UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 00-10833-RWZ

HEALTH CARE FOR ALL, INC., *et al*.

v.

GOVERNOR MITT ROMNEY, *et al*.

MEMORANDUM OF DECISION AND ORDER

October 1, 2004

ZOBEL, D.J.

Plaintiff Health Care For All, Inc. ("HCFA") is a nonprofit, tax-exempt organization that represents the interests of Massachusetts residents who seek quality, affordable health care, including enrollees in the Massachusetts Medicaid program ("MassHealth"). Medicaid is a medical assistance program operated on a state-by-state basis pursuant to individual state plans and is funded cooperatively by the federal and state governments. A state Medicaid plan must comply with federal standards in order for the state to receive federal Medicaid funding. HCFA and several MassHealth enrollees filed a lawsuit alleging that MassHealth fails to meet federal requirements for the provision of adequate dental care. Defendants in this suit include Mitt Romney, Governor of Massachusetts, and other named state government officials who oversee the administration of MassHealth.

Each of the plaintiffs' seven causes of action in its Second Amended Complaint alleges deprivation of rights granted by the Medicaid provisions of the Social Security

Act and seeks relief under 42 U.S.C. § 1983. Section 1983 provides a general remedy for violations of rights secured by the United States Constitution or a federal statute, and the parties dispute whether the particular Medicaid provisions alleged in the seven counts constitute enforceable rights. The plaintiffs have voluntarily dismissed Counts I and IV. Counts II and III allege unsatisfactory provision of dental care by defendants for lack of "reasonable promptness" and comparatively inequitable "amount, duration, [and] scope" of care, in violation of 42 U.S.C. §§ 1396a(a)(8) and 1396a(a)(10)(B). Count V challenges the sufficiency of payments "to enlist enough providers" to ensure efficient, economic, high quality and geographically accessible care, in violation of 42 U.S.C.

§ 1396a(a)(30). Counts VI and VII concern the periodic provision of early and periodic screening, diagnostic and treatment ("EPSDT") services and the requirement to inform eligible individuals under the age of 21 of the availability of such services, in violation of 42 U.S.C. §§ 1396a(a)(43), 1396d(a)(4)(B) and 1396d(r).

The defendants now seek summary judgment on the five remaining counts and argue that the Medicaid statutes underlying plaintiffs' claims do not create enforceable rights. A federal statute confers an enforceable right if three factors are met: (1) Congress "intended that the provision in question benefit the plaintiff," (2) "the right assertedly protected by the statute is not so 'vague and amorphous' that its enforcement would strain judicial competence," and (3) the statute articulates the right "in mandatory, rather than precatory, terms." Blessing v. Freestone, 520 U.S. 329, 340-341 (1997). With respect to the first factor, only "an unambiguously conferred right"

constitutes sufficient Congressional intent "to support a cause of action brought under § 1983." Gonzaga Univ. v. Doe, 536 U.S. 273, 283 (2002). Such intent may be demonstrated through "individually focused terminology" as opposed to language with "an 'aggregate' focus." Gonzaga, 536 U.S. at 287-288. According to the defendants, none of the statutes cited by plaintiffs meet this standard. In response, the plaintiffs stand firmly behind Counts II, III, VI and VII, but they acknowledge precedent in the First Circuit that undermines the statutory basis for Count V.

The statute cited in Count II obligates the defendants to provide medical assistance with reasonable promptness "to all individuals," and thereby "on its face, does intend to benefit the plaintiffs." Bryson v. Shumway, 308 F.3d 79, 88 (1st Cir. 2002). As plaintiffs contend, the benefit conferred by the statute "is not vague or amorphous," and the statute "does unambiguously bind the states." Bryson, 308 F.3d at 89. Similarly, the statute cited in Count III contains "'rights creating' language" and "identifies a 'discrete class of beneficiaries'." Mendez v. Brown, 311 F. Supp. 2d 134, 140 (D. Mass. 2004). See also, Sabree v. Richman, 367 F.3d 180, 190 (3d Cir. 2004)(finding that the "'individual focus'" of the statutes cited in Counts II and III "is unmistakable"). While the defendants present cases that have identified rights created for subclasses of Medicaid beneficiaries, the defendants have not identified any affirmative authority for their proposition that rights created under the Medicaid statutes are enforceable only by discrete subclasses of beneficiaries. Defendants also disagree with the plaintiffs' characterizations of the rights created by the statutes underlying Counts II and III, but these arguments do not properly address whether rights have, in

