

FILED

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

2009 DEC -2 PM 12:49

U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE, FLORIDA

JACQUELINE JONES,

Plaintiff,

v.

Case No.

3:09-cv-1170-j-34 JRK

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

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

Defendants.

COMPLAINT

INTRODUCTION

1. Jacqueline Jones is a 35 year old woman who, as a result of a car accident in 1991, broke her spine and now has quadriplegia. Ms. Jones resides with her 74 year old father and 67 year old mother, who for a number of years after her accident were her primary caregivers. As her parents have aged, their health has deteriorated, and they can no longer provide the attendant services Ms. Jones requires to survive.

2. Ms. Jones is eligible for and receives Medicaid. For more than four years, Ms. Jones has applied for Medicaid's home health services, but Defendants have not provided her with any home and community-based services. Instead they have placed her

on a “wait list.” Recently, Defendants have acknowledged that Ms. Jones is at imminent risk of being institutionalized in a nursing home in order to receive the same services she has requested and needs to continue living in the community. Defendants have Medicaid funded services which would permit Ms. Jones to continue to live successfully at home and to participate in church, family and community life.

3. 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.

4. Plaintiff Jones 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.

JURISDICTION AND VENUE

5. 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).

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

DEFENDANTS

7. Thomas Arnold, is the Secretary of the Florida Agency for Health Care Administration (AHCA), and is sued in his official capacity. 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). AHCA is the "single state agency" that operates Florida' 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. 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.

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

PLAINTIFF JACQUELINE JONES

9. Plaintiff Jacqueline Jones is 35 years old. In November, 1991, when she was 17 years old, she was a driver in a car accident which resulted in her breaking her spine and being paralyzed in her hands and from her breast area down through her feet.

10. Miss Jones was born in Florida and in 1979 she and her parents moved to Jacksonville, where they continue to reside.

11. Miss Jones' car accident occurred in her senior year in high school. She graduated from high school in 1993 and attended community college for two years.

12. She uses a motorized wheelchair which enables her to ambulate.

13. As part of the car accident settlement, the damages permitted her and her family to make their house fully accessible for a person who uses a wheelchair.

14. Miss Jones is an active member of the community. She is a Jehovah Witness and in her wheelchair is able to do her community ministry. She attends Kingdom Hall of Jehovah Witnesses twice a week and also conducts bible study once a week at another person's home.

15. She goes out to dinner with friends, goes to the movies, and frequently goes to mall with friends.

16. Miss Jones regularly visits friends for supper at their homes.

17. She receives Social Security Disability in the amount of \$505 a month and manages her own money. Miss Jones is eligible for and receives both Medicaid and Medicare.

18. As a result of her paralysis, she requires physical therapy several times a week which Medicare covers.

19. Every day, Miss Jones requires assistance transferring from her bed to her wheelchair and from the wheelchair back to her bed. She also requires assistance dressing, grooming, toileting, personal hygiene, food preparation, and cleaning her room. These activities of daily living require several hours a day of assistance.

20. Miss Jones also requires assistance several times a day with her supra pubic urinary catheter and several times a week for a bowel program.

21. These activities require a number of hours per week of assistance.

22. In order to prevent decubitus ulcers, Miss Jones should be turned twice a night.

23. From 1991, when she became paralyzed, until about 2007, Plaintiff Jones' parents, Mr. Jack Jones and Mrs. Charmaine Jones, were able to provide the assistance and care she required.

24. Mr. Jack Jones was a printer and also worked in maintenance. Mrs. Charmaine Jones was a housewife.

25. Several years ago, Mrs. Charmaine Jones was diagnosed with degenerative arthritis, which has gotten worse in the past year, and she was also diagnosed with an inoperable tumor near her kidneys. She can no longer assist in transferring, bathing, dressing or bowel care for her daughter.

26. In the past year, Mr. Jones has developed back, shoulder and knee pains, all of which make it much more difficult for him to assist his daughter in dressing, turning at night and transferring.

27. For the past eight months, Medicare has paid for a home health aide three times a week for one hour each session.

28. Plaintiff Jones initially applied to Defendants for Home and Community-Based Medicaid Waiver services on July 15, 2005.

A. On June 6, 2006, Defendants conducted a telephone interview of Miss Jones during which they completed a "Priorization Screening Instrument." Defendants issued a "Notice of Decision" which stated: "No openings at this time. We will be calling you from time to time. Meanwhile, please keep us advised of changes to your condition or situation." Defendants noted that Ms Jones was not "at risk of nursing home placement within the next 30 to 60 days."

