (i) that have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability; [or] (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the entity’s program with respect to individuals with disabilities....” 28 C.F.R. § 35.130(b)(3).

54. Defendants ACHA and DOH are public entities under Title II of the ADA and its implementing regulations.

SECTION 504 OF THE REHABILITATION ACT

55. Section 504 of the Rehabilitation Act of 1973 provides:

“No otherwise qualified individual with a disability in the United States..., shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance....” 29 U.S.C. § 794a.

56. Regulations implementing Section 504 require a recipient of federal financial assistance to administer its services, programs, and activities in “the most integrated setting appropriate” to the needs of qualified individuals with disabilities. 28 C.F.R. § 41.51(d).

57. Regulations implementing Section 504 prohibit recipients of Federal financial assistance from:

“[u]tiliz[ing] criteria or methods of administration... (i) [t]hat have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap [or] (ii) [t]hat have the...effect of substantially impairing

accomplishment of the recipients' program with respect to handicapped persons.”

45 C.F.R. § 84.4(b)(4); 28 C.F.R. § 41.51(b)(3)(i).

58. Defendants' Medicaid program receives Federal financial assistance under Section 504 and its implementing regulations. Federal Medicaid funds pay for approximately 67.64% of the cost of the Florida's Medicaid program.

59. In 1965, Congress enacted Title XIX of the Social Security Act, 42 U.S.C. § 1396-1396v, establishing Medicaid, a medical assistance program cooperatively funded by the federal and state governments. The purpose of Medicaid is to furnish, as far as practicable, “medical assistance on behalf of...aged, blind or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services” and “to help such families and individuals to *attain or retain capability for independence or self-care....*” 42 U.S.C. § 1396 (emphasis added).

60. The Secretary of Health and Human Services administers the Medicaid program at the federal level through the Centers for Medicare & Medicaid Services (CMS), which has urged states pursuant to the ADA to avoid unnecessary institutionalization of person with disabilities in nursing facilities.

61. State participation in Medicaid is voluntary. Once a state elects to participate, it must adhere to the federal legal requirements, as provided by the Medicaid Act, the Americans with Disabilities Act (ADA), and Section 504 of the Rehabilitation Act of 1973 (Section 504).

62. The Medicaid Act allows states to provide coverage of home health nursing and personal attendant services, for persons who are otherwise entitled to receive nursing

home services, if they meet the state's nursing home "level of care" requirements, e.g., need assistance with a certain number of activities of daily living. *See* 42 U.S.C. §§ 1396a(a)(10)(A), 1396d(a)(7), (8), (22). Based on information and belief, the Plaintiffs meet Defendants' "level of care" for a nursing facility.

63. The Medicaid Act also authorizes states to obtain Home and Community-Based Service (HCBS) waivers from CMS to provide for alternatives to nursing home care and services. Waiver programs cover a range of home-based services for Medicaid recipients. *See* 42 U.S.C. § 1396n(c).

64. Defendants have applied to CMS for a Medicaid Waiver entitled the "Traumatic Brain Injury/Spinal Cord Waiver" for only 375 people.

65. Ms. Haddad has been on the waiting list since November, 2007.

66. Ms. Haddad has never been informed about her rank or numerical position on the waiting list, whether her rank or numerical position has even changed, when approximately she will receive Waiver services, what if anything she might do to increase her position, or any other information regarding how slowly or quickly the waiting list might be moving.

67. Defendants will limit Traumatic Brain Injury/Spinal Cord Waiver" services to 375 people through June 30, 2012. According to a November 24, 2009 Kaiser Commission report entitled "Medicaid Home and Community-Based Service Programs: Data Update", there were 434 people with spinal cord injuries on a "wait list" in FY 2008 for these community-based services. (See Table 11). These people could reside in the community with appropriate Medicaid-funded services and not be forced to enter a nursing home. Based on information and belief, in late 2008, the number of people who

had applied for these services and were on a waiting list had increased to 554 people. Despite this waiting list, Defendants have not increased the number of people with spinal cord injuries who will receive community-based waiver services.

68. Defendant ACHA is designated as the “single state agency” responsible for the administration and supervision of Florida’s Medicaid Program under Title XIX of the Social Security Act.

69. Under the Medical Assistance Act, the Defendants are required to administer the Florida’s Medicaid program in conformity with federal law, including the ADA and Section 504.

