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ASSET BUILDING
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Federal Court Says California, Despite Budget Problems, Must Comply with Disability Laws

In a suit to preserve access to adult day health care (ADHC), a critical community-based alternative to institutional care, cocounsel Disability Rights California, AARP Foundation Litigation, the National Senior Citizens Law Center, the National Health Law Program, and pro bono counsel Howrey LLP halted cuts in the program through two preliminary injunctions: *Brantley v. Maxwell-Jolly*, 656 F. Supp. 2d 1161 (N.D. Cal. 2009), and *Cota v. Maxwell-Jolly*, 2010 WL 693256 (N.D. Cal. 2010). The *Cota* ruling is on appeal (Case No. 10-15635) to the Ninth Circuit.

In granting these injunctions, in September 2009 and February 2010, the federal district court for the northern district of California found that, despite budget problems, California could not abdicate its duty to ensure continuing compliance with the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act. In *Cota*, the second preliminary injunction, the court also ruled that new, restrictive eligibility standards would likely violate comparability and "reasonable standards" requirements under Medicaid law, and federal due process requirements, besides violating the ADA and Section 504.

Factual Framework

The ADHC program has been in place in California for more than thirty years. It enables elderly persons and adults with disabilities to remain in their communities and to avoid institutionalization, and it offers respite for their caregivers. The state's budget crisis, however, threatened to undermine the program.

Program History. In 1978 the California Legislature authorized ADHC as a benefit under Medi-Cal, California's Medicaid program. What began as a pilot program in a few sites expanded to hundreds of programs that have become an integral component of California's long-term care network.

By 2009 approximately 37,000 low-income seniors and younger adults with significant disabilities resulting from conditions such as Alzheimer's disease, unstable diabetes, and the effects of stroke received care from one to five days per week in centers across the state. For one all-inclusive rate, participants receive skilled nursing services, physical therapy, occupational therapy, speech therapy, nutrition services, and transportation to and from the program to their homes.

California's Fiscal Crisis and Proposed Cuts. In the summer of 2009, in the face of the nation's—and California's—financial crisis, California proposed a number of draconian cuts in essential programs for seniors and people with disabilities. One of such cuts is a complex two-part refashioning of the ADHC benefit, set forth in Assembly Bill 5, 4th Extraordinary Sess. (Cal. 2009) (2009 Cal. Stat. ch. 5) (ABx4 5), and signed into law by Gov. Arnold Schwarzenegger on July 28, 2009.

The first cut challenged would have reduced from five to three the maximum number of days per week that individuals could participate in the program, regardless of approved treatment plans and need for the service. This cut was set to go into effect on August 27, 2009; it would have cut services to approximately 8,000 individuals who attended ADHC four or five days per week.

The lawsuit also challenged new eligibility criteria that would have restricted program participation based on diagnosis or disability and limited the qualifying areas of need. The result would be termination of services entirely for up to 15,000 participants. The trigger for this cut was a declaration by the director of the Department of Health Care Services, the state agency that administers the Medi-Cal program. This declaration would also, however, reinstate the maximum number of days to five per week.

Factual Development

A provider organization, the California Association of Adult Day Services, was key to developing the case.

Finding Plaintiffs and Telling Stories. ADHC is unique in California. Many programs have existed for decades and are nonprofit entities that struggle to stay afloat, driven by the tremendous dedication of the providers and their culture of making personal sacrifices to keep participants in their homes and communities. A strong lobby, the California Association of Adult Day Services links these providers.

Faced with the proposed cuts, the association rallied its members to tell the stories of individual participants whose lives would be devastated by a reduction in their attendance to only three days a week. Through this network we found six individuals with a range of stories but singular dependence on ADHC.

