

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

FILED
CEDAR RAPIDS HQTRS OFFICE
NORTHERN DISTRICT OF IOWA

SEP 26 1984

3:10 PM
WILLIAM J. KANAK - Clerk
By Mary A. Pusey DEPUTY

JEANNE MEYERS, By Her Next)
Friend, Helen Walden,)
)
Plaintiff,)
)
vs.)
)
MICHAEL V. REAGEN, et al.,)
)
Defendants.)

NO. 1C 83-3133

ORDER

This matter is before the court on plaintiff's pending motion for summary judgment, filed February 1, 1984.^{1/} Granted.

As noted in the court's order of July 18, 1984, at issue in this action is defendants' refusal to approve payment of medical assistance benefits^{2/} for an electronic speech device that is medically necessary for treatment of plaintiff's condition. Plaintiff contends that defendants' action is in violation of federal statutory and constitutional law. Defendants deny plaintiff's allegations contending that this decision is properly based on fiscal considerations governing administration of the Iowa medical assistance program as a whole.

1/

In its order of July 18, 1984, the court reserved ruling on this motion while requesting additional briefing by the parties. The matter became ready for decision on August 23, 1984 when defendants submitted their supplemental memorandum.

2/

The Iowa medical assistance plan is funded in part under Title XIX of the Social Security Act (Medicaid). 42 USC § 1396 et seq.

Plaintiff has claimed throughout this matter that defendants have failed to promulgate regulations which limit medical assistance coverage for the type of device she requests. The court rejected this contention in its order of July 18, 1984, finding that Iowa has tied the coverage for such devices under its medical assistance plan to the coverage provided for similar items under Medicare and the Medicare Carrier's Manual. Iowa Administrative Code § 770-79.1(2). Medicare Carrier's Manual §§ 2100.1, 2100.2, 2105 and 2130 delineate the Medicare requirements for coverage of prosthetic devices and durable medical equipment.^{3/} The Appendix to § 2105 of the Manual directs that coverage for "Communicators" and "Communic-Aids" should be denied on the ground that these devices are convenience items. Thus, it appears that no state plan coverage is provided by the Iowa Medicaid program for the type of device that plaintiff seeks.^{4/}

While plaintiff has challenged the exclusion of coverage for electronic speech devices on a number of different fronts, the court bases its decision on resolution of the following issue: "Do the federal Medicaid statutes and regulations require the State of Iowa to provide benefits for medically necessary services in an optional

3/

It appears from the exhibits before the court that when an item meets the definition of durable medical equipment and a prosthetic device, coverage is determined under the guidelines applicable to durable medical equipment. See Medicare Carrier's Manual § 2130(A) (reference to coverage for hemodialysis equipment and §§ 4105(1).

4/

Defendants state, however, that contrary to the Medicare Carrier's Manual provisions that require denial of coverage for electronic speech devices in all cases, defendants are prepared to pay for an electronic speech device under Medicaid which costs approximately 75% less than the device sought by plaintiff and is correspondingly less sophisticated.

category of Medicaid coverage." Based on the court's view of the law in this circuit, the conclusion is yes.

In the court's opinion, this decision is controlled by the Eighth Circuit's ruling in Pinneke v. Preisser, 623 F.2d 546 (8th Cir. 1980). In Pinneke, the Eighth Circuit stated that medical necessity is the standard for determining when a state must provide medical assistance coverage. Id. at 548 n.2 (citing Beal v. Doe, 432 U.S. 438, 444-45 and n.9 (1977)). While Pinneke applies this standard in the context of mandatory coverages under Medicaid, 42 USC § 1396a(13)(B), it appears to be equally applicable in the context of optional coverages. The court does not find defendants' efforts to distinguish this case persuasive.

The court previously determined that the record must be deemed to establish the medical necessity of an electronic speech device for adequate treatment of plaintiff's condition. Therefore, it follows that the Iowa state plan cannot absolutely exclude this form of treatment without violating the provisions of 42 CFR § 440.230(c) (1983). This regulation forbids the arbitrary denial of a service to an eligible recipient because of diagnosis, type of illness, or condition. While the language of the regulation now limits its application to the mandatory areas of coverage, other courts have found the section applicable to optional coverage areas. See e.g. White v. Beal, 555 F.2d 1146, 1150-51 (3rd Cir. 1977); Doe v. Busbee, 481 F.Supp. 46, 49-50 (N.D. Ga. 1979).

In the opinion of the court, this position is most compatible with the purpose of the federal legislation. 42 USC § 1396(2) provides that the purpose of Medicaid is to furnish medical assistance and rehabilitation and other services to help families or individuals

attain or retain capability for independence or self-care. The state plan must also "provide such safeguards as are necessary to assure that eligibility for care and services will be determined, and such care and services will be provided in a manner consistent with simplicity of administration and the best interests of the recipients." 42 USC § 1396a(a)(19).

