Minute Order Form (06/97)

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	John F. Grady	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	00 C 5392	DATE	May 1, 2001
CASE TITLE	Boudreau et al. v. Ryan, et al.		

[In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd party plaintiff, and (b) state briefly the nature of the motion being presented.]

MOTION:

DOCKET ENTRY:

(1) ☐ Filed motion of [use listing in "Motion" box above.]

(2) ☐ Brief in support of motion due _____.

(3) ☐ Answer brief to motion due_____. Reply to answer brief due_____.

(4) ☐ Ruling/Hearing on _____ set for _____ at _____.

(5) ☐ Status hearing[held/continued to] [set for/re-set for] on _____ set for _____ at _____.

(6) ☐ Pretrial conference[held/continued to] [set for/re-set for] on _____ set for _____ at _____.

(7) ☐ Trial[set for/re-set for] on _____ at _____.

(8) ☐ [Bench/Jury trial] [Hearing] held/continued to _____ at _____.

(9) ☐ This case is dismissed [with/without] prejudice and without costs[by/agreement/pursuant to]
☐ FRCP4(m) ☐ General Rule 21 ☐ FRCP41(a)(1) ☐ FRCP41(a)(2).

(10) ■ [Other docket entry] Defendants' motion to dismiss [19-1] is granted in part. We grant the motion as to the plaintiffs' ADA claim (Count III), but deny the motion as to Counts I, II, IV, and V. Further, this court orders that the parties make all of the initial disclosures set forth under Federal Rule of Civil Procedure 26(a)(1) within 14 days of receipt of this opinion. A status hearing is scheduled for May 30, 2001, at 9:30 a.m.
ENTER MEMORANDUM OPINION.

(11) x [For further detail see order (on reverse side of/attached to) the original minute order.]

	No notices required, advised in open court.		number of notices	Document Number
	No notices required.		MAY - 2 2001	
x	Notices MAILED by judge's staff.		date docketed	34
	Notified counsel by telephone.		docketing deputy initials	
	Docketing to mail notices.			
	Mail AO 450 form.		date mailed notice	
	Copy to _____			
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(Reserved for use by the Court)

00-5392.011.MEV May 1, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

EDWARD BOUDREAU, by and through his parents, Edwin and Ann Boudreau, BRIAN BRUGGEMAN, by and through his parents Kenneth and Carol Bruggeman, FRANCES CORSELLO, by and through her parents, Vincent and Agnes Corsello, ANGELA MOORE, by and through her parents, James and Brenda Moore, LINDA SEMPREVIVO, by and through her parents, Richard and Ruth Ann Semprevivo, individually and on behalf of a class,

Plaintiffs,

v.

GEORGE H. RYAN, in his official capacity as Governor of the State of Illinois, ANN PATLA, in her official capacity as Director of the Illinois Department of Public Aid, LINDA RENEE BAKER, in her official capacity as Secretary of the Illinois Department of Human Services, MELISSA WRIGHT, in her official capacity as Associate Director of the Office of Developmental Disabilities,

Defendants.

No. 00 C 5392

MEMORANDUM OPINION

Before the court is defendants' motion to dismiss the plaintiffs' amended complaint. For the reasons explained below, the motion is granted in part and denied in part.

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Background

The following facts are drawn from the plaintiffs' amended complaint and are taken as true for the purposes of deciding this motion to dismiss. The named plaintiffs are five developmentally disabled and/or mentally retarded adults (ages 29 to 49) who live with their parents, some of whom are elderly. The plaintiffs' disabilities prevent them from caring for themselves fully, and they require twenty-four hour help to meet their basic needs to eat, bathe, and toilet.

The defendants are George Ryan, Governor of the State of Illinois, Ann Patla, Director of the Illinois Department of Public Aid ("DPA"), Linda Renee Baker, Secretary of the Illinois Department of Human Services ("DHS"), and Melissa Wright, Associate Director of the Office of Developmental Disabilities ("ODD"). All are sued in their official capacities. The DPA is responsible for oversight and administration of the Medicaid program in Illinois, but it has delegated responsibility for the day-to-day administration of certain Medicaid programs to DHS, including the programs at issue here. The DHS must administer these programs according to the rules, regulations and procedures established by the DPA. The ODD is the office within the DHS that is responsible for the control and administration of the developmental disabilities program in Illinois.

Established by Title XIX of the Social Security Act of 1965, 42 U.S.C. § 1396 et seq., Medicaid is a cooperative federal-state

program under which states receive federal funding to provide health care to low-income individuals. State participation in the Medicaid program is voluntary, but if a State elects to participate it must comply with the requirements of Title XIX and applicable regulations. Alexander v. Choate, 469 U.S. 287, 289 n. 1 (1985). Also, the state must submit to the Secretary of the United States Department of Health and Human Services a "State Plan" which states what services it will provide under the Medicaid program. States can apply for a waiver of certain Medicaid requirements so that they can use Medicaid funds to pay for services that would not be covered otherwise, such as home and community-based services. 42 U.S.C. § 1396n(b) and (c).

The State of Illinois' Medicaid program includes services in an intermediate care facility for the developmentally disabled or mentally retarded ("ICF/MR").[1] ICF/MR services provide health and rehabilitative services, in which individuals also receive active treatment, 42 U.S.C. § 1396d(d), designed to help individuals reach optimal functional status and prevent loss of skills. See 42 C.F.R. § 483.440(a)(1)(i)-(ii). In addition, Illinois applied for and was granted a waiver to provide home and community-based services ("waiver services") to individuals who would otherwise require ICF/MR level care.

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[1] An intermediate care facility for the mentally retarded is a "Medicaid-certified long-term care facility as defined by 42 CFR 440.150 (1996) serving individuals with developmental disabilities. ICF/MR includes ... intermediate care for the developmentally disabled (77 Ill. Adm. Code 350), intermediate care for the developmentally disabled with 16 beds and under (77 Ill. Adm. Code 350) and State-operated developmental centers." 59 Ill. Adm. Code, Chapter I, Part 120.10.

The plaintiffs have applied for and been found eligible for residential Medicaid services, including care in an ICF/MR, services provided in a community integrated living arrangement ("CILA"),[2] and waiver services. Two of the plaintiffs were found eligible for these services in 1994. However, the DHS/ODD has not informed any of the five plaintiffs whether or when they will receive these services. The State of Illinois does not have a waiting list for granting eligible individuals residential Medicaid services.

The plaintiffs allege that the failure of the defendants to provide them with residential Medicaid services for which they are eligible violates their rights under the Medicaid Act, the Rehabilitation Act, the Americans with Disabilities Act, and the Equal Protection Clause. Moreover, the failure of the defendants to provide these services without a hearing violates the Due Process Clause. All of the claims are brought pursuant to 42 U.S.C. § 1983 (West Supp. 2000).

The defendants make numerous arguments as to why this complaint should be dismissed: (I) the claims are barred under the Eleventh Amendment; (II) § 1983 bars all claims against all the defendants; Spending Clause statutes, such as the Medicaid Act and

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[2/] The Illinois Administrative Code defines a "CILA" as "A living arrangement provided by a licensed community developmental disabilities services agency where eight or fewer individuals with a developmental disability reside under the supervision of the agency. Individuals receive a customized array of flexible habilitation or personal care supports and services in the home, in day programs and in other community locations under the supervision of a community support team within the local agency." 59 Ill. Adm. Code, Chapter I, Part 120.10. Part 120 is entitled the "Medicaid Home and Community-Based Waiver Services Waiver Program for Individuals with Developmental Disabilities."

the Rehabilitation Act, cannot be enforced through the mechanism of § 1983; and the plaintiffs assert no federal right under § 1983; (III) the plaintiffs failed to plead the elements of a Rehabilitation Act claim; (IV) the Equal Protection Clause is not implicated because the State has a rational basis for treating the plaintiffs differently from others who do receive waiver services; and (V) the plaintiffs' claims do not implicate the Due Process Clause because the plaintiffs have neither a property interest in the services they seek nor do they challenge the fairness of the DHS's administrative appeal procedures.[3] We will address each of these arguments in turn.

Analysis

I. 11th Amendment Immunity

The defendants argue that the Eleventh Amendment to the Constitution bars all claims against all defendants. The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. The Supreme Court has not limited sovereign immunity to suits described in the text of the Eleventh Amendment; it has extended Eleventh Amendment immunity to bar federal suits

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[3] The defendants also advance numerous arguments why the plaintiffs' ADA claim should be dismissed. We will only address those arguments that compel us to dismiss that claim. See infra I.B.

against an unconsenting state brought by her own citizens as well. Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 268 (1997)(citing Hans v. Louisiana, 134 U.S. 1 (1890)); Edelman v. Jordan, 415 U.S. 651, 662-63 (1974)(same). As an initial matter, we note that the Eleventh Amendment does not bar the plaintiffs' Rehabilitation Act claim. Stanley v. Litscher, 213 F.3d 340, 344 (7th Cir. 2000) ("the Rehabilitation Act is enforceable in federal court against recipients of federal largess"). The following will address the applicability of the Eleventh Amendment to the plaintiffs' other claims.

A. Applicability of Ex Parte Young

Relying on the doctrine articulated in Ex parte Young, 209 U.S. 123 (1908), the plaintiffs argue that this action is not barred by the Eleventh Amendment because it is a suit against state officials, rather than the state itself, to obtain prospective injunctive relief from violations of federal law. The Supreme Court has explained that the doctrine of Ex parte Young does not apply simply because the plaintiff sues state officials rather than the state itself. If the suit is one that seeks retroactive payments or the recovery of money, the suit is considered to be one against the state and does not come within the ambit of the Ex parte Young doctrine. See Edelman, 415 U.S. at 668 (determining that to the extent the plaintiffs sought an award of accrued monetary liability in the form of retroactive payments, the suit was barred by the Eleventh Amendment); Ford Motor Co. v. Department

of Treasury, 323 U.S. 459, 464 (1945) (holding that a suit against state tax collectors for the recovery of overpaid taxes was a suit against the state and therefore, barred). The rationale for this rule is that any form of monetary award, even that labeled "equitable relief," will not be paid by the state official named as the defendant, but will instead come from the state treasury, thereby making the state the interested party. See Edelman, 415 U.S. at 666, 668. Such suits against states for money damages are barred under the Eleventh Amendment.

