

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

DANIELLE BROWN, a child, by)
her next friend, Rebecca Brown,)
individually, JOHN GEISEN, and)
the ALABAMA DISABILITIES)
ADVOCACY PROJECT,)
on behalf of all)
others similarly situated,)

Plaintiffs,)

**FIRST
AMENDED
COMPLAINT**

Case No. 98-M-663-N

vs.)

GOVERNOR FOB JAMES, JR., and)
GWENDOLYN H. WILLIAMS,)
COMMISSIONER OF THE)
ALABAMA MEDICAID AGENCY)

Defendants.)

PRELIMINARY STATEMENT

1. This is a civil action brought to enforce the Plaintiffs' rights under the Social Security Act, the Americans with Disabilities Act, and the Rehabilitation Act of 1973. Plaintiffs, disabled persons without the ability to meaningfully communicate with others, seek declarative and injunctive relief to require the Defendants to provide funding for augmentative and alternative communication devices (AAC) as mandated by law. AAC devices are analogous to hearing aids.

Just as hearing aids enable those with hearing disabilities to hear, AAC devices enable those with speech disabilities to, in effect, speak.

JURISDICTION

2. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 to address causes of action arising under 42 U.S.C. § 1396, et. seq., 42 U.S.C. § 1983, 42 U.S.C. § 12103, et. seq., and 29 U.S.C. § 794, et. seq. This Court also has jurisdiction pursuant to 28 U.S.C. § 1343 to address the causes of action under 42 U.S.C. § 12103, et. seq., and 29 U.S.C. § 794, et. seq.

3. Plaintiffs' request for declaratory and injunctive relief is authorized by 28 U.S.C. §§ 2201 and 2202.

PARTIES

4. Danielle Brown, age six, is a resident of Jefferson County, Alabama. She is eligible for and has received services through the Alabama Medicaid Agency. She sues by her mother and next friend, Rebecca Brown.

5. John Geisen is a forty-five year old male. He is eligible for and has received services through the Alabama Medicaid Agency.

6. The Alabama Disabilities Advocacy Project (ADAP) is a statewide protection and advocacy system (P&A) created for the purpose of pursuing legal, administrative, and other appropriate remedies to insure the protection of, and the advocacy for, individuals with disabilities. ADAP was established pursuant to the Developmental Disabilities Assistance and Bill of Rights Act of 1975. It maintains authority and funding pursuant to 42 U.S.C. § 6042 et. seq. Among other things, it is authorized to pursue claims in court in its own name to ensure the protection of the rights of people with developmental disabilities. 42 U.S.C. § 6042(2)(A)(i).

7. Defendant Fob James, Jr., is the Governor of the State of Alabama. He heads the Office of the Governor, the "single state agency" for operation of the Medicaid program in Alabama. He is sued in his official capacity.

8. Defendant Gwendolyn H. Williams is the Commissioner of the Alabama Medicaid Agency. She is responsible for administering the Medicaid program in Alabama and for ensuring that the program operates in accordance with federal law. Defendant Williams is sued in her official capacity.

CLASS ALLEGATIONS

9. Pursuant to Federal Rule of Civil Procedure 23, Plaintiffs Danielle Brown and John Geisen bring this suit on their own behalf and on behalf of the class of all Alabama Medicaid recipients with severe expressive communication impairments who need, or may in the future need, AAC devices. Because of the Alabama Medicaid Agency's failure to provide funding for AAC devices in accordance with federal law, the members of the class are being, and will in the future be, denied benefits to which they are entitled. The prerequisites of Rule 23(a) and Rule 23(b)(2) are satisfied.

10. Danielle also sues on behalf of herself and all Medicaid recipients under the age of 21 with severe expressive communication impairments who need, or may in the future need, AAC devices. Medicaid recipients who are under 21 have rights to services under the Early and Periodic Screening, Diagnostic and Treatment Services (EPSDT) provisions of the Medicaid Act that adults do not have. Because of Alabama Medicaid's failure to provide funding for AAC devices in accordance with federal law, the members of the class are being, and will in the future be, denied benefits to which they are entitled. The prerequisites of Rule 23(a) and Rule 23(b)(2) are satisfied.

11. ADAP sues on its own behalf and on behalf of all individuals in Alabama with developmental disabilities who need, or may in the future may need, AAC devices.

FACTUAL ALLEGATIONS

12. Plaintiff Danielle Brown suffers from a severe motor speech disorder. This disorder prevents her from articulating sounds that form words. Danielle also suffers from developmental delay and fine motor delay. These impairments prevent her from developing the ability to communicate meaningfully through sign language. As a result of these disorders, Danielle is unable to effectively communicate with others. Danielle's disability is probably permanent.

13. Recognizing that speech language therapy is medically necessary for Danielle, the Alabama Medicaid Agency currently funds Danielle's speech therapy services. Unfortunately, Danielle's progress has been extremely slow and limited.

14. On September 23, 1997, certified speech pathologists evaluated Danielle to determine whether an AAC device would be appropriate for her. AAC devices enable persons with speech and language impairments to communicate. Such a device provides the same functional benefits as a hearing aid. Just as a hearing aid allows a person with a hearing disorder to hear, an AAC device allows a person with a speech disorder to, in effect, speak. With the device, Danielle will be able to communicate with others. The device will also increase her ability to be independent and self-sufficient.

15. AAC devices, like hearing aids, do not cure the condition causing the functional limitations. Rather, they ameliorate the condition by reducing its adverse functional effects.

16. Danielle's speech pathologists have concluded that an AAC device is medically necessary for Danielle. After considering the different types of AAC devices available, the speech pathologists determined that the most appropriate and least costly AAC device for Danielle is the Words+ Personal Communication Device.

17. Danielle's physician has prescribed an AAC device for Danielle as medically necessary.

18. Danielle's occupational therapist also determined that an AAC device is necessary for Danielle.

19. These health care providers agree that the AAC device offers the only form of treatment that will effectively treat Danielle's communication disability.

20. Danielle's mother, Rebecca Brown, has pursued funding for an AAC device through potential sources other than Alabama Medicaid. Her private insurance company has refused to provide funding. Danielle's school offered to provide to Danielle a basic communication device called the Superhawk. According to Danielle's speech pathologists, this device is clearly inappropriate and inadequate to treat Danielle's disability. The school has refused to provide Danielle with an appropriate device.

21. On or about December 22, 1997, Danielle requested prior approval from the Alabama Medicaid Agency for funding for the AAC device that had been prescribed for her by her physician, speech pathologists, and occupational therapist. A letter following up on the request was sent to Defendant Williams on January 14, 1998.

22. Nearly six months later, at the time this lawsuit was filed on June 11, 1998, the Alabama Medicaid Agency had not provided Danielle with a decision on her request for prior approval. They had not contacted the health

professionals that prescribed the device for Danielle nor the vendor who had submitted the request for prior authorization. This failure to respond constituted a denial of her request and reflected the Alabama Medicaid Agency's across-the-board policy and practice of refusing to fund AAC devices.

23. On June 26, 1998, Defendants provided the Plaintiffs with a draft plan ("Medicaid I") for funding AAC devices. Danielle refused to comply with the requirements in the draft plan, asserting that they violated federal law. Although Danielle refused to comply with the requirements of Medicaid I, Danielle's request for funding was approved on July 29, 1998. Medicaid I was never adopted by the Defendants.

24. In September, 1998, Defendants provided the Plaintiffs with another draft plan ("Medicaid II") for funding AAC devices. This draft plan requires, among other things, that a Medicaid recipient seeking funding for an AAC device be evaluated by a "Medicaid Approved AAC Evaluation Team." The draft plan has not been adopted by the Defendants. If Medicaid II had been in place when Danielle applied for funding for an AAC device, Danielle would not have received a device because she failed to comply with the requirements of Medicaid II.

25. Under Medicaid II, there are no procedures in place to become a "Medicaid Approved AAC Evaluation Team." The requirements for the composition and qualifications of the Team are designed to funnel AAC evaluations to Children's Rehabilitation Services (CRS), an arm of a state agency that has agreed to provide Alabama Medicaid's share of the funding for AAC devices for children and for individuals covered by the Home & Community Based Services for the Homebound (SAIL) Waiver. The requirements for the composition and qualifications of the Team are arbitrary and unnecessarily

burdensome. They impair Medicaid recipients from receiving medical assistance from qualified health care providers of their choice.

26. Medicaid II's definition of "medical necessity" is unduly narrow and restrictive and conflicts with federal law.

27. The Defendants do not have a policy or practice of funding AAC devices that accords with federal law. To date, devices have been provided only as an attempt to purposely moot Plaintiffs' lawsuit.