These sections require that optional services be distributed "in a manner which bears a rational relationship to the underlying federal purpose of providing the service to those in greatest need of it." White v. Beal, supra at 1151. Here, plaintiff has proven a real need for the only medical service available to effectively help her attain capability for independence or self-care. Thus, the provisions of the state plan for furnishing durable medical equipment and prosthetic devices must be viewed as arbitrarily discriminating against those with speech handicaps on the basis of their diagnosis, type of illness, or condition. See Pinneke, 623 F.2d at 549.

It is the court's further opinion that the Iowa policy on electronic speech devices is in violation of 42 CFR § 440.230(b). This regulation is clearly applicable to both optional and required services and provides that "each service must be sufficient in amount, duration and scope to reasonably achieve its purpose." Since Iowa has elected to provide optional coverage for physical therapy and related services, 42 USC § 1396d(a)(11); and other diagnostic, screening, preventive, and rehabilitative services, 42 USC § 1396d(a)(13); its coverage must include "diagnostic, screening, preventive, or corrective services provided by or under the direction of a speech

pathologist . . . and any necessary supplies and equipment." 42 CFR § 440.110(c)(1). The purpose of such services can only be to improve the communication abilities of eligible patients who suffer from speech handicaps. A policy which presumptively denies the only available speech pathology service for effective treatment of plaintiff's speech handicap cannot be sufficient in amount, duration or scope to reasonably achieve this purpose.

Finally, it is clear that the Iowa Department of Social Services has, without formal rulemaking proceedings or hearings, established an irrebuttable presumption that "Communic-Aids" or "Communicators" can never be medically necessary.^{5/} As noted by the Eighth Circuit, "This approach reflects inadequate solicitude for the applicant's diagnosed condition, the treatment prescribed by the applicant's physicians, and the accumulated knowledge of the medical community." Pinneke, supra at 549. The determination of medical necessity must rest with the individual recipient's physician and not with clerical personnel or government officials. *Id.* at 550.

Having determined that the state policy of denying Medicaid benefits for medically necessary electronic speech devices is contrary to the provisions of Title XIX of the Social Security Act and accompanying regulations, it follows that this policy is in violation of the supremacy clause of the United States Constitution. *Id.* at 547.


5/

While defendants contend a less expensive device could be covered, it is clear that the provisions of the state plan do not provide this. 42 CFR § 440.230(a) states "The plan must specify the amount, duration and scope of each service that it provides for - (1) The categorically needy."

It is therefore

ORDERED

1. The provisions of the Medicare Carrier's Manual, Appendix to § 2105, which direct the denial of coverage for "Communic-Aids" and "Communicators" are void as applied in the context of medical assistance benefits under the Iowa Medicaid program;
2. Defendants are permanently enjoined from the administration and enforcement of the Iowa Medicaid program in a manner which presumptively denies benefits for medically necessary electronic speech devices which are furnished for treatment of speech handicaps.
3. Defendants shall pay medical assistance benefits for a Handi Vois 110 as specified in plaintiff's Request for Prior Authorization; and
4. Plaintiff is entitled to her costs hereinafter herein.
September 26, 1984.


Edward J. McManus, Chief Judge
UNITED STATES DISTRICT COURT

United States District Court

FOR THE

NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

JEANNE MEYERS, By Her Next Friend,
Helen Walden,

Plaintiff

CIVIL ACTION
DOCKET NO.

LC 83-3133

vs.
MICHAEL V. REAGEN, et al.,

JUDGMENT

Defendants'.

This action came on for ~~trial~~ ^{decision} (hearing) before the court, United States District Judge (Magistrate)

*Edward J. McManus

presiding. The issues having been duly ~~tried~~ ^{decided} (heard)

and a decision having been duly rendered, it is ordered and adjudged.....

1. The provisions of the Medicare Carrier's Manual, Appendix to § 2105, which direct the denial of coverage for "Communic-Aids" and "Communicators" are void as applied in the context of medical assistance benefits under the Iowa Medicaid program;
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FILED
CEDAR RAPIDS HDQTRS OFFICE
NORTHERN DISTRICT OF IOWA

SEP 27 1984

11:50 AM

WILLIAM J. KANAK-Clerk

By: Mary P. Bessick
DEPUTY

proved as to Form:

Edward J. McManus
and ~~Jr. McManus~~, Chief Judge
Dated at: Cedar Rapids, Iowa

Date: September 27, 1984

Charles L. Scott
Chief Deputy Clerk of the Court

United States District Court

FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

JEANNE MEYERS, By Her Next Friend,
Helen Walden,
Plaintiff

vs.
MICHAEL V. REAGEN, et al.,

Defendants'.