On the other hand, suits against state officials for violations of federal law are generally not barred by the Eleventh Amendment if the plaintiff seeks only prospective injunctive relief. This is true even if the enforcement of federal law against those officials would cause the state to expend money that it otherwise would not spend. Id. For example, in Edelman v. Jordan, the plaintiffs sued Illinois state officials to require them to comply with federally imposed time standards for distributing benefits under the Aid to the Aged, Blind, and Disabled program. To the extent the plaintiffs sought "payment of state funds ... as a necessary consequence of compliance in the future with a substantive federal question determination," the suit was proper under the Ex parte Young doctrine. See Milliken v. Bradley, 433 U.S. 267, 289 (1977) (discussing and quoting from Edelman). However, to the extent the suit sought retroactive

payments for accrued violations of federal law, the claim was barred by the Eleventh Amendment. Edelman, 415 U.S. at 668.

In so holding, the Edelman Court surveyed other Supreme Court cases, noting in particular that requests for prospective relief often have a substantial impact on state treasuries. Id. at 667. For example, in Ex parte Young, the negative consequence on the state treasury of the enforcement of federal law was the inability of the state's Attorney General to impose the state's rate-setting scheme on railroads. Id. Other cases have gone further and ordered prospective relief that would require states to pay money to individuals whose federal rights were violated by the states; for example, in Graham v. Richardson, 403 U.S. 365 (1971), state officials of Pennsylvania and Arizona were prohibited from denying welfare benefits to qualified recipients who were resident aliens. Id. The Edelman Court articulated the distinction between these permissible claims for relief and the impermissible claims for retroactive equitable relief as follows:

> [T]he fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective in nature. State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in Ex parte Young.

Id. at 667-668. See also Milliken, 433 U.S. at 289 (stating that Ex parte Young "permits federal courts to enjoin state officials to conform their conduct to requirements of federal law,

notwithstanding a direct and substantial impact on the state treasury").

The relief sought by the plaintiffs here is purely for prospective relief. Although the prospective relief sought could require the state to expend money to provide the services the plaintiffs seek, it would not require the state to pay money for prior violations of federal law. Therefore, there is nothing about the relief plaintiffs seek that bars the application of the Ex parte Young doctrine. See e.g., Doe v. Chiles, 136 F.3d 709, 720 (11th Cir. 1998) (holding that the Eleventh Amendment did not bar a lawsuit based on the Medicaid Act insofar as plaintiffs sought only prospective relief).

The defendants argue, however, that Ex parte Young is not applicable because special state sovereignty interests, such as those articulated in Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, are implicated by this case. We disagree.

In Coeur d'Alene, the plaintiff Coeur d'Alene Tribe contested the state's ownership of certain submerged lands, banks, and navigable waters. Although the plaintiff sought injunctive and declaratory relief, the Supreme Court analogized the case to a quiet title action over lands and navigable waters which, in the common law, have been held to "uniquely implicate sovereign interests." Id. at 283-85 (discussing in detail the treatment of lands and navigable waters as "essential attribute[s] of sovereignty" and held for the benefit of the public). The Court concluded:

> It is apparent, then, that if the Tribe were to prevail, Idaho's sovereign interest in its lands and waters would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury. Under these particular and special circumstances, we find the Young exception inapplicable.

Id. at 287 (emphasis added).

According to the defendants, this action seeks to force the state to fundamentally alter the State's Plan and to reallocate its Medicaid funding. The defendants do not point out how these interests are "special" sovereignty interests distinct from those interests at stake whenever individuals challenge a State's failure to pay benefits under a welfare program partially funded by the federal government. See e.g., Marie O. v. Edgar, 131 F.3d 610, 616-17 & n. 13 (7th Cir. 1997) (finding no important sovereignty interest in a suit bought under the Individuals with Disabilities in Education Act to enforce compliance with a federal program under which the state had accepted federal funds); J.B. ex rel. Hart v. Valdez, 186 F.3d 1280, 1287 (10th Cir. 1999) (distinguishing Coeur d'Alene in a case challenging denial of Medicaid services, among other things); American Soc. of Consultant Pharmacists v. Patla, No. 00 C 7821, 2001 WL 197847, at *5 n.4 (N.D. Ill. Feb. 27, 2001) (distinguishing Ex parte Young because "it has been recognized that the Medicaid statute does not implicate such special historical sovereign interests of the states"); Lewis v. New Mexico Dept. of Health, 94 F. Supp.2d 1217, 1232 (D.N.M. 2000) ("The state of New Mexico's interests in administering the waiver services at issue do not outweigh the 'interest in vindicating the federal rights and

answering the federal questions' in this case"). The defendants have cited no cases in support of their proposition, and in view of the overwhelming case law to the contrary, we find that there are no special sovereignty interests here to preclude application of the Ex parte Young doctrine.

Finally, in a second supplement to their motion to dismiss, the defendants cite a recently decided case from the Eastern District of Michigan, Westside Mothers v. Haveman, -- F. Supp.2d --, 99-CV-73442-DT, 2001 U.S. Dist. LEXIS 3422 (March 26, 2001, E.D. Mich.), and advance three new arguments to support their contention that Ex parte Young does not apply.[4]

In Westside Mothers, the plaintiffs alleged "systematic deprivation" of certain Medicaid services to children in the State of Michigan. Granting the defendants' motion to dismiss, Judge Cleland noted that the doctrine of Ex parte Young only contemplates that state officials may be ordered to comply with the "supreme law of the land," which does not include all federal laws. Federal laws passed pursuant to the Spending Clause - such as the Medicaid Act - Judge Cleland reasoned, are not supreme because the state's obligation to follow the law arises not from the law itself but from the state's voluntary participation in the federal-state program.