28. Danielle requires ongoing treatment for her disability. Because the useful life of an AAC device is approximately five years, Danielle will likely require another device before she is a teenager and is likely to need funding for necessary repairs to her AAC device in the interim. Because the Alabama Medicaid Agency does not have a policy or practice of funding AAC devices, it is likely Danielle will be unable to receive a new device or to secure needed repairs in the future.

29. Despite the Defendants' refusal to provide funding for AAC devices to Medicaid beneficiaries in compliance with federal law, the Defendants routinely provide speech pathology services to persons with less severe speech impairments. The Agency also routinely provides funding for speech language therapy, durable medical equipment, prosthetic devices, and rehabilitative services for people with other types of disabilities. Funding for such services and devices is provided without the onerous requirements of Medicaid II.

30. Plaintiff John Geisen is functionally nonspeaking as a result of severe cerebral palsy. Although Mr. Geisen attempts speech, he is usually unintelligible even to persons who know him.

31. Mr. Geisen has been evaluated for an AAC device by a certified speech pathologist, Pam Elder. Ms. Elder has worked with AAC devices for

approximately 23 years and is considered to be a leading expert in the field. She has published several articles and books in the field of augmentative/alternative communication and conducted numerous AAC seminars for speech-language pathologists and educators both nationally and abroad.

32. Ms. Elder determined that an AAC device is medically necessary for Mr. Geisen.

33. Despite her credentials, Ms. Elder is not eligible under the terms of Medicaid II to evaluate Mr. Geisen for the purpose of Medicaid funding for an AAC device.

34. Because the Alabama Medicaid Agency does not have an actual policy or practice of funding AAC devices and because only a person evaluated by a "Medicaid Approved AAC Evaluation Team" would be eligible to receive funding for an AAC device under the terms of Medicaid II, Mr. Geisen will be unable to qualify for funding for an AAC device. It would be futile for him to file a request for funding for an AAC device even if Medicaid II were in force.

35. ADAP represents the interests of all Medicaid eligible Alabamians with developmental disabilities who need, or may in the future need, AAC devices. Because the Alabama Medicaid Agency does not have a policy or practice of funding AAC devices in accordance with federal law, ADAP, and such individuals with developmental disabilities, have been and will continue to be harmed.

CLAIMS FOR RELIEF

I. Violations of the Federal Medicaid Act

A. Overview of the Medicaid Act Requirements

36. Title XIX of the Social Security Act created "Medicaid," a cooperative federal-state program designed to provide necessary medical services to low-

income, disabled persons. Although a state's participation in the Medicaid program is voluntary, states that choose to participate in the program must comply with the Medicaid Act and its regulations. Alabama has chosen to participate in the Medicaid program.

37. Under the Medicaid Act, the Alabama Medicaid Agency is required to: (1) furnish Medicaid services to eligible persons with reasonable promptness, 42 U.S.C. § 1396a(a)(8); (2) provide the same amount, duration and scope of services to all persons who are categorically eligible, 42 U.S.C. § 1396a(a)(10)(B); and (3) apply uniform standards to govern the extent of benefits and services provided, 42 U.S.C. §§ 1396a(a)(17), 1396a(a)(30)(A).

38. The standards the Alabama Medicaid Agency adopts for determining the extent of medical assistance provided must be reasonable and consistent with the objectives of the Medicaid Act. 42 U.S.C. § 1396a(a)(17). The Alabama Medicaid Agency is required to provide covered services in an amount, duration, and scope sufficient to reasonably achieve its purpose. 42 C.F.R. § 440.230(b). Further, the Alabama Medicaid Agency is prohibited from arbitrarily denying or reducing the amount, duration, or scope of a required service solely because of the diagnosis, type of illness, or condition. 42 C.F.R. § 440.230(c).

39. The Alabama Medicaid Agency is required to allow Medicaid beneficiaries to obtain medical assistance from any institution, agency, or person qualified to perform the services required. 42 U.S.C. § 1396a(23).

40. The Alabama Medicaid Agency is also required to provide Medicaid applicants with written notice of: (1) any action affecting his or her claim; (2) the reasons for the action; and (3) an applicant's right to a fair hearing to contest the denial of services. 42 U.S.C. § 1396a(a)(3); 42 C.F.R. §§ 431.206, 431.210.