B On March 7, 2007, Defendants conducted another telephone interview of Miss Jones during which they completed a "Priorization Screening Instrument." Defendants' March 7, 2007 "Notice of Decision" stated: "No openings at this time. We will be calling you from time to time. Meanwhile, please keep us advised of changes to your condition or situation." Defendants wrote that she had been "placed on the TBI/SCI Waiver waiting list: Date of Referral: 7-15-05." Defendants noted that Ms Jones was not "at risk of nursing home placement within the next 30 to 60 days."

C. On July 28, 2009, Defendants sent Ms. Jones another "Notice of Decision" which stated "You have been placed on the TBI/SCI Waiver waiting list" and "No openings at this time. We will be calling you from time to time. Meanwhile, please keep us advised of changes to your condition or situation."

D. On October 8, 2009, Defendants conducted another telephone interview of Miss Jones during which they completed a "Priorization Screening Instrument." Defendants' October 8, 2009 Notice of Decision stated: "No

openings at this time. We will be calling you from time to time. Meanwhile, please keep us advised of changes to your condition or situation.”

29. However, on the October 8, 2009 “Priorization Screening Instrument,” Defendants noted that Ms. Jones was “at risk of nursing home placement within the next 30 to 60 days.”

30. Despite Defendants knowing that Ms. Jones was at imminent risk of institutionalization, they have never offered her any Medicaid services so she could remain in the community.

THE AMERICANS WITH DISABILITIES ACT

31. 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.

32. 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).

33. 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).

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

SECTION 504 OF THE REHABILITATION ACT

35. 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.

36. 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).

37. 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).

38. Defendants’ Medicaid program receives Federal financial assistance under Section 504 and its implementing regulations. Federal Medicaid funds pay for approximately 55% of the cost of the Florida’s Medicaid program.

MEDICAID

39. 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).

40. 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.

41. 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).

42. 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 Plaintiff meets Defendants’ “level of care” for a nursing facility.

43. 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).

44. Defendants have received a CMS Waiver entitled the “Traumatic Brain Injury/Spinal Cord Waiver” for which Miss Jones has been on a waiting list since she originally applied in 2005.

45. 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.

46. 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

47. Plaintiff Jacqueline Jones is an individual with disabilities in that she has physical 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.

48. Plaintiff Jones 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).

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

50. 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).

51. Defendants have utilized criteria and methods of administration that subject Plaintiff to discrimination on the basis of disability, including unnecessary institutionalization, by (1) failing to assess properly the services and supports that would enable Plaintiff to remain in the community and (2) 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

52. Plaintiff is a "qualified person with disabilities" within the meaning of Section 504, because 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.

53. 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 Section 504 of the Rehabilitation Act, 29 U.S.C. §794(a), and its implementing regulation, 28 C.F.R. §41.51(d).

54. Defendants have also utilized criteria and methods of administration that subject Plaintiff to discrimination on the basis of disability, including risk of unnecessary institutionalization, by (1) failing to assess properly the services and supports that would enable Plaintiff to remain in the community and (2) 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 Jones 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 Plaintiffs' 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.

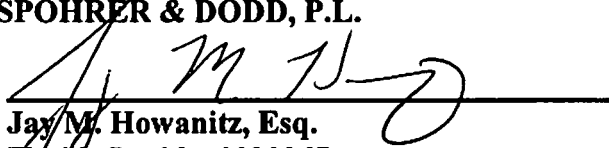
F. All such other and further relief as the Court deems to be just and equitable.

Dated: December 2nd, 2009

Respectfully submitted,

Stephen F. Gold
PA Bar No. 09880
1709 Benjamin Franklin Parkway
Second Floor
Philadelphia, PA 19103
(215) 627-7100, ext 227
Facsimile: 215-627-3183
stevegoldada@cs.com
(Application for admission pro hac vice to be filed)

SPOHRER & DODD, P.L.



Jay M. Howanitz, Esq.
Florida Bar No. 0020967
701 West Adams Street, Suite 2
Jacksonville, Florida 32204
Telephone: (904) 309-6500
Facsimile: (904) 309-6501
Email: jhowanitz@sdlitigation.com

Counsel for the Plaintiff