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[4] The defendants do not explicitly advance more than three new arguments; rather, they simply summarize and quote extensively from Westside Mothers, concluding that this is simply additional authority for arguments they have made previously. Many of the sections they summarize and quote, however, support arguments they did not make. It is unclear whether they wish to incorporate by reference all of the arguments in Westside Mothers, or, as they state, simply to cite additional authority. We will take them at their word and focus only on Westside Mothers to the extent the defendants clearly use it to advance new arguments or to support a prior argument.

While this is an interesting concept, we do not agree with the appraisal of laws passed pursuant to the Spending Clause as having inferior dignity to other laws. Certainly the Supreme Court has not articulated any such distinction; to the contrary, it has struck down state laws or regulations which violated a federal welfare statute, Aid to Families with Dependent Children, on the basis that such laws violated the Supremacy Clause. See Blum v. Bacon, 457 U.S. 132, 138 (1982); Carleson v. Remillard, 406 U.S. 598, 600 (1972); Townsend v. Swank, 404 U.S. 282, 285-86 (1971). Like the Medicaid Act, the AFDC statute was a Spending Clause statute that did not require states to participate. Therefore, we decline to hold that Spending Clause statutes fall outside the ambit of the Supremacy Clause.

Defendants next argue that whatever the caption of this case, the State of Illinois is the real party in interest rather than the defendants, because what the plaintiffs really seek is to compel the state to perform its contract with the federal government. See Westside Mothers, 2001 U.S. Dist. LEXIS 3422 at *65-66 (stating that Ex parte Young recognized it is impermissible to sue a state for specific performance of a contract). This position, however, depends upon a finding that the state's relationship with the federal government under the Medicaid program is nothing more than a contract. As explained above, by seeking to enforce the Medicaid Act, the plaintiffs seek to enforce a federal law, not merely a contract. This is not a suit against officers acting lawfully, but against officers acting ultra vires in contravention of federal law.

See Doe, 136 F.3d at 720 (finding that the Ex parte Young doctrine applied where the plaintiffs sought to "enjoin state officials from continuing to violate federal law, that is, the Medicaid Act").

Finally, the defendants argue that federal courts may not control a State officer's exercise of discretion under the Ex parte Young doctrine. Id. at *75 (quoting from Ex parte Young: "the [federal] court ... can only direct affirmative action where the officer having some duty to perform not involving discretion, but merely ministerial in nature, refuses or neglects to take such action"). In Westside Mothers, the court noted that the Medicaid Act does not tell the state how it must provide the services for which it will receive federal funds; because it requires the exercise of discretion, state officers cannot be compelled to act in the way the plaintiffs insist. Id. at 76-77. The distinction here, however, is that the defendants are not providing any residential Medicaid services to the Medicaid-eligible plaintiffs. In a case cited by the defendants, King by King v. Sullivan, the court explained that "[t]he character and details of the state's obligations arise from the commitments the state makes in its State Plan, which, through the Medicaid Act and its regulations, binds the state as a matter of federal law." 776 F. Supp. 645, 648 (D.R.I. 1991) (emphasis added). Although it may be said that state officers can exercise discretion as to how to provide such services, it cannot be said that they have the discretion to withhold altogether services included in the State Plan. See Lewis, 94 F. Supp.2d at 1230 (citing the Tenth Circuit for the proposition that Ex parte

Young "does not bar federal courts from reviewing discretionary acts that violate federal law"). Therefore, we reject the defendants' argument that because the state enjoys some discretion in determining how it will provide Medicaid services, its officers are immune from a challenge based on their total withholding of residential medicaid services to the eligible plaintiffs.

B. Americans with Disabilities Act Claim

In a related vein, the defendants argue that the plaintiffs' ADA claim must be dismissed pursuant to the Seventh Circuit's holding in Walker v. Snyder, 213 F.3d 344 (7th Cir. 2000), cert. denied, 121 S.Ct. 1188 (2001). In that case, the Seventh Circuit noted its prior holding that actions based on Title II of the ADA were precluded by the Eleventh Amendment. Id. at 347. Noting that Title II prohibits discrimination by any "public entity," the court held that the proper defendant cannot be an individual, but must be the public entity. Id. at 346 (stating that Titles I and II are similar in that they both prohibit imposition of personal liability). The court concluded that the Ex parte Young doctrine - that the defendant is the state official rather than the state itself - is inapplicable to Title II cases. Id. at 347. This holding bars the plaintiffs' ADA claim, which is accordingly dismissed.[5]

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[5] The recent Supreme Court case Board of Trustees of the Univ. of Alabama v. Garrett, 531 U.S. —, 121 S.Ct. 955 (2001) appears relevant to the Seventh Circuit's holding. In Garrett, the Supreme Court held that suits against states based on Title I of the ADA are barred by the Eleventh Amendment. However, in dicta, Chief Justice Rehnquist specifically noted that Title I of the ADA could

II. § 1983 Claims

Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured ....