FIRST CLAIM FOR RELIEF
Title II of the Americans with Disabilities Act

70. Plaintiff Haddad is an individual with disabilities in that she has a physical impairment, and other impairments, that substantially limit one or more of her major life activities, including but not limited to breathing, walking, bathing, speaking, and standing.

71. Plaintiff Haddad is a qualified person with disabilities in that she is capable of safely living at home with necessary services and she meets the essential eligibility requirements for the receipt of services from and participation in the State Medicaid program with reasonable modification to the rules, policies, and practices of that program, 42 U.S.C. §12131(2).

72. Reasonable modifications include, *inter alia*: increasing the number of Spinal Cord Injury Waiver slots so that people who are otherwise eligible for this waiver are not at risk of institutionalization or expanding the personal care option services to provide

these services to individuals who are in their homes and apartments instead of only in an assisted living facility, and allocating the same funds Defendants would pay for her in a nursing home to provide services for Ms. Haddad in the community.

73. Without reasonable modification of the rules, policies, and procedures governing the Florida's Medicaid program, Plaintiff is at a risk of being isolated and segregated into an institutional setting. This is against her will, and she does not want to be placed into a nursing home.

74. Defendants' denial of Medicaid funding for the in-home health services that Plaintiff requires to avoid segregation in an institution and remain in the integrated home settings that is appropriate to her needs, constitutes unlawful discrimination in violation of Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132, and its implementing regulation, 28 C.F.R. § 130.51(d).

75. Defendants have utilized criteria and methods of administration that subject Plaintiff to discrimination on the basis of disability, including (A.) conditioning receipt of community-based services on her entering a nursing home for 60 days and be unnecessarily institutionalized, and (B.) by failing to assess properly the services and supports that would enable Plaintiff to remain in the community and failing to ensure that Plaintiff has access to Medicaid-covered services that will meet her needs in the community, in violation of Title II of the ADA and implementing regulations.

SECOND CLAIM FOR RELIEF
Section 504 of the Rehabilitation Act

76. Plaintiff is a "qualified person with disabilities" within the meaning of Section 504. She has physical and/or mental impairments that substantially limit one or more

major life activities, and she meets the essential eligibility requirements for long term care under Florida's Medicaid program.

77. Defendants' denial of Medicaid funding for the in-home health services that Plaintiff requires to avoid segregation in an institution and remain in the integrated home settings that is appropriate to their needs constitutes unlawful discrimination in violation of Section 504 of the Rehabilitation Act, 29 U.S.C. §794(a), and its implementing regulation, 28 C.F.R. §41.51(d).

78. Defendants have also utilized criteria and methods of administration that subject Plaintiffs to discrimination on the basis of disability, including (A.) conditioning receipt of community-based services on her entering a nursing home for 60 days and be unnecessarily institutionalized, and (B.) by failing to assess properly the services and supports that would enable Plaintiff to remain in the community and failing to ensure that Plaintiff has access to Medicaid-covered services that will meet her needs in the community, thereby violating Section 504 and its implementing regulations.

RELIEF REQUESTED

WHEREFORE, Plaintiff respectfully requests that the Court grant the following relief:

A. Declare that the Defendants' denial of funding for Plaintiff's necessary and appropriate Medicaid in-home nursing services constitutes unlawful discrimination in violation of Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.

B. Grant preliminary and permanent injunctions enjoining the Defendants, their officers, agents, employees, attorneys, and all persons who are in active concert or

participation with them from denying Plaintiff Medicaid in-home nursing services “in the most integrated setting,” her home, including to the extent to which Plaintiff’s service needs can and will be met by enrolling her in the existing Home and Community-Based Services waiver.

C. Waive the requirement for the posting of a bond as security for the entry of preliminary relief.

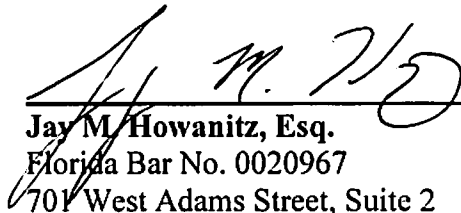
D. Award the Plaintiff the costs of this action and reasonable attorney’s fees pursuant to 29 U.S.C. § 794a and 42 U.S.C. § 12133 and any other applicable provision of law.

F. All such other and further relief as the Court deems to be just and equitable.

Respectfully submitted,

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