41. All Medicaid beneficiaries under the age of 21 are entitled to Early and Periodic Screening, Diagnostic and Treatment Services (EPSDT). 42 U.S.C. § 1396d(a)(4)(B). Under EPSDT, eligible children must receive all services listed in 42 U.S.C. § 1396d(a) -- including services that are not mandatory for adults -- that are necessary to diagnose, treat, correct or ameliorate defects and physical illnesses. 42 U.S.C. § 1396d(r)(5). These services include: speech language therapy, 42 U.S.C. § 1396d(a)(11) & 42 C.F.R. § 440.110(c); durable medical equipment, 42 U.S.C. § 1396d(a)(7) & 42 C.F.R. § 440.70; prosthetic devices, 42 U.S.C. § 1396(a)(12); and rehabilitative services, 42 U.S.C. § 1396d(a)(13).

42. Alabama Medicaid recipients -- those under as well as those who are 21 years of age and older -- are entitled to durable medical equipment and prosthetic devices, because the State has chosen to provide these benefits under its State plan. See Ala. Medicaid Agency Admin. Code, 560-X-1-.01(1)(g), (2)(g).

43. AAC devices fall within each of these categories of covered Medicaid benefits: (1) durable medical equipment; (2) prosthetic devices; (3) equipment necessary for speech language therapy; and (4) rehabilitative services. 42 U.S.C. §§ 1396d(a) (7), (11), (12), (13).

B. Defendants' Violations of the Medicaid Act

44. The Defendants' failure to provide AAC devices in accordance with federal law has violated and will continue to violate Plaintiffs' rights to: (1) durable medical equipment, (2) prosthetic devices, (3) physical therapy and other related services which includes speech-language pathology, and (4) rehabilitative services. 42 U.S.C. §§ 1396d(a) (7), (11), (12), (13); 42 U.S.C. § 1396d(r)(5).

45. The Defendants' failure to provide Plaintiffs with AAC devices in accordance with federal law has violated and will continue to violate Plaintiffs' rights under provisions of the Medicaid Act that require Defendants to furnish

Medicaid services to eligible persons with reasonable promptness. 42 U.S.C. § 1396a(a)(8).

46. The Defendants' refusal to provide Plaintiffs with AAC devices in accordance with federal law, while providing services to persons with less severe and other disabilities, has violated and will continue to violate provisions of the Medicaid Act that require Defendants to furnish the same amount, duration and scope of services to all persons who are categorically eligible, 42 U.S.C. § 1396a(a)(10)(B).

47. The Defendants' failure to provide AAC devices in accordance with federal law has violated and will continue to violate provisions of the Medicaid Act that require Defendants to furnish medical assistance reasonably and consistently with the objectives of the Medicaid Act and in an amount, duration, and scope sufficient to reasonably achieve its purpose. 42 U.S.C. § 1396a(a)(17); 42 C.F.R. § 440.230(b).

48. The Defendants' failure to provide AAC devices in accordance with federal law has violated and will continue to violate provisions of the Medicaid Act that prohibit Alabama Medicaid from arbitrarily denying or reducing the amount, duration, or scope of a required service solely because of the diagnosis, type of illness, or condition. 42 U.S.C. §§ 1396a(a)(17), 1396a(a)(30)(A); 42 C.F.R. § 440.230(c).

49. The Defendants' failure to provide AAC devices in accordance with federal law has violated and will continue to violate provisions of the Medicaid Act that allow Medicaid beneficiaries to obtain medical assistance from any institution, agency, or person qualified to perform the services required. 42 U.S.C. § 1396a(23).

50. The Defendants' failure to provide Plaintiffs with written notice of their denial of the Plaintiffs' claims and with notice of their right to a fair hearing to contest the denial of services has violated and continues to violate provisions of the Medicaid Act that require such notices to be provided. 42 U.S.C. § 1396a(a)(3), 42 C.F.R. §§ 431.206, 431.210.

51. Defendants have acted and continued to act under color of state law.

52. Plaintiffs do not have an adequate remedy at law.

53. The violations of Plaintiffs' rights specified above may be remedied pursuant to 42 U.S.C. § 1983.

II. The Rehabilitation Act of 1973

54. The Rehabilitation Act of 1973 protects otherwise qualified persons with a disability from discrimination on the basis of their disability. 29 U.S.C. § 794(a). The Act applies to all programs and activities receiving federal financial assistance as defined by the Act. 29 U.S.C. § 794(b).

55. Plaintiffs are "otherwise qualified individual[s] with a disability" as defined by the Rehabilitation Act of 1973. 29 U.S.C. § 794(a), 29 U.S.C. § 706(8).