42 U.S.C. § 1983. The defendants make several arguments for dismissal of the claims brought pursuant to § 1983, which we address seriatim.

A. Dismissal of Defendants Under § 1983

The defendants argue that all claims must be dismissed against them because "official-capacity" suits against state officials are suits against the state itself. Therefore, state officials who have been sued in their "official capacity" are not "persons" amenable to suit under 42 U.S.C. § 1983. In support of this proposition, they cite Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989).

The defendants' argument and citation to this authority is curious because Will excludes from its broad rule suits filed against state officers for injunctive relief.

> Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because "official-capacity actions

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still be enforced by private individuals in actions for injunctive relief under the Ex parte Young doctrine. Id., 121 S.Ct. at 968 & n.9. To the extent the Seventh Circuit's reasoning as to the unavailability of Young in Title I cases mirrors the reasoning for its unavailability in Title II cases, its position may have been called into question. Nevertheless, we are bound by the Seventh Circuit's holding in Walker.

> for prospective relief are not treated as actions against the State." Kentucky v. Graham, 473 U.S. [159,] at 167, n. 14 (1985); Ex parte Young, 209 U.S. 123, 159-160 ... (1908).

Id. at 71 n. 10. This being a suit solely for injunctive relief, we reject the defendants' claim.

Next, defendants argue that Governor Ryan must be dismissed from the suit because the plaintiffs failed to plead any connection between Ryan and the enforcement of the Medicaid Act. Given the liberal standards of pleading under Federal Rule of Civil Procedure 8, the plaintiff does not have to plead the particular duties in order to survive a motion to dismiss. Currently, the extent of Governor Ryan's duties "in the context of the intertwined provisions of federal law is unclear to the court." See Rolland v. Cellucci, 52 F. Supp. 2d 231, 243 (D. Mass. 1999) (refusing to dismiss the Governor). Because at this stage "the plaintiff receives the benefit of imagination," Sanjuan v. American Bd. of Psychiatry & Neurology, Inc., 40 F.3d 247, 251 (7th Cir. 1994), it would be inappropriate to dismiss the claim against Governor Ryan.

B. Dismissal of Claims Brought Under Spending Clause Statutes

The defendants next argue that the plaintiffs' claims under the Medicaid Act and under the Rehabilitation Act must be dismissed because they seek to enforce isolated violations of the State Plan. In Mallett v. Wis. Div. of Vocational Rehabilitation, the Seventh Circuit reviewed the circumstances under which a plaintiff may use § 1983 in connection with laws passed pursuant to the Spending

Clause. 130 F.3d 1245, 1253 (7th Cir. 1997) (discussing in particular Wilder v. Virginia Hosp. Assn., 496 U.S. 498 (1990) and Suter v. Artist M., 503 U.S. 347 (1992)). The threshold question is whether the plaintiffs claim that the State Plan itself violates federal law, or whether they simply assert that the defendants have failed to comply with the requirements of a lawful State Plan. Id. (stating that the next step is to consider whether there is an enforceable right under § 1983).

Mallett provides an illustration of the distinction. There, the plaintiff brought suit under the Rehabilitation Act ("RA") seeking payment of his graduate school expenses. He alleged that Wisconsin's plan discouraged graduate education in favor of vocational training, which violated the RA's mandate requiring states to provide "highly individualized services to each beneficiary." Id. The court found this allegation sufficient because it was a challenge to the legality of the plan itself. However, the plaintiff's claims that the defendant did not follow the correct procedures when it closed his file were not sufficient, because these were challenges to the implementation of the state's plan.

Here we find that the plaintiffs are not suing merely to correct procedural deficiencies in the handling of their cases; nor do they contend that the State Plan is lawful but flawed in its implementation. Instead, they argue that Illinois does not have a plan for providing "medical assistance... with reasonable promptness to all eligible individuals," 42 U.S.C. § 1396a(a)(8), who are

developmentally disabled.[6] For example, Illinois does not maintain a waiting list for the services plaintiffs seek. Thus, plaintiffs found eligible for residential Medicaid services as many as seven years ago simply linger, waiting even to be told whether or when they will receive such services.[7] This presents the same type of question the Seventh Circuit found sufficient in Mallett: whether this policy prevents the state from adopting a plan that complies with a direct obligation imposed by the Medicaid Act.[8]

Next, the defendants argue that at the time of § 1983's enactment, third-party beneficiaries of a contract could not sue for its breach. Therefore, § 1983 confers no right for beneficiaries of federal programs enacted pursuant to the Spending Clause to sue government officers for failing to provide the benefits sought. In support of this conclusion, the defendants cite Justice Scalia's concurrence in Blessing v. Freestone, 520 U.S. 329, 349 (1997). However, Justice Scalia stopped short of endorsing this argument, stating that the issue was not before the court in Blessing and he

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6/ The plaintiffs further allege this violates the RA's anti-discrimination mandate and the requirement that handicapped individuals be placed in the most integrated setting appropriate. See 28 C.F.R. § 41.51(d).

7/ The defendants' argument that these are allegations of isolated violations of a legal plan is, therefore, unpersuasive. It is further belied by their own policy defense: that although there are currently open slots for the waiver services plaintiffs seek, the "State uses open waiver slots for emergency situations such as when a parent or guardian of a disabled adult dies or himself becomes disabled." Mem. in Support of Dismissal, pp. 4 & n.1, 14.

