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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior District Judge Richard P. Matsch

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO

FEB 28 2005

Civil Action No. 00-M-1609

GREGORY J. L.

MANDY R., by and through her parents and guardians, Mr. and Mrs. R;
LISA W., by and through her parents and next friends, Mr. and Mrs. W.;
STEPHANIE F., by and through her parents and next friends, Mr. and Mrs. F.,
CATHY G., by and through her parent and guardian, Russell G.,
MARIAN L., by and through her parent and guardian, Ms. L.; JODI F., by and through her
parents and next friends, Mr. and Mrs. F., and

Intervenor-Plaintiffs, and

COLORADO ASSOCIATION OF COMMUNITY CENTERED BOARDS,

Intervenor-Plaintiff,

v.

BILL OWENS, Governor of the State of Colorado;
MARVA HAMMONS, Executive Director of the Colorado Department of Human Services;
KAREN REINERTSON, Executive Director of the Colorado Department of Health Care Policy
and Financing;
COLORADO DEPARTMENT OF HUMAN SERVICES; and
COLORADO DEPARTMENT OF HEALTH CARE POLICY AND FINANCING.

Defendants.

MEMORANDUM OPINION AND ORDER

Matsch, Senior District Judge

The plaintiffs in this action are adults who suffer from developmental disabilities ("DD"). Their parents and guardians have brought this civil action on their behalf against defendant Bill Owens in his capacity as the Governor of Colorado, Marva Hammons in her capacity as the director of the Colorado Department of Human Services ("DHS"), and Karen Reinertson in her capacity as the director of the Colorado Department of Health Care Policy and Financing ("HCPF") (collectively the "State

Defendants”), claiming that the State of Colorado is violating its obligations under Title XIX of the Social Security Act of 1965, 42 U.S.C. § 1396a, *et seq.* (the “Medicaid Act”), by failing to provide appropriate 24-hour residential care and treatment to all developmentally disabled adults in Colorado eligible for Medicaid-funded care. The findings of fact and conclusions of law required by Fed. R. Civ. P. 52 from the trial are contained in this memorandum.

Colorado Association of Community Centered Boards (“CACCB”) intervened on behalf of the non-profit organizations who deliver DD services under contract with the State, claiming that the reimbursement rates have been and now are too low to provide adequate incentives to the development of new care facilities and to assure the quality of care to which Medicaid recipients are entitled.

The Medicaid Act

Congress enacted the Medicaid Act as a means for public funding of the cost of providing medical assistance to persons unable to pay for it. Medicaid is a joint program with states who elect to participate in it. Under Medicaid, a state pays providers of medical services and receives reimbursement from the national government of a percentage of those payments. To participate in the Medicaid program, a state must adopt a State Plan that complies with statutory requirements and implementing regulations of the Secretary of Health and Human Services (“HHS”). The Centers for Medicare and Medicaid Services (“CMS”) (formerly known as the Health Care Financing Administration) is the agency within HHS responsible for administration of Medicaid, including approval of State Plans and monitoring their operations.

Each participating state determines who is eligible for medical assistance, the types of assistance to be paid for and the rates of reimbursement. The State Plans must include some specified categories of eligible persons and some types of medical assistance mandated by the federal law, with the option to include more categories of eligibility and additional services. Thus, the states have complete freedom to choose whether they will join the program and some discretion to determine the levels of participation.

Care for mentally retarded persons in a facility designated as an Intermediate Care Facility for the Mentally Retarded ("ICF/MR") is an optional service under Medicaid. See 42 U.S.C. §§ 1396a(1)(10)(A) and 1396d(a)(15). ICF/MRs are institutional care facilities subject to extensive federal regulation. See 42 CFR Part 483, Subpart I.

The Medicaid Act requires that medical assistance provided under a State Plan be furnished with "reasonable promptness" to all eligible individuals and that the assistance provided to any one group be comparable to that provided to other groups. The Act authorizes a waiver of certain statutory requirements to enable states to provide coverage for specialized services. One such waiver is an array of home and community-based services ("HCBS") to persons who would otherwise need care in a skilled nursing facility ("SNF"), an ICF/MR, or a similar institution. 42 U.S.C. § 1396n(c); 42 C.F.R. 441.300. These services are typically provided in private homes or apartments, group homes, or host homes. These alternatives to institutional care may be more beneficial to the recipients and may be less costly than institutional care. Waivers for HCBS services are granted only upon assurances and conditions

satisfactory to CMS. See 42 U.S.C. § 1396n(c)(2). To obtain a waiver, a state must provide an estimate of the number of persons expected to receive services and the estimate becomes a cap for spending on the waiver program. The cap must be no fewer than 200 recipients of such services. See 42 U.S.C. § 1396n(c)(9) and (10); 42 C.F.R. § 441.303(f)(6).

Colorado's State Plan and Delivery of DD Services

The Colorado General Assembly enacted the Colorado Medicaid Assistance Act, C.R.S. § 26-4-101, *et seq.*, authorizing participation in Medicaid. Colorado has adopted a State Medicaid Plan (the "State Plan"). CMS has approved Colorado's State Plan and federal funds have been provided pursuant to it.

Colorado included ICF/MR services in its State Plan. C.R.S. § 26-4-302(1)(I). Colorado obtained a Medicaid waiver to include HCBS services to individuals with DD who otherwise would require services in an ICF/MR. (Ex. A-1). The HCBS-DD waiver permits payment for full time residential services for adults with DD (over 18 years of age) in host homes (serving 1 to 3 persons) or in group homes (serving 4 to 8 people). Colorado also obtained a Medicaid waiver to provide Supported Living Services ("SLS") to persons with DD. The SLS program, as the name implies, provides financial support for assistance to people who live in their own homes or in their parents' homes, in amounts less than the cost of full time residential care. The Colorado State Plan includes other Medicaid-funded services to persons with DD that are not included in this case.

The Medicaid Act requires each state to designate a single state agency to be