"Reduction in Days" Plaintiffs. Both Lillie Brantley, who at 84 was extremely frail and had Alzheimer's disease, and Allie Jo Woodard, who was 79 and had a psychiatric disability along with other physical conditions, attended the Bayview Adult Day Health Care program in San Francisco five days a week. Both needed constant supervision and assistance. Along with nursing and other skilled services, the program gave critical respite to the women's families, allowing them to keep their jobs and reduce caregiver burnout. Brantley lived with her niece, whose care, combined with care from a paid attendant and the ADHC program, meant that Brantley was never alone. Woodard, who in theory lived "alone," spent her time outside the ADHC program either at her home with overnight care from her son or daughter or at one of their homes on weekends. Both Brantley and Woodard received the maximum number of hours of in-home support services attendant care available under Medi-Cal. Losing two days a week of ADHC would have left no alternative but institutionalization for Brantley and Woodard—their families' effort to keep them safely at home could stretch no further.

By contrast, Gilda Garcia was one of the many seniors and younger people who have disabilities and live alone but manage to stay in their communities with ADHC services. Garcia was relatively independent and lived alone with a few hours of in-home supportive services. However, because of her extremely unstable diabetes, she was highly dependent on ADHC services five days a week; she faced acute hospitalizations, and possibly death, if her services were reduced.

"Termination of Benefits" Plaintiffs. By mid-November, the Department of Health Care Services indicated that the target date for implementation of the new eligibility restrictions was March 1, 2010. Because none of the three original plaintiffs faced complete termination of care, we found, by working with the California Association of Adult Day Services' network of providers, three new named plaintiffs who were in danger of losing ADHC entirely when the new criteria took effect. Harry Cota, 60, lives alone and has multiple medical conditions requiring ADHC five days a week. Ronald Bell, 45, has dementia and unstable diabetes, among other medical conditions; he lives with and was represented by his grandmother and guardian ad litem, Rozene Dilworth. Sumi Konrai, 87, has Alzheimer's disease and is very frail but is able to live alone with the combination ADHC five days a week and daily assistance from her daughter-in-law and guardian ad litem, Casey Konrai.

Putative Class Members and Providers. Both motions for preliminary injunction were supported by declarations not only from named plaintiffs but also from putative class members and providers, nurses, and physicians who described the harms they foresaw from cuts in the program.

Experts and Evidence. We retained two experts—doctors with extensive experience in the treatment, care, and support of persons with developmental and mental disabilities as well as conditions associated with advanced age—who were critical in showing that plaintiffs and putative class members would be at risk of institutionalization if ADHC were reduced or terminated. They also spoke to the disproportionate harm that the proposed new eligibility restrictions would impose on certain groups of people with disabilities: those who have mental or cognitive impairments and are physically capable but highly dependent on ADHC services to maintain health or who greatly need a single service; and others who are cognitively intact but who have very high medical needs.

Individuals enter the ADHC program following an extensive three-day assessment by a multidisciplinary team of health care professionals (physicians and nurses among them). Ultimately the judge found this process, and the credentials of the team members, particularly compelling evidence of plaintiffs' and class members' need for ADHC.

Litigation—Stopping the Days-per-Week Cut

We first turned our attention to making sure that class members for whom more than three days of care was essential could continue their four- or five-days-per-week schedule.

Procedural History and Claims. On August 18, 2009, we filed a complaint in federal district court for the Northern District of California on behalf of all Medi-Cal ADHC recipients whose benefits would be affected by the proposed cuts. We alleged two subclasses: a "limitation of benefits" subclass whose ADHC services would be reduced from four or five to three days per week, and a "termination of benefits" subclass whose services would be terminated because of the new, restrictive criteria. We alleged violations of the ADA and Section 504 of the Rehabilitation Act; procedural due process under the U.S. Constitution and the Medicaid Act; Medicaid's comparability requirement; and state law.

Upon learning that the cuts would take place during the week of September 7, 2009, and after discussion with defendants and the court, we moved for a preliminary injunction on August 26, 2009; a hearing was set for September 9, 2009. We faced an unusual and compelling set of legal and factual issues. First, ADHC is an "optional" Medi-Cal service that the state may opt to, but need not, offer as part of its Medicaid State Plan. Second, ADHC is a "bundled" Medi-Cal service, that is, it offers a number of Medi-Cal services within a single program. Individuals who attend ADHC are authorized for, and therefore entitled to, the nursing, medical, and personal care services and the therapies they receive through the program—regardless of where those services are provided. And, third, individuals are eligible for ADHC only if the multidisciplinary team determines, and the state certifies, that the individuals are at risk of hospitalization or institutionalization without ADHC services *on each day of attendance*. This risk is documented in individual plans of care.

Thus the motion alleged that reducing benefits to no more than three days per week violated the ADA and Section 504. We sought to enjoin the state from reducing, terminating, or modifying benefits unless alternate Medi-Cal services were provided, for example, through reasonable modifications such as an individualized exception process, which would prevent inappropriate institutionalization. We argued that, while the state could reduce ADHC without violating Medicaid requirements, it would have to continue to provide the underlying medical services and therapies to which the plaintiffs were entitled. As a practical matter, providing these services separately would cost the state significantly more than providing them in the bundled form at ADHC. Moreover, we argued that reducing ADHC services without ensuring uninterrupted continuation of replacement services, thereby creating a risk of unnecessary institutionalization, would violate the ADA and the U.S. Supreme Court's decision in *Olmstead v. L.C.*, 527 U.S. 581 (1999).

Although the state did not dispute that plaintiffs were entitled to replacement services, it rejected any obligation to ensure that such services were actually in place before reducing ADHC services. We also alleged violation of Medicaid due process requirements because of defendants' failure to give ADHC participants any individualized or timely notice of their right to a pretermination hearing. We did not at this point seek to stop implementation of the restrictive criteria because the time for the director's declaration appeared too remote for a claim to be ripe.

First Preliminary Injunction. The day after a two-and-one-half-hour hearing in a courtroom filled with ADHC providers

and participants from all over the Bay Area, Judge Saundra Brown Armstrong issued a sweeping ruling; she found that plaintiffs were likely to prevail on the ADA and Section 504 claims but did not rule on the due process claims. As for our argument that the continuing availability of five days of ADHC services per week was critical to plaintiffs' physical and mental health and their continuing ability to remain integrated in their community, the court unequivocally found that plaintiffs made a showing of discrimination under the ADA and Section 504. Judge Armstrong noted:

> Defendants concede that they bear the ultimate responsibility for ensuring compliance with federal disability laws. Nevertheless, they have taken an arguably cavalier approach to ensuring their continuing compliance with the ADA and Rehabilitation Act by placing full responsibility for identifying and securing alternative services to replace those eliminated by Assembly Bill ABX4 5 on the individual ADHC programs [(*Brantley*, 656 F. Supp. 2d at 1174)].

The court ruled that reduction or elimination of public medical benefits constituted irreparable harm to those likely to be affected and that defendants could not reduce the number of days available to plaintiffs and putative class members until they ensured the seamless provision of alternative services.

Litigation—Stopping the Restrictive Criteria

With the service cuts enjoined, we turned our attention to the proposed eligibility restrictions.

Procedural History and Claims. On December 18, 2009, we amended the complaint to add named plaintiffs Cota, Konrai, and Bell, as well as a claim under the "reasonable standards" requirements of the Medicaid Act, and filed a second motion for preliminary injunction. Brantley died in February 2010, and the case name was changed to *Cota v. Maxwell-Jolly*.

In the second motion, again arguing that complete termination of ADHC would place plaintiffs at risk of institutionalization, we relied on the court's findings in its ruling on our earlier motion. We also alleged that the state had employed ADA-prohibited administration methods, including failure to make reasonable modifications such as an individualized case-by-case exception process. We also argued that the new, restrictive eligibility criteria constituted illegal eligibility criteria under the ADA.