8/ This is not a case, as in Suter, where Congress left it entirely up to the states to define the contents of the provision at issue. See Suter, 503 U.S. at 359-60 (noting that the term "reasonable efforts" was "left up to the State," and distinguishing Wilder, in which the term "reasonable rates" was subject to federal regulations which provided a great deal of guidance). Here, federal regulations provide guidance as to what time period is sufficiently "prompt" to meet the requirements of the Medicaid Act. See infra II.C. (discussing the various federal regulations).

was not prepared to negate this argument. Id. at 349-50. The defendants also quote from Westside Mothers in support of this argument. 2001 U.S. Dist. LEXIS 3422 at *99. But Westside Mothers itself recognized that there is authority to support the argument that third-party beneficiaries could sue for breach of contract in 1871. Id. at *94 (noting that the Westside Mothers plaintiffs cited Corbin on Contracts and Williston's Treatise on the Law of Contracts). We decline to depart from the long line of cases allowing plaintiffs to use § 1983 to enforce rights under federal Spending Clause statutes.

C. Whether the Medicaid Act Provides an Enforceable Right Under § 1983

The defendants argue that the plaintiffs have no entitlement to waiver services and have no enforceable right to waiver services pursuant to § 1983. Although the plaintiffs' request for relief states that they seek "the full range of ICF/MR services or home and community-based waiver services and other services for which they are eligible," Am. compl. p. 23, the defendants apparently believe that the plaintiffs truly seek waiver services rather than ICF/MR services. See Reply at p. 2, n.2. Accordingly, their briefs focus on the plaintiffs' claims for waiver services, and they appear not to challenge the plaintiffs' argument that they have enforceable rights to ICF/MR services under § 1983. Therefore, we decline to dismiss Count I to the extent it seeks ICF/MR services, and this

section will focus only on the plaintiffs' claims for waiver services.

In Maine v. Thiboutot, 448 U.S. 1 (1980), the Supreme Court established that § 1983 was available to remedy violations of the Constitution and federal statutes by state and local governments. Id. at 4. Section 1983, however, is not available to remedy every violation of federal law, but only those laws that create "rights, privileges, or immunities." Mallett, 130 F.3d at 1251. There are three factors to consider in determining whether a particular statutory provision gives rise to a federal right: (1) whether Congress intended the provision to benefit the plaintiffs; (2) whether the right "is not so 'vague and amorphous' that its enforcement would strain judicial competence," and (3) whether the provision unambiguously imposes a binding obligation on the states. Blessing, 520 U.S. at 340-41; Wilder, 496 U.S. at 509 (determining that health care provider plaintiffs had an enforceable right under § 1983 to be reimbursed "reasonable and adequate" rates by the states for the services they provided).

The plaintiffs assert that two sections of the Medicaid Act, 42 U.S.C. § 1396a(a)(8) and § 1396n(c)(1), may be enforced through § 1983. Section 1396a(a)(8) provides, in pertinent part:

> A State plan for medical assistance 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.

42 U.S.C. § 1396a(a)(8). The Medicaid Act states that "medical assistance" can include payment of "home or community-based

services" if a waiver is approved. 42 U.S.C. § 1396n(c)(1).[9] Illinois having obtained such a waiver and the plaintiffs having been found eligible for waiver services, we have no trouble concluding that the plaintiffs are the intended beneficiaries. See Lewis v. New Mexico Dept. of Health, 94 F. Supp.2d 1217, 1233-34 (D.N.M. 2000); see also Boulet v. Cellucci, 107 F. Supp.2d 61, 72, 78 (D. Mass. 2000) (finding that § 1396a(a)(8) applies to home and community-based waivers services).

We also believe that the "reasonable promptness" requirement is not so "vague or amorphous that enforcement would strain judicial competence." Here the applicable regulations provide guidance on acceptable time frames. See 42 C.F.R. § 435.911(a) (stating that the time frame to determine disabled individuals' eligibility for Medicaid services may not exceed ninety days); 42 C.F.R. 435.930(a) (stating that state agencies should furnish Medicaid "without any delay caused by the agency's administrative procedures"); 42 C.F.R. § 435.911(e)(1) (prohibiting the agency from using "the time standards" as a "waiting period"). Where federal regulations provide guidance in interpreting a statutory provision, courts are less inclined to find the "reasonableness" requirement too vague for enforcement. Boulet, 107 F. Supp.2d at 72 (citing cases). Moreover, some courts have observed that even if a time period is not specifically mentioned, delays of several years could be considered "far outside the realm of reasonableness." Doe, 136 F.3d

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[9] Also, § 1396d(a)(15) defines "medical assistance" to include ICF/MR services.

at 717; see also Lewis, 94 F. Supp.2d at 1235-36 (quoting from Wilder, 496 U.S. at 519-20, that "[w]hile there may be a range of reasonable rates [to compensate health care providers], there are certainly some rates outside that range that no State could ever find to be reasonable").