fact, been created. Thus, summary judgment is denied as to Counts II and III.

With respect to Count V, in deciding whether Congress intended 42 U.S.C. § 1396a(a)(30) to benefit Medicaid providers, the First Circuit previously ruled that this statute displays no intent to benefit any single class of individuals, much less the class of providers. Specifically, the First Circuit found that the statute "has no 'rights creating language' and identifies no discrete class of beneficiaries." Long Term Care Pharmacy Alliance v. Ferguson, 362 F.3d 50, 57 (1st Cir. 2004). Additionally, the statute sets "criteria (avoiding overuse, efficiency, quality of care, geographic equality) [that] are highly general and potentially in tension." Long Term Care, 362 F.3d at 58. Summary judgment is therefore allowed as to Count V.[1]

Plaintiffs present Counts VI and VII together as claims for the subclass of plaintiffs who are under the age of 21. As plaintiffs note, the statute underlying Count VI applies to "all persons in the State who are under the age of 21" and uses individually focused terminology to identify a discrete class of beneficiaries. See, e.g., Kenny A. v. Perdue, 218 F.R.D. 277, 293-294 (N.D. Ga. 2003)(ruling that 42 U.S.C. § 1396a(a)(43) grants to foster children, as a subset persons under the age of 21, a right enforceable through a § 1983 claim). Defendants argue that Congress intended a broad programmatic focus for this statute as part of the state plan. However, the Social Security Act clarifies that a state plan may also create enforceable rights, and defendants offer no further persuasive reason why the statute underlying Count VI

[1]This Court is aware that courts in other circuits have found sufficient rights-creating language in 42 U.S.C. 1396a(a)(30) to support an enforceable right under § 1983 but is bound by the First Circuit's ruling in Long Term Care.

does not create an enforceable right. 42 U.S.C. § 1320a-2.

In Count VII, the plaintiffs rely upon a definition, not an obligation, as the basis for arguing that defendants must provide EPSDT services on a periodic basis. While the definition for "medical assistance" encompasses EPSDT services, and the definition of these services includes dental care to be provided at reasonable intervals and as medically necessary, these definitions do not articulate an obligation to be met by the defendants. 42 U.S.C. §§ 1396d(a)(4)(B) and 1396d(r). See, e.g., 31 Foster Children v. Bush, 329 F.3d 1255, 1271 (11th Cir. 2003)(finding that "because [certain statutes] are definitional in nature, they alone cannot and do not supply a basis for conferring rights enforceable under § 1983"). The obligation for the defendants to provide and meet the standards for delivery of EPSDT services as set forth in these definitions derives from 42 U.S.C. 1396a(a)(10)(A), which requires a state plan to "provide for making medical assistance available" and also identifies several specific classes of intended beneficiaries. Memisovski v. Maram, 2004 WL 1878332, *9 (N.D. Ill. 2004).

While defendants have not demonstrated entitlement to judgment as a matter of law as to either of Counts VI and VII, plaintiffs have failed to cite the essential statutes conferring the right that they seek to enforce in Count VII. Accordingly, defendants' Motion for Summary Judgment is allowed as to Count V and, unless plaintiffs file within five days of the issuance of this memorandum an amended Complaint that properly alleges all relevant statutory authority for Count VII, it is also allowed as to Count VII. Otherwise, the motion is denied.

_____ /s/ Rya W. Zobel

DATE RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE