

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

HARRY DAVIS; RITA-MARIE GEARY;)
PATTY POOLE; and ROBERTA)
WALLACH, on behalf of themselves)
and all others similarly situated,)

Plaintiffs)

v.)

NIRAV SHAH, in his capacity as)
Commissioner of the New York)
State Department of Health,)

Defendant)

**AGREED UPON PROPOSED
ORDER FOR DECLARATORY
AND PERMANENT INJUNCTIVE
RELIEF**

12-CV-6134-CJS-MWP

WHEREAS on December 13, 2012, the Plaintiffs filed an Amended Class Action
Complaint (Dkt #34);

WHEREAS on January 7, 2013, the Court certified this case as a class action pursuant to
Fed. R. Civ. P. 23(a) and 23(b)(2), defining the class as:

[a]ll current and future New York State Medicaid recipients for whom Defendant has directly
or indirectly failed to provide coverage for medically necessary orthopedic footwear and
compression stockings as a result of New York Soc. Serv. Law § 365-a(2)(g)(iii) and (iv) and
regulations and policies promulgated thereto (Dkt #35);

WHEREAS on December 9, 2013 the Court granted partial summary judgment in favor
of the Plaintiffs (Dkt #39) and, on January 28, 2014, entered an Order for Declaratory and
Injunctive Relief (Dkt #42) that:

1. Granted Defendant's motion for summary judgment in part, finding that New York
Soc. Serv. Law § 365-a(2)(g)(iii) and (iv), and 18 N.Y.C.R.R. § 505.5(g)(1) and (2) do

not violate the home health requirement of the Medicaid Act, 42 U.S.C. §§ 1396a(a)(10)(A), (a)(10)(D), and 1396d(a)(4);

2. Granted Plaintiffs' motion for summary judgment in part, finding that New York Soc. Serv. Law § 365-a(2)(g)(iii) and (iv), and 18 N.Y.C.R.R. § 505.5(g)(1) and (2) violate the reasonable standards requirements of the Medicaid Act, 42 U.S.C. § 1396a(a)(17) and are therefore invalid;
3. Granted Plaintiffs' motion for summary judgment in part, finding that New York Soc. Serv. Law § 365-a(2)(g)(iii) and (iv), and 18 N.Y.C.R.R. § 505.5(g)(1) and (2) violate the comparability requirement of the Medicaid Act, 42 U.S.C. § 1396a(a)(10)(B) and are therefore invalid;
4. Granted Plaintiffs' motion for summary judgment in part, finding that Defendant's implementation of New York Soc. Serv. Law § 365-a(2)(g)(iii) and (iv) and 18 N.Y.C.R.R. § 505.5(g)(1) and (2) violate Plaintiffs' rights to written notice of changes in coverage under the Due Process Clause of the Fourteenth Amendment to the United States Constitution and as provided in the Medicaid Act, 42 U.S.C. § 1396a(a)(3);
5. Granted Defendant's motion for summary judgment in part, finding that, at the time that Defendant implemented New York Soc. Serv. Law § 365-a(2)(g)(iii) and (iv) and 18 N.Y.C.R.R. § 505.5(g)(1) and (2), there were no factual issues that Plaintiffs could raise in a fair hearing regarding their eligibility for compression stockings and orthopedic footwear and Defendant did not violate the Plaintiffs' rights to fair hearings under the Due Process Clause of the Fourteenth Amendment to the United States Constitution and as provided in the Medicaid Act, 42 U.S.C. § 1396a(a)(3);

6. Granted Plaintiffs' motion for summary judgment in part, finding that New York Soc. Serv. Law § 365-a(2)(g)(iii) and (iv) and 18 N.Y.C.R.R. § 505.5(g)(1) and (2) violate the prohibition against discrimination on the basis of disability provided in 42 U.S.C. § 12132, 28 C.F.R. § 35.130(b)(7) and Section 504 of the Rehabilitation Act under 29 U.S.C. § 794; and
7. Granted Plaintiffs' motion for summary judgment in part, finding that New York Soc. Serv. Law § 365-a(2)(g)(iii) and (iv), and 18 N.Y.C.R.R. § 505.5(g)(1) and (2) violate the prohibition against utilizing methods of administration that have the effect of discrimination on the basis of disability provided in the ADA and in Section 504 of the Rehabilitation Act under 28 C.F.R. §§ 35.130(b)(3) and 41.51(b)(3)(i), and 45 C.F.R. § 84.4(b)(4) (Dkt #42);

WHEREAS on December 12, 2013, Defendant issued a Medicaid Prescription Footwear and Stocking Benefit Update ("Footwear and Stocking Benefit Update"), attached hereto as Exhibit A, on its website and circulated the notice via its various email listserves explaining that, in response to the Court's Decision and Order of December 9, 2013, it would no longer enforce the benefit limits on compression stockings and orthopedic footwear implemented on April 1, 2011, but would return to its previous coverage policy.

WHEREAS on February 24, 2014, Defendant Shah appealed this Court's Decision and Order dated December 9, 2013 granting in part and denying in part the parties' cross motions for summary judgment (Dkt #45);

WHEREAS on March 24, 2016, the Second Circuit Court of Appeals affirmed in part and vacated in part the Court's Decision and Order of December 9, 2013 by:

1. Affirming the Court's Decision granting Defendant's motion for summary judgment in part, finding that New York Soc. Serv. Law § 365-a(2)(g)(iii) and (iv), and 18 N.Y.C.R.R. § 505.5(g)(1) and (2) do not violate the home health services requirement of the Medicaid Act, 42 U.S.C. §§ 1396a(a)(10)(A), (a)(10)(D), and 1396d(a)(4);
2. Vacating the Court's Decision granting Plaintiffs' motion for summary judgment in part, and granting Defendant's motion for summary judgment in part, finding that neither the federal Medicaid Act nor the Supremacy Clause of Article VI of the United States Constitution confer a private right of action to enforce the reasonable standards provision of the federal Medicaid Act, 42 U.S.C. § 1396a(a)(17);
3. Affirming the Court's Decision granting Plaintiffs' motion for summary judgment in part, finding that New York Soc. Serv. Law § 365-a(2)(g)(iii) and (iv), and 18 N.Y.C.R.R. § 505.5(g)(1) and (2) violate the comparability requirement of the Medicaid Act, 42 U.S.C. § 1396a(a)(10)(B), and are therefore invalid as applied to categorically needy Medicaid beneficiaries as defined in 42 U.S.C. § 1396a(a)(10)(A)(i);
4. Affirming the Court's Decision granting Plaintiffs' motion for summary judgment in part, finding that Defendant's implementation of New York Soc. Serv. Law § 365-a(2)(g)(iii) and (iv) and 18 N.Y.C.R.R. § 505.5(g)(1) and (2) violates Plaintiffs' rights to written notice of changes in coverage under the Due Process Clause of the Fourteenth Amