

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

(1) KATHERINE FISHER,)
(2) EARLEE HEATH, and)
(3) KAROL LOY, on behalf of)
themselves and all others)
similarly situated,)

Plaintiffs,)

v.)

(1) OKLAHOMA HEALTH CARE)
AUTHORITY, and (2) MIKE)
FOGARTY, in his official)
capacity as CEO of the)
Oklahoma Health Care)
Authority,)

Defendants.)

No. 02CV-762P (C)

FILED
NOV 1 2002
Phil Lamberdi, Clerk
U.S. DISTRICT COURT

ORDER

Now before the court is Defendants' Motion for Summary Judgment, Plaintiffs' Response to said motion and Defendants' Reply.

Plaintiffs are medical assistance recipients who are on the Home and Community-Based Services Waiver Program, sometimes called "Advantage." Plaintiffs currently reside in the community in their own homes and apartments. Plaintiffs seek prospective injunctive and declaratory relief in regard to Defendants' newly implemented policy of limiting Plaintiffs' prescriptions to five per month. The Defendants will provide more than five prescription medications per month, but only if Plaintiffs reside in an institution, whether it be a hospital or nursing home. Plaintiffs contend the policy will force them into unjustified institutional isolation.

Plaintiffs amended their Complaint on October 8, 2002. The Plaintiffs allege a cause of action against Defendant Fogarty in his official capacity pursuant to the *Americans with Disabilities Act*, 42 U.S.C. §12101 *et seq.* ("ADA"), as the State has limited prescription drug coverage for individuals on Advantage to five prescriptions per month while allowing nursing home residents unlimited prescriptions; a cause

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of action against Defendant Fogarty in his official capacity alleging the prescription limitation violates the *Medicaid Act*, 42 U.S.C. §1396 *et seq.*; a cause of action against Defendant Fogarty in his official capacity alleging denial of due process requirements under the Fourteenth Amendment of the U.S. Constitution because OHCA did not provide individual hearings before changing each Advantage recipient's prescription benefit; and a cause of action against Defendant Fogarty in his official capacity and the OHCA pursuant to *Section 504 of the Rehabilitation Act of 1973*, 29 U.S.C. §794.

Defendants argue Medicaid is a joint State/federal program designed to provide medical care for various groups in the American population, particularly low-income individuals who are children, pregnant, elderly, or blind or otherwise disabled. 42 U.S.C. §1396a(a)(10)(A) and (C). Each State has the option to participate with the federal government in Medicaid or to forgo participation. Once a State enters into a partnership with the federal government, Congress requires the State to provide a minimum level of benefits generally known as the mandatory program. 42 U.S.C. §1396a(a)(10)(A)(i); 42 C.F.R. §§440.210 and 440.220. Mandatory services are nursing home care, hospital care, laboratory and X-ray services, physician care, nurse-midwife care, and pediatric nurse practitioner care. *Id.*

States may also expand the program with certain optional coverages. 42 U.S.C. §1396a(a)(10)(A)(ii). Pharmacy benefits outside hospital and nursing home stays are part of the optional program and are implicated in this suit. *Id.* and 42 U.S.C. §1396d. The Home and Community-Based Waiver Program, which is also relevant to this action, is part of the optional program. 42 U.S.C. §§1396n, 1396t and 1396u.

It is the contention of the Defendants that the Oklahoma Legislature appropriated a certain sum of money for the mandatory and optional portions of the Medicaid program. State revenues fell short of expectations, and all State administrative agencies were forced to cut budgets by the provisions of Oklahoma's Balanced Budget Amendment, Okla. Const. 10 §23. Defendants allege due to the revenue shortfall they were forced to limit the number of prescriptions available to those enrolled in the Home and Community-Based Waiver Program. Defendants contend this was the most equitable solution to the deficit, without abolishing the optional Home and Community-Based Waiver Program altogether.

DISCUSSION

In general, summary judgment is proper where the pleadings depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). An issue of fact is "genuine" if the evidence is significantly probative or more than merely colorable such that a jury could reasonably return a verdict for the nonmoving party. *Anderson v. Liberty Lobby*,

Inc., 477 U.S. 242, 248 (1986). An issue is "material" if proof thereof might affect the outcome of the lawsuit as assessed from the controlling substantive law. *Id.* at 249.

In considering a motion for summary judgment, this court must examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. *Gray v. Phillips Petroleum Co.*, 858 F.2d 610, 613 (10th Cir. 1988). Furthermore, if on any part of the prima facie case there is insufficient evidence to require submission of the case to the jury, summary judgment is appropriate. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). In addition, one of the principal purposes of summary judgment is to isolate and dispose of factually unsupported claims or defenses, and the rule should be interpreted in a way that allows it to accomplish this purpose. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986).

The following facts are undisputed:¹

1. Plaintiffs Katherine Fisher, Earlee Heath, and Karol Loy are Medicaid recipients with disabilities who are part of the Home and Community-Based Waiver Program or sometimes called "Advantage."
2. During the current State Fiscal Year and prior to October 1, 2002, the Oklahoma Medicaid program provided Advantage recipients with unlimited prescription drugs.
3. On September 18, 2002, the OHCA Board reduced the drug benefit for all Advantage recipients across the State of Oklahoma to five prescriptions per month.
4. The reduction was occasioned by a statewide revenue shortfall.
5. On or about September 19, 2002, OHCA informed the Medicaid Recipients that Advantage recipients' drug benefits would be limited to five per month.
6. OHCA did not provide the Medicaid Recipients with an opportunity for a hearing about the benefit reduction.
7. As part of the creation of the Home and Community-Based Waiver Program, the U.S.

¹ Plaintiffs' brief is required to begin with a concise, numbered statement of material facts as to which the Medicaid Recipients contend genuine issues of fact exist. *N.D. LR 56.1(B)*. Movant's alleged facts not so disputed shall be deemed admitted. *Id.* The Plaintiffs' Brief contains no such disputation of the Defendants' listed facts, therefore all Defendants listed facts are deemed admitted. Further, Plaintiffs did not address Defendants' argument in regard to the Fourteenth Amendment due process cause of action and it is therefore confessed.

Secretary of Health and Human Services waived the requirement that Medicaid services for waiver recipients be comparable to those for other Medicaid recipients.

8. With proper scheduling of Earlee Heath's prescription purchases, Earlee Heath's monthly cost for prescription drugs could be reduced to approximately twenty-five dollars rather than the two hundred fifty-five dollars alleged in the Medicaid Recipients complaint.

9. Even that cost could be reduced if Ms. Heath's diabetes prescriptions were managed to avoid drug interactions and conflicting drugs.

10. With scheduling, Karol Loy's monthly prescription cost could be reduced to two hundred dollars instead of four hundred seventy-six dollars alleged in the complaint.

11. Management of Ms. Loy's prescriptions to avoid drugs working at cross purposes could reduce the cost further.

12. With scheduling, Katherine Fisher's prescription cost could be reduced to forty-five to sixty dollars per month instead of two hundred seventy-four dollars as alleged in the complaint.

13. Management to eliminate duplicate drug therapy and interaction could reduce Ms. Fisher's cost further.

Medicaid provides medical assistance to low income families and individuals. As part of the program, Congress reimburses for both nursing home care and inpatient acute hospitalization. When persons are institutionalized in either a nursing home or a hospital, they receive all the prescription medications that are medically necessary. Medicaid also provides Home and Community-based services through its waiver program. 42 U.S.C. § §1396n, 1396t and 1396u. In order for a person to be eligible to participate in the waiver program, they must meet the level of care for admission into an institution, whether a nursing home or hospital. Additionally, a state must certify that placement in the waiver program will be "cost neutral," that is, the aggregate costs for persons in the waiver program will be less than if those persons were in an institution.

Plaintiffs contend that but for the Defendants' Home and Community-Based Waiver Program, they would be unnecessarily segregated in nursing homes or other institutions. Plaintiffs reside in the community with appropriate HCBS services, including prescriptions in excess of five per month, prior to October 1, 2002. Effective October 1, 2002, Defendants changed their medical assistance program so that persons on the Home and Community-Based Waiver Program would not be permitted to receive more than five prescription medications per month if they continued to reside in the community. If,

however, they resided in an institution, they would receive more than five prescriptions per month. Thus, Plaintiffs contend only if they relinquish their independence and live in a nursing home or hospital, both of which are more expensive than residing in the community, will they receive the appropriate number of medications.²

The Americans with Disabilities Act, 42 U.S.C. §12101 et seq., is a far reaching statute designed "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities. 42 U.S.C. §12101(a)(2), (3) and (5). Congress noted specifically that discrimination persists in the provision of "health services," 42 U.S.C. §12101(a)(3), and established a national goal "to assure ... independent living ... for such individuals." 42 U.S.C. §12101(a)(8).

Congress directed the Attorney General to promulgate regulations implementing the public services title of the ADA. 42 U.S.C. §12134. The Attorney General's ADA public services regulations are codified at 28 C.F.R. 35.101 et seq. Plaintiffs allege Defendants have violated 28 C.F.R. 35.130(d) which provides that a public entity in providing any aid, benefit or service discriminates against persons with disabilities when it violates these regulations, including the following, "(d) A public entity shall administer services, programs and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." Plaintiffs argue by limiting the number of prescription medications to five per month in the community and providing unlimited prescriptions in institutions, Defendants discriminate against Plaintiffs because they deny the services in the community-based settings but provide it only in unnecessarily segregated settings.

" In *Olmstead v. L.C.*, 527 U.S. 119 (1999), the Supreme Court specifically considered the Title II integration mandate and explained:

Recognition that unjustified institutional isolation of persons with disabilities is a form of discrimination reflects two evident judgments. First, institutional placement of persons

² Generally, when medical assistance is provided under the Medicaid program, whether through mandatory or optional services, benefits must be comparable among recipients. 42 U.S.C. §1396a(a)(10)(B). The Secretary of Health and Human Services, however, can waive the comparability requirement for programs such as the Home and Community-Based Waiver Program. 42 U.S.C. §1396n(c)(3). Under such a waiver, the State may pay for "part or all of the cost of home or community-based services." 42 U.S.C. §1396n(c)(1). The record reveals the Secretary waived this requirement for the State of Oklahoma.

who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life ... Second, confinement in an institution severely diminishes life activities of individuals, including family relations, social contact, work options, economic independence, educational advancement and cultural enrichment.

Olmstead v. L.C., 527 U.S. at 2187.

In the instant case, Plaintiffs argue *Olmstead* is on point because like the Plaintiffs in *Olmstead*, Plaintiffs in this case must also "relinquish participation in community life they could enjoy given reasonable accommodations," in order to receive needed medical services. *Id.* at 2187. In *Olmstead* the Court found unjustified disparate treatment, or unjustified institutional isolation, constitutes discrimination under the ADA. *Id.*

This court finds *Olmstead* is factually and materially distinguishable from this case. Unlike the plaintiffs in *Olmstead* who challenged their continued confinement in a mental institution once they had been qualified for community-based care, the Plaintiffs in the instant case are not confined to a segregated environment. To the contrary, the undisputed record reveals Plaintiffs are presently living in their homes and utilizing the Home and Community-Based Waiver Program. Plaintiffs have produced no evidence at this time that they will be forced into institutional settings if their prescriptions are limited pursuant to the Defendants' policy changes. In fact, the unrefuted testimony of Defendants' expert revealed with appropriate scheduling of drug purchases, management of prescriptions to avoid drug interactions, and alternative community resources, Plaintiffs could completely avoid institutional care.³ Therefore, Defendants have not subjected Plaintiffs to unjustified institutional isolation.

Further, when a Plaintiff requests relief that requires modification of a State's services or programs, the State may assert, as an affirmative defense, that the requested modification would cause a


³ Plaintiffs labeled their Amended Complaint a "class action." The issue is not the subject of a motion to certify at this time. The court notes that based on the testimony in this case, there appear to be significant problems with such a certification. Foremost would be the lack of similarly situated plaintiffs evidenced by different medical conditions and their corresponding treatment regimens, as well as their differing financial situations.

fundamental alteration of a State's services and programs. *Olmstead v. L.C.*, at 597. This "cost-based defense . . . [allows Defendant] to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with [disabilities]." *Id.* at 603-604. The inquiry requires not simply an assessment of the cost of the accommodation in relation to the recipient's overall budget, but a "case-by-case analysis weighing [several] factors." See, *Olmstead* at 606, n. 16 citing 28 C.F.R. §42.511(c)(1998) and 45 C.F.R. §84.12(c)(1998).

In the instant case, the undisputed record reveals the State is required to provide an unlimited nursing home program because of the mandatory nature of such care. 42 U.S.C. §1396a(a)(10)(A)(i); 42 C.F.R. §§440.210 and 440.220. The State, however, may amend its optional programs, such as the Advantage Waiver. Given this reality and the State financial crisis, the court finds Defendants have made a reasonable move to reduce the optional program rather than eliminate it altogether as the State could pursuant to 42 U.S.C. §1396a(a)(10)(A)(ii).

Accordingly, Defendants' Motion for Summary Judgment is granted.

IT IS SO ORDERED this 3rd day of October, 2002.


JAMES H. PAYNE
UNITED STATES DISTRICT JUDGE