CIVIL ACTION
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NORTHERN DISTRICT OF IOWA

SEP 27 1984

11:50 AM

WILLIAM J. KANAK - Clerk

By: Mary P. Bassett
DEPUTY

Proved as to Form:

Edward J. McManus
Edward J. McManus, Chief Judge

Dated at: Cedar Rapids, Iowa

Date: September 27, 1984

Cheryl A. Scott
Chief Deputy Clerk of the Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

JUL 18 1984

WILLIAM J. KANAK - Clerk
By: *[Signature]* DEPUTY

JEANNE MEYERS, By her)
Next Friend, Helen Walden,)
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Plaintiff,)
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vs.)
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MICHAEL V. REAGEN, et al.,)
)
Defendants.)

NO. C 83-3133

ORDER

This matter is before the court on plaintiff's resisted motion for summary judgment, filed February 1, 1984, and defendants' resisted motion to dismiss, filed March 19, 1984. Ordered in accordance herewith.

In this action, plaintiff Jeanne Meyers seeks declaratory and injunctive relief alleging that defendants' refusal to authorize payment of medical assistance benefits for an artificial speech device is in violation of federal law and based on policies which violate her civil rights. Defendants are state officials who are in charge of administering the State's medical assistance program funded under Title XIX of the Social Security Act. 42 U.S.C. § 1396 et seq. Jurisdiction is alleged on the basis of 28 U.S.C. §§ 1331, 1343(3) and 1343(4).

A review of the present record establishes that plaintiff is a thirty-two year old person who is severely handicapped. As a result of encephalopathy due to post-natal injury, spastic quadriplegia and hearing loss, plaintiff's speech is not a

functional means of communication and she is severely restricted in her ability to communicate through signs or writing. Plaintiff is also mentally retarded but the degree of her mental ability is difficult to ascertain in light of her other handicaps.

On January 6, 1983, plaintiff's attending physician prescribed the use of an artificial speech device known as the Handi Voice 110 to assist plaintiff in her efforts to communicate. In his prescription, the physician indicated that use of this device is necessary to achieve plaintiff's optimum function and to replace organic loss of function due to her cerebral palsy and hearing loss. On February 16, 1983, a request for prior authorization to pay for this device was made to the Iowa Department of Human Services. This request was denied initially and after hearing on August 2, 1983, when defendant Reagen affirmed the proposed decision of the Department's hearing officer. Plaintiff did not appeal this decision to Iowa State District Court as permitted by Iowa Code § 17A.19.

Plaintiff now attacks the action of defendants alleging that their refusal to approve payment of medical assistance benefits for this device is in violation of federal law and improperly based upon an irrebuttable presumption that such devices are not medically necessary. In five alternative counts, plaintiff characterizes this conduct as violative of her civil rights to substantive due process and equal protection of the laws under the Fourteenth Amendment and actionable both directly and through 42 U.S.C. § 1983. Plaintiff further alleges that the defendant's

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failure to adopt a state plan in conformity with federal law violates the Supremacy Clause in Article VI of the Constitution and is in breach of defendants' statutory duties under Iowa Code § 249A.4.

Defendants deny these allegations and have now moved to dismiss plaintiff's action pursuant to FRCP 12(b)(1) and 12(h)(3). Because of its potential effect on the outcome of this action, defendants' motion is addressed first.

Motion to Dismiss

In this motion, defendants contend that the court should dismiss plaintiff's state law claim on the ground that the court is barred by the Eleventh Amendment from taking jurisdiction. Defendants then go on to argue that the court should abstain from taking jurisdiction of plaintiff's federal claims for the reasons discussed in Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941) and Burford v. Sun Oil Co., 319 U.S. 315 (1943).

As concerns plaintiff's claim based on defendant's alleged violation of their statutory duties under Iowa Code § 249A.4, the parties are in agreement that the recent Supreme court decision in Pennhurst State School and Hospital v. Halderman, _____ U.S. _____, 52 U.S.L.W. 4155 (1984) is dispositive. This case holds that federal courts are powerless under the Eleventh Amendment to order state officials to conform their conduct to state law, even where the state law claim is brought to the court under pendent jurisdiction. Accordingly, plaintiff's "Fifth Cause of Action", properly denominated as a count under FRCP 8(e)(2), shall be dismissed.

With respect to plaintiff's federal claims, however, the court is not persuaded that this is an appropriate case for either Pullman or Burford abstention. In George v. Parratt, 602 F.2d 818 (8th Cir. 1979), the Eighth circuit listed five factors to be considered in deciding whether to apply the Pullman abstention doctrine. One of those factors is whether there are available state remedies by which the instant plaintiff can obtain a determination of her claim, *id.* at 820-821. In the present case, it appears no such remedy is available since plaintiff's right to review of the Department's decision has been extinguished by Iowa Code § 17A.19. Salsbury Laboratories v. Iowa Dep't. of Environmental Quality, 276 N.W.2d 830, 835 (Iowa 1979). Further, it appears that Pullman abstention is applicable primarily in those cases where a state statute is challenged as unconstitutional but the statute is unclear and can be given a saving construction by state court. See e.g., Moe v. Brookings County, South Dakota, 659 F.2d 880, 883 (8th Cir. 1981). Here, there is no direct challenge to the constitutionality of a state statute. More specifically at issue is the State's compliance with federal law and whether it requires coverage for the type of equipment involved.

Nor does the court believe that Burford abstention is appropriate in this case. As pointed out by plaintiff, Burford is a narrower ground for abstention than Pullman and is ordinarily invoked only in those cases where the issues involve a vital state interest that has been addressed by the state with a complex regulatory scheme or system of review. Moe v. Brookings

County, South Dakota, supra at 833. This case does not present such a system. The existence of a statutory right to appeal defendants' decision to Iowa State District Court is not a sufficient ground to invoke the abstention doctrine. See e.g. Alabama Public Service Commission v. Southern R. Co., 341 U.S. 341, 361 (1951) (cited in Moe v. Brookings County, South Dakota, supra). Therefore, the remaining portions of defendants' motion shall be denied.

Motion for Summary Judgment

Plaintiff has moved for summary judgment pursuant to FRCP 56 alleging that on the record now before the court, there are no genuine issues of material fact and that she is entitled to judgment as matter of law.

The governing standard for such a motion is well known. Summary judgment should not be granted unless the pleadings, depositions, answers to interrogatories, and admissions show that there is no genuine issue as to any material fact. FRCP 56(c); Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 467 (1962). FRCP 56(c) goes on to provide that the moving party must be entitled to judgment as a matter of law. Since summary judgment is an extreme remedy, it should not be entered unless the moving party has established its right to judgment with such clarity as to leave no room for controversy and unless the other party may not prevail under any discernable circumstance. E.E.O.C. v. Liberty Loan Corp., 584 F.2d 853, 857 (8th Cir.

1978).

In the present case, plaintiff's willingness to agree to the facts as presented by defendants in resistance to this motion indicates that the matter should be submissible on an agreed statement of facts. Defendants contend, however, that there are material facts in dispute. Specifically, defendants contend that plaintiff's physical handicaps are less severe and restrictive than would appear and that therefore, there are many more options in communication aids which would meet her needs and are less sophisticated and expensive. Defendant has not, however, supported this contention with any credible evidence to rebut plaintiff's expert showing and it is the court's opinion that the record must be deemed to establish that the device is medically necessary for plaintiff's condition. This is particularly true in light of the Eighth Circuit's standard for evaluating the evidence on this issue. See Pinnecke v. Preisser, 623 F.2d 546, 549-550 n.3 (8th Cir. 198).

The court is not satisfied, however, that the present record is sufficiently clear to permit judgment to be entered for plaintiff as a matter of law. Contrary to plaintiff's assertions, it appears the Iowa Department of Human Services has promulgated a regulation which ties medical assistance coverage for prosthetic devices and durable medical equipment to the coverage provided for these items by Medicare, Iowa Administrative Code § 770-79.1(2), and it was upon this basis that plaintiff's claim was denied. The parties have not, however, addressed the validity of this regulation or whether the State's discretion to restrict medical assistance coverage based

on medical necessity or utilization control procedures , 42
C.F.R. § 440.230, may be permissably exercised in this fashion.
Thus, the court's ruling on the motion will be reserved.

It is therefore

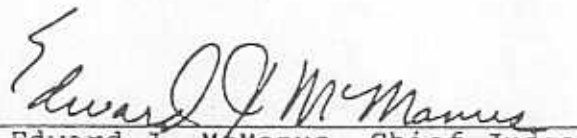
ORDERED

1. Motion to dismiss Count 5 of plaintiff's complaint
granted, the remainder denied.

2. Ruling on motion for summary judgment reserved.

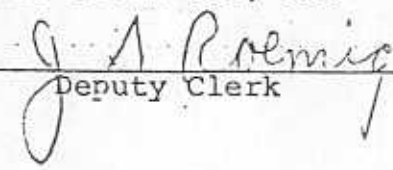
Plaintiff shall file an additional brief on the issues outlined
in this order by not later than August 7, 1984. Defendants'
resistance, if any, shall be made within the time specified by
Local Rule 2.2.6 at which time the matter will be considered
ready for decision.

July 18, 1984.


Edward J. McManus, Chief Judge
UNITED STATES DISTRICT COURT

Copies sent by certified mail on July 18, 1984 to:

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Deputy Clerk