We raised two Medicaid claims—reasonable standards and comparability—and argued that the new eligibility restrictions violated the Medicaid Act by imposing criteria that illegally distinguish among similarly situated Medicaid recipients based on reasons other than individual need. Finally we argued that the state violated Medicaid and Constitutional due process requirements by failing to give adequate notice and opportunity for pretermination hearings, along with continuation of benefits pending hearing decision.

February 24, 2010, Injunction. The court's second injunction was even more comprehensive than the first; the court found that we had shown a likelihood of success on all of plaintiffs' legal claims.

ADA and Section 504 Claims. Noting that plaintiffs met the *Olmstead* test—treatment professionals determined that plaintiffs were capable of community placement, they preferred to remain in the community, and community placement could be reasonably accommodated—the court found it likely that plaintiffs would prevail on the "integration mandate" claims. The court found unpersuasive the state's blithe reliance on its budget crisis as grounds for its actions: "Largely ignoring *Olmstead*, and without citing any authority, Defendants argue that they have no obligation to maintain the same level of services as before, and are thus entitled to cut services at will to accommodate the State's budgetary constraints" (*Cota*, 2010 WL 693256, at 10).

Moreover, the court found that the disparate impact on certain groups of ADHC recipients occasioned by the eligibility criteria was sufficient to demonstrate a violation under the "methods of administration" claim. Noting that defendants had not addressed the "illegal-eligibility criteria" claim, the court found that in practice the criteria would discriminate and that plaintiffs were likely to prevail on this claim.

Medicaid Claims. We presented evidence from ADHC providers and experts that the new criteria would require termination of services to people who need the services as much as those who retain eligibility need them. The court found the new, restrictive eligibility requirements to be "seemingly arbitrary" and likely to violate the "reasonable standards" requirements (*id.* at 8).

Similarly, in ruling that plaintiffs had shown likelihood of success on their comparability claim, the court noted that defendants could not claim a right to limit eligibility criteria: "that principle has no application in a case, such as the present, where it has not been established that the eligibility criteria bear any reasonable relation to the particular needs of the individual" (*id.* at 9).

Due Process. The court found it likely that plaintiffs would succeed on their claims that defendants violated due process under the U.S. Constitution and Medicaid law by failing to give notice and information about hearing rights for individuals who, providers determined, would not meet the new restrictive criteria: "As the sole state agency administering Medi-Cal, Defendants are obligated to ensure compliance with federal law…. As such, Defendants cannot disclaim responsibility for compliance with federal law based on its decision to rely on private entities to administer ADHC services" (*id.* at 12). In a footnote, the court further noted: "Indeed, Defendants previously acknowledged in court that 'they bear the ultimate responsibility for ensuring compliance with federal disability laws'" (*id.* n.9).

Harm. Citing its earlier order in *Brantley*, the court ruled that "the reduction or elimination of public medical benefits is sufficient to establish irreparable harm to those likely to be affected by the program cuts" (*Brantley*, 656 F. Supp. 2d at 1176; *Cota*, 2010 WL 693256, at 13). Moreover, the court noted:

> Given the purpose of the new law, it is axiomatic that in order to have any significant impact on the State's budget, the curtailment of ADHC services arguably will be dramatic. As such, it is somewhat disingenu-

> ous for Defendants to downplay the impact of the proposed changes by suggesting that only "some" individuals will lose their ADHC services…. As this Court recognized previously, Plaintiffs need not wait until the harm is actually suffered before seeking injunctive relief [(*Cota*, 2010 WL 693256, at 14)].

Legal Implications

The rulings in both injunctions signal possible avenues for cases involving institutional alternatives such as ADHC. While the program itself is an optional Medicaid benefit, the recognition that the unbundled services available through Medicaid are entitlements, to which a state bears the burden of ensuring access, is an important advocacy tool, particularly as more and more programs face reductions in the current economic climate.

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