56. The Alabama Medicaid Agency is a program or activity receiving federal financial assistance as defined by the Rehabilitation Act, 29 U.S.C. § 794(b).

57. The Defendants' provision of durable medical equipment, prosthetic devices, and rehabilitative services to persons with some types of disabilities, while depriving these services to persons like Plaintiffs who have severe speech disorders, or providing these services with onerous limitations unique to the disabilities from which Plaintiffs suffer, violates the Rehabilitation Act's prohibition against non-discriminatory treatment. 29 U.S.C. § 794(a).

58. The Defendants' provision of speech language pathology services to beneficiaries who are capable of benefiting from articulation therapy, while refusing to provide speech-language services to Plaintiffs who have more severe disorders that can only be treated with an AAC device, or providing these services with onerous limitations unique to the severe disabilities from which Plaintiffs suffer, violates the Rehabilitation Act's prohibition against discrimination on the basis of severity of disability. 29 U.S.C. § 794(a).

III. The Americans with Disabilities Act

59. The Americans with Disabilities Act protects qualified individuals with a disability from discrimination on the basis of that disability by public entities. 42 U.S.C. §§ 12131, 12132.

60. Plaintiffs are "qualified individual[s] with a disability" as defined by the Americans with Disabilities Act. 42 U.S.C. § 12131(2).

61. The Alabama Medicaid Agency is a "public entity" as defined by the Americans with Disabilities Act. 42 U.S.C. § 12131(1).

62. The Defendants' provision of durable medical equipment, prosthetic devices, and rehabilitative services to persons with some types of disabilities, while depriving these services to persons who have severe speech disorders, or providing these services with onerous limitations unique to the disabilities from which Plaintiffs suffer, violates the Americans with Disabilities Act's prohibition against non-discriminatory treatment. 42 U.S.C. § 12132.

63. The Defendants' provision of speech language pathology services to beneficiaries who are capable of benefiting from articulation therapy, while refusing to provide speech-language services to Plaintiffs who have more severe disorders that can only be treated with an AAC device, or providing these services with onerous limitations unique to the severe disabilities from which

Plaintiffs suffer, violates the Americans with Disabilities Act's prohibition against discrimination on the basis of severity of disability. 42 U.S.C. § 12132.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that this Honorable Court grant the following relief:

1. Certify the Plaintiff class in this action;
2. Declare that the Defendants' policy and practice of refusing to provide funding for AAC devices in accordance with federal law violates the Medicaid Act;
3. Declare that the policies which operate to prohibit named Plaintiff Geisen from obtaining funding for an AAC device from the Defendants violates the Medicaid Act, the Americans with Disabilities Act, and the Rehabilitation Act;
4. Declare that the Defendants' failure to provide the class with funding for an AAC device with reasonable promptness and without delay violates the Medicaid Act;
5. Declare that the Defendants' failure to notify Danielle of their denial of her request for prior approval of funding for the AAC device recommended for her violates the Medicaid Act;
6. Declare that by providing covered services to some recipients but denying such services to other recipients on the basis of their disabilities, or providing these services with onerous limitations unique to the disabilities from which Plaintiffs suffer, the Defendants' actions violate the Rehabilitation Act and the Americans with Disabilities Act;

7. Order the Defendants to implement policies and procedures to provide funding for AAC devices that operate in accordance with the Medicaid Act, the Rehabilitation Act, and the Americans with Disabilities Act;

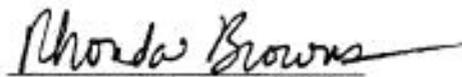
8. Order the Defendants to provide Plaintiff Geisen and others similarly situated with funding for AAC devices in a manner that complies with the Medicaid Act, the Rehabilitation Act, and the Americans with Disabilities Act, and to provide funding to them with reasonable promptness and without delay;

9. Order the Defendants to promptly notify Plaintiffs of any denial of their requests for prior approval and of their right to hearings to contest such denials;

10. Award Plaintiffs reasonable costs and attorneys' fees; and

11. Grant Plaintiffs such other relief as the Court deems necessary and just.

Respectfully submitted,



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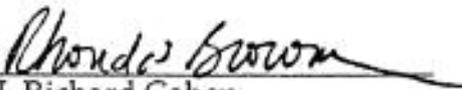
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Certificate of Service

I certify that on this the 25th day of September, 1998, a copy of the foregoing was served upon the following by United States Mail, first class delivery, postage pre-paid:

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