

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MICHAEL BIRDSO, KELLEY DOTSON,)
SUSAN EDWARDS, BOBBY JONES,)
MIA MURRAY, LARRY PRITCHARD, and)
PATRICIA REDMOND,)
on behalf of themselves and all others)
similarly situated,)

Plaintiffs,)

v.)

SONNY PERDUE, in his official capacity)
as Governor of the State of Georgia,)
GEORGIA DEPARTMENT OF COMMUNITY)
HEALTH, GEORGIA DEPARTMENT OF)
HUMAN RESOURCES, B.J. WALKER,)
Commissioner, Georgia Department of)
Human Resources, in her official capacity,)
TIM BURGESS, Commissioner, Georgia)
Department of Community Health,)
in his official capacity,)

Defendants.)

CIVIL ACTION NO.

1:03 – CV – 0288 -JEC

INTERVENORS' COMPLAINT

**I.
PRELIMINARY STATEMENT**

1.

Plaintiffs are persons with physical disabilities who receive or are seeking to receive long-term health-care services under federally assisted state programs

administered by Defendants. Although Plaintiffs prefer and are eligible to receive care in their homes and communities, Defendants' official practices and policies cause Plaintiffs to be unnecessarily segregated in nursing homes or at risk of nursing home placement. Defendants continue to require Plaintiffs, as a condition of receiving services, to be isolated in nursing homes that often cost more than Defendants would have to spend for the same or similar services in the community. Defendants violate the American with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-12213 and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a) by requiring that Plaintiffs be confined in nursing homes in order to receive long-term health-care services, when community-based care is both available and appropriate to Plaintiffs' needs. Defendants further violate the ADA and Section 504 by utilizing criteria and methods of administration in their Home and Community Based (HCB) waiver programs that have the effect of discriminating against Plaintiffs. Defendants also violate Title XIX of the Social Security Act, 42 U.S.C. § 1396-1396v ("Medicaid Act") by failing to provide benefits to Plaintiffs with reasonable promptness, failing to adequately inform Plaintiffs of the waiver alternatives, and failing to allow Plaintiffs a choice of institutional or home and community-based services. In administering a state program in such a way as to

deprive Plaintiffs of federal rights, Defendants violate the Civil Rights Act of 1871, 42 U.S.C. § 1983.

2.

All three Plaintiff-Intervenors are physically disabled individuals residing in nursing homes. Community-based care is both available and appropriate to their needs. They have not been adequately informed of the home and community based waiver alternatives and, thus, were not allowed a meaningful choice between institutional or home and community-based services. By their actions towards Plaintiff-Intervenors, Defendants violated the ADA, Section 504, the Medicaid Act and deprived Plaintiff-Intervenors of their federal rights in violation of 42 U.S.C. § 1983.

II. JURISDICTION AND VENUE

3.

This Court has jurisdiction of this action under 28 U.S.C. §§ 1331 and 1343.

4.

Plaintiffs' claims are authorized by 28 U.S.C. §§ 2201 and 2202, by 42 U.S.C. §§ 1983 and 12133, and by 29 U.S.C. § 794a.

5.

Venue is proper under 28 U.S.C. § 1391.

**III.
PARTIES**

A. Plaintiff-Intervenors

6.

Jennifer Bivins is a 30-year-old resident of Macon, Georgia.

7.

Alanna Clay is a 55-year-old resident of Macon, Georgia.

8.

Barney Strickland is a 51-year-old resident of Macon, Georgia.

B. Defendants

9.

Defendant Sonny Perdue is the Governor of the State of Georgia. He is responsible for appointing the commissioner of the Department of Community Health (“DCH”) and approving the appointment by the Board of the Department of Human Resources (“DHR”) of its commissioner. He is sued in his official capacity for actions and omissions under color of state law.

10.

Defendant DCH is the state agency responsible for administering the Georgia Medicaid Program. *See* 42 U.S.C. § 1396a(a)(5); O.C.G.A. § 31-5A-4(a).

It is a public entity as defined in 42 U.S.C. § 12131(1), and is a recipient of federal financial assistance.

11.

Defendant Tim Burgess is the Commissioner of the DCH. Pursuant to O.C.G.A. § 31-5A-6, he is responsible for the functions and programs of the DCH, including the state Medicaid program and the HCB waiver programs. Defendant Burgess is sued in his official capacity for actions and omissions under color of state law.

12.

Defendant DHR is empowered under state law to apply for, receive, and administer federal funds under the Medicaid program and other federal health programs. *See* O.C.G.A. § 31-2-2. It is a public entity as defined in 42 U.S.C. § 12131(1) and is a recipient of federal financial assistance.

13.

Defendant B.J. Walker is the Commissioner of the DHR. Pursuant to O.C.G.A. § 49-2-1, she is responsible for the functions and programs of the DHR, including its acceptance and disbursement of federal Medicaid funds. She is sued in her official capacity for actions and omissions under color of state law.

**IV.
FACTS**

14.

Jennifer Bivins is a 30-year-old physically disabled woman. She suffers from diabetes, hypertension, partial paralysis of her digestive system, and has been blind for four years. She requires kidney dialysis three times a week. Ms. Bivins has lived in nursing homes for the past four and a half years, and currently resides at Rosewood Nursing Center, 2795 Finney Circle, Macon, GA 31217, where she has lived for approximately four years. She was forced to enter a nursing home when her family was no longer able to care for her.

15.

When Ms. Bivins was first admitted to a nursing home, no one told her about community-based alternatives. She first learned of these alternatives from her attorneys in this case.

16.

Ms. Bivins does not want to live in a nursing home. She is significantly younger than most of the other residents, and finds the nursing home restrictive and isolating. Because of her institutionalization, she is unable to engage in many of the life activities in which most 30-year-olds participate. She wants to live in the community so that she can become more independent and socialize with people

of her own age. She would like to be able to go and see movies, go shopping, and generally lead a more normal life.

17.

If appropriate care were provided, Ms. Bivins could live in the community. Ms. Bivins would need help with activities such as housekeeping and cooking and would require transportation to the dialysis center.

18.

Alanna Clay is 55 years old. She suffers from lupus, degenerative bone disease, Crohn's disease, chronic pain, and she is an amputee. She moved to Rosewood Nursing Center in February 2004 following the amputation of one of her legs.

19.

Before her amputation, Ms. Clay was an active member of the community. She has lived in Macon for approximately eight years and would like to live in the community again so she would have the freedom to participate in normal life activities, rather than being confined in a nursing home.

20.

With the help of Anna McCrary from Georgia Legal Services in Macon, Ms. Clay has applied for ICWP and CCSP. No determination of eligibility has been made.

21.

Ms. Clay needs help with activities such as getting up in the morning, bathing, getting dressed, shopping, keeping house, and getting to bed at night. With the appropriate services she could live in the community again.

22.

Mr. Strickland is 51 years old, and suffers from cerebral palsy and a fused hip. He has lived in Rosewood Nursing Center in Macon since June of 2004. He came to Rosewood from Emory Woods Nursing Home in Atlanta where he lived for approximately three years.

23.

Mr. Strickland lived and worked in the community until he suffered a shoulder injury and was admitted to Grady Hospital. After several weeks in the hospital he moved to Emory Woods Nursing Home.

24.

Mr. Strickland was not advised of the existence of home or community based alternatives when he was admitted to the nursing home. Anna McCrary from Georgia Legal Services in Macon is helping him apply for CCSP.

25.

Mr. Strickland would like to live in the community, and with appropriate care is capable of doing so. He wants the freedom to go to libraries, attend the symphony, and visit with friends. In the community, Mr. Strickland will need help with activities such as bathing, dressing, housekeeping and getting to bed.

26.

Defendant's actions have caused and are continuing to cause Plaintiff-Intervenors irreparable harm.

**V.
CLAIMS FOR RELIEF**

COUNT I

**The Americans with Disabilities Act: Failure to Provide Services
in the Most Integrated Appropriate Setting.**

27.

Plaintiffs are qualified individuals with disabilities protected by the ADA, 42 U.S.C. § 12132, and are subjected to discrimination.

28.

Defendants' requirement that Plaintiff-Intervenors be confined in unnecessarily segregated environments (*i.e.*, nursing facilities), rather than in the community, in order to obtain long-term care and services, violates the ADA's integration mandate, which requires that a "public entity shall administer 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).

29.

Plaintiff-Intervenors can receive and are appropriate candidates for receipt of publicly-funded long-term health-related services in the community, and the community is the most integrated setting appropriate to meet their needs. Nevertheless, Defendants have denied them access to the array of community-based services they need and instead have offered them services only if they are confined in segregated facilities

COUNT II

Section 504 of the Rehabilitation Act: Failure to Provide Services in the Most Integrated Appropriate Setting.

30.

Plaintiff-Intervenors are qualified individuals with disabilities protected by Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a), and are subjected to discrimination.

31.

Defendants' requirement that Plaintiff-Intervenors be confined in unnecessarily segregated environments (*i.e.*, nursing facilities) rather than in the community, in order to obtain long-term care and services, violates Section 504's "integration mandate."

32.

Plaintiff-Intervenors can receive and are appropriate candidates for receipt of long-term health related services in the community, and the community is the most integrated setting appropriate to meet their needs. Nevertheless, Defendants have denied them access to the array of community-based services they need and, instead, have offered them services only if they are confined in segregated facilities.

COUNT III
Americans With Disabilities Act : Utilization of
Discriminatory Criteria and Methods of Administration.

33.

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

34.

In violation of this requirement, Defendants use criteria and methods of administration in their HCB waiver programs that have the effect of subjecting Plaintiff-Intervenors to discrimination. Among these criteria and methods of administration that have the effect of requiring Plaintiff-Intervenors, as a condition of receiving disability services, to be unnecessarily segregated in nursing homes are: the use of arbitrary eligibility criteria (such as age and mobility limitations), the use of a limited number of service providers with wheelchair accessible

facilities, and an unreasonable limit on the number of attendant care hours an applicant for these services may receive. These and other methods of administration substantially undermine accomplishment of the objective of the waiver programs, which is to provide an alternative to institutionalization.

COUNT IV

Section 504 of the Rehabilitation Act: Utilization of Discriminatory Criteria and Methods of Administration.

35.

In violation of the Rehabilitation Act and 28 C.F.R. § 41.51(b)(3), Defendants have utilized criteria and methods of administration in their HCB waiver programs that have the effect of subjecting Plaintiff-Intervenors to discrimination. Among these are: the use of arbitrary eligibility criteria (such as age and mobility limitations), the use of a limited number of service providers with wheelchair accessible facilities, and an unreasonable limit on the number of attendant care hours an applicant for these services may receive. These and other methods of administration substantially undermine accomplishment of the objective of the waiver programs, which is to provide an alternative to institutionalization.

COUNT V

Medicaid: Failure to Provide Timely and Adequate Notice and Freedom of Choice in Home and Community-Based Waiver Services.

36.

Title XIX requires as a condition of the ICWP and CCSP waivers that Defendants give “[a]ssurance that when a recipient is determined to be likely to require the level of care provided in a . . . [nursing facility], . . . , the recipient . . . will be - (1) Informed of any feasible alternatives available under the waiver; and (2) Given the choice of institutional or home and community-based services.” 42 CFR § 441.302.(d); 42 U.S.C. § 1396n(c)(2)(C).

37.

In violation of this requirement, Defendants administer state programs and services in a way that fails to provide Plaintiff-Intervenors with adequate information about the waiver alternatives and deprives them of a meaningful choice between nursing home care and the more integrated care settings that are available in the community and required by federal law, including the opportunity to be placed on waiting lists for HCB programs.

COUNT VI
Medicaid: Failure to Provide Services with
Reasonable Promptness

38.

Title XIX requires that Defendants provide Medicaid services to eligible individuals with “reasonable promptness.” 42 U.S.C. § 1396a(a)(8).

39.

Defendants use services provided through Medicaid ICWP and CCSP waivers as the primary means of attempting compliance with the ADA and § 504 requirements that Plaintiff-Intervenors be provided with services in the most integrated setting appropriate. Because Defendants have chosen to rely primarily on the Medicaid waivers to attempt to comply with the requirements of the ADA and § 504, Defendants are obligated to make such services available with reasonable promptness.

40.

In violation of this requirement, Defendants have failed to provide Plaintiff-Intervenors with “reasonabl[y] prompt[.]” access to waiver and other Medicaid services that would afford long-term health-care services in home and community-based settings, although Plaintiff-Intervenors are qualified for such services.

VI.
PRAYER FOR RELIEF

WHEREFORE, Plaintiff-Intervenors request:

- a. That this Court exercise jurisdiction over this action.
- b. That this Court declare that the actions and failure to act of Defendant Georgia Department of Community Health, Defendant Burgess, and the other Defendants violate the Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973, the Medicaid Act, and Section 1983 of the Civil Rights Act of 1871.
- c. That this Court issue permanent injunctions to enjoin Defendants from continuing to violate the Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973, Sections 1396a(a)(8) and 1396n(c)(2)(C) of the Medicaid Act and Section 1983 of the Civil Rights Act of 1871; to require Defendants to immediately offer its long-term care services to Plaintiff-Intervenors in their homes and communities, rather than only in unnecessarily segregated institutional facilities; to require Defendants to notify Plaintiff-Intervenors in a meaningful manner of the waiver alternatives and of their

option to choose between institutional and home-based or community-based services; to require Defendants to allow those Plaintiff-Intervenors who choose home-based or community-based services to apply and be placed on a waiting list for the waiver programs; to enjoin Defendants from utilizing criteria and methods of administration in their HCB waiver programs that discriminate against Plaintiff-Intervenors and have the effect of defeating the purpose of the HCB waivers; and to require Defendants to provide long-term care in home-based and community-based settings with reasonable promptness.

- d. That this Court issue such other relief as may be just, equitable and appropriate, including an award of reasonable attorneys' fees, litigation expenses and costs pursuant to 42 U.S.C. §§ 1988 and 12205, and 29 U.S.C. § 794a(b).

Dated: January 5, 2005

S/ Charles T. Lester, Jr.

Charles T. Lester, Jr., Georgia Bar Number 447200

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CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the accompanying **Intervenors' Complaint** upon counsel of record by first class mail properly addressed as follows:

Robert David Powell, Esq.
Office of United States Attorney
Northern District of Georgia
75 Spring Street, S.W.
600 United States Courthouse
Atlanta, GA 30303

All other counsel of record will be automatically served through the Court's electronic filing system.

This 5th day of January, 2005.

S/ Charles T. Lester, Jr.
Charles T. Lester, Jr.
Georgia Bar Number 447200