In making the final determination as to whether the provision at issue imposes a binding obligation on the states, we assess whether the provision is stated in mandatory or precatory terms. See Blessing, 520 U.S. at 341. Here, § 1396a(a)(8) states that medical assistance "shall" be furnished with reasonable promptness. This imposes a binding obligation on Illinois, since it elected to provide the waiver services plaintiffs seek. See Tallahassee Mem'l Reg'l Med. Ctr. v. Cook, 109 F.3d 693, 698 (11th Cir. 1997) (per curiam) ("[W]hen a state elects to provide an optional service, that service becomes part of the state Medicaid plan and is subject to the requirements of federal law."). See also Doe, 136 F.3d at 718 (stating that a state's receipt of Medicaid funds is conditioned on its compliance with the provisions of § 1396a). In sum, we hold that the plaintiffs have articulated a federal right to reasonably prompt provision of medical assistance under § 1396a(a)(8) and that this right is enforceable under § 1983. See Lewis, 94 F. Supp.2d at 1236 (refusing to dismiss the plaintiffs' § 1983 claims for home and community-based waiver services under the Medicaid Act); Boulet, 107 F. Supp.2d at 73; see also Doe, 136 F.3d at 718 (holding that

the plaintiffs had a federal right to reasonably prompt provision of medical assistance (ICF/MR services) under § 1983).[10]

The defendants argue that there is no right to such services for three reasons: first, federal law imposes a cap on the services; second, federal law prohibits the waiver program if it would result in a higher per capita cost to provide CILA services than to provide institutional care; and third, there has been a waiver of the comparability requirement, which means that the state need not provide the same level of waiver services to each plaintiff. We reject all three arguments because all depend on findings of fact that could not be made on this motion to dismiss.

As to the first argument, the defendants themselves admit that although a cap is in place, 150 slots are still open and available. The defendants argue that those slots must remain open pursuant to a consent decree (they do not say how many must remain open) and also because they need to keep such placements available for individuals who have greater need than the plaintiffs - for example, individuals whose care-givers die, become disabled themselves, or are abusive. This may be true, but these are matters of fact which we do not consider at this time. In a similar case, Boulet v. Cellucci, the court found that individuals who are eligible for

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[10] The defendants cite one case to the contrary: Cook v. Hairston, No. 90-3437, 1991 WL 253302 (6th Cir. Nov. 26, 1991). Apart from being an unpublished opinion, this case bears little similarity to the one at bar. In that case, the plaintiffs lost Medicaid benefits when their authorized representatives failed to respond to communications from the county agency processing Medicaid applications. Id. at *1. The court determined that §§ 1396a(a)(8) and (19) were not sufficiently specific to require that the state guarantee nursing home residents benefits for which they were eligible. Id. at *5.

services and who are below the state's cap are entitled to those services. 107 F. Supp.2d at 77.

The defendants' second argument would also require us to delve into the facts and make findings about the relative cost of CILA services and institutional services.

The defendants' third argument focuses on the plaintiffs' request for "the full range of ICF/MR services or home and community-based waiver services." They argue that this court cannot grant persons who are already receiving waiver services the additional services for which they are waiting because the Medicaid Act's comparability requirement -- that individuals who need the same level of care must receive the same level of services -- does not apply to waiver services.[11] This argument is somewhat puzzling because neither the Amended complaint nor the Response state that the plaintiffs are receiving any waiver services; in fact, the Response specifically points out that the current funding for the plaintiffs' day program placement is funded by sources other than Medicaid. Moreover, the defendants do not contend that this applies to the plaintiffs claims for non-waiver services (ICF/MR services) for which they are still waiting. We decline to find, therefore, that the waiver of the comparability requirement warrants dismissal of the plaintiffs' claims for waiver and non-waiver services.

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[11] The comparability requirement states that Medicaid services "shall not be less in amount, duration or scope than the medical assistance made available to any other such individual." 42 U.S.C. § 1396a(a)(10)(B)(i). This requirement may be waived, however, when a state elects to operate a waiver program.

Having found that there is an enforceable right under § 1396a(a)(8), it is unnecessary to decide whether the plaintiffs also have an enforceable right under § 1396n(c)(2)(C).

III. Rehabilitation Act

Section 504 of the Rehabilitation Act states in pertinent part:

> No otherwise qualified individual with a disability ... shall, solely by reason of his or her 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.

29 U.S.C. § 794(a) (West Supp. 2000). The defendants argue that the plaintiff's claim based on the Rehabilitation Act ("RA") must be dismissed because the plaintiffs' have failed to plead the elements of an RA violation. As the Seventh Circuit noted in Mallett, 130 F.3d at 1257, two of the key elements are that the plaintiff be "otherwise qualified" to participate in the program at issue, and that the plaintiff have been denied benefits solely because of a handicap. The defendants assert that the plaintiffs' claim must fail because they cannot show that they would have received the services if they were not handicapped, and moreover, they cannot show that other non-handicapped individuals received these services.

The plaintiffs respond that their claim, brought under § 1983, is that the State has violated the RA's mandate that individuals with disabilities be placed in the least restrictive setting available. See 28 C.F.R. § 41.51(d); see also Makin ex rel. Russell v. Hawaii, 114 F. Supp. 2d 1017, 1036 (D.C. Haw. 1999) (discussing the RA's integration mandate). In Mallett, as discussed above, a

disabled individual who had been denied payment for graduate school education brought a § 1983 claim alleging violations of Title I of the RA. The Seventh Circuit determined that he could not enforce his Title I claim under § 504 of the RA, in part because he could not show that he would be entitled to such benefits absent his handicap. Id. at 1257. However, this type of individualized discrimination claim is distinct from a § 1983 claim that a state's plan "does not satisfy a mandatory provision the federal statute requires as a condition for receiving federal funds." Id. at 1256. This latter type of claim Mallett clearly allowed. Id. at 1256-57. Having determined that the plaintiff properly challenged Wisconsin's policy, the Mallett court moved on to consider whether the RA created an enforceable right under the framework set forth by the Supreme Court in Wilder. Id. at 1253-54.

The defendants do not argue that this claim fails to meet the requirements of Blessing or Wilder, so we will not engage in an independent analysis of this issue. We deny the defendants' motion to dismiss Count IV.

IV. Equal Protection

In City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432 (1985), the Supreme Court determined that the correct standard to assess an equal protection claim brought by mentally retarded individuals is a "rational basis" standard, that is, whether the State's law is rationally related to a legitimate government purpose. The defendants argue that the plaintiffs' equal protection claim should be dismissed because there is a rational basis for

allowing some developmentally disabled individuals to receive waiver services while others do not: some individuals face a greater need for such services when their care-givers die, become disabled themselves, or become abusive. We are inclined to agree that such a reason would be rational. However, this is a factual question, not a legal question we can address on a motion to dismiss. Therefore, we deny the defendants' motion to dismiss Count V.

V. Due Process

The plaintiffs argue that their rights to due process were violated because they were not afforded an opportunity for a fair hearing when their claims for services were not acted upon with reasonable promptness. The defendants argue that this claim should be dismissed because the plaintiffs possess neither a property nor a liberty interest that triggers the protection of the due process clause. See Board of Regents of State Colleges v. Roth, 408 U.S. 564, 569 (1972). Furthermore, the defendants argue that there are administrative procedures in place to challenge the state's failure to provide the Medicaid services plaintiffs seek, and the plaintiffs do not challenge the fairness of those procedures.

As to the first argument, we believe the plaintiffs do have a property interest in Medicaid services for which they have applied and have been deemed eligible. "Applicants who have met the objective eligibility criteria of a wide variety of governmental programs have been held to be entitled to protection under the due process clause." Holbrook v. Pitt, 643 F.2d 1261, 1278 n. 35 (7th

Cir. 1981) (citing cases finding that applicants for general assistance, AFDC, public housing, and other benefits have due process protection). We hold that applicants who are eligible for Medicaid services have a property interest that triggers due process protection. See Lewis, 94 F. Supp.2d at 1237 (finding that plaintiffs who applied for home and community-based waiver services had a property interest).

The defendants argue that Illinois has appellate procedures in place for those who wish to challenge the failure of the DHS to provide home and community-based services. See 59 Ill. Admin. Code, Chapter I, part 120.110(a)("The individual ... may appeal the following actions: ... (2) Failure to act on a request for services within the mandated time period"). We note that this point was raised only in the defendants' reply brief, and the plaintiffs did not have an opportunity to respond to this argument.

We have examined the portions of the Code that refer to an individual's right to appeal, but it is not clear that these would apply to the circumstances presented in this case. For example, Part 120.100(d) states that individuals applying for services "have a right to written notice of disposition of the request" and that "[s]uch notice must be mailed at least 10 calendar days prior to the effective date of the action." Part 120.110(b) apparently contemplates that an individual's right to appeal is triggered by receipt of "the notice of action." Here, however, the plaintiffs claim that they have never been told whether or not they will receive the services. See Am. Compl., ¶¶ 5(g), 6(g), 7(g), 8(g),

9(g) ("the DHS/ODD has not informed [plaintiffs] or [their] parents when or if he [or she] will receive residential Medicaid services at any time in the forseeable future"). This may be because there is no "action" when the DHS receives requests from eligible individuals to whom it chooses not to provide services because of policy reasons. Whatever the reason, any effort of the plaintiffs to appeal would be problematic, at best, because the Administrative Code does not appear to contemplate an appeal in the circumstances faced by these plaintiffs.

Therefore, we decline to dismiss the plaintiffs' due process claim (Count II).

CONCLUSION

For the reasons discussed above, we grant the defendants' motion to dismiss the plaintiffs' ADA claim (Count III), but deny the motion as to Counts I, II, IV, and V. Further, this court orders that the parties make all of the initial disclosures set forth under Federal Rule of Civil Procedure 26(a)(1) within 14 days of receipt of this opinion. A status hearing is scheduled for May 30, 2001, at 9:30 a.m.

Date: May 1, 2001

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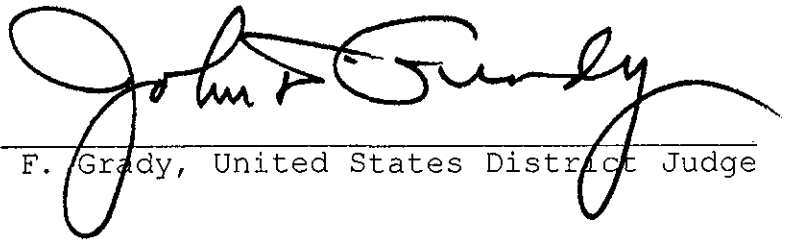

John F. Grady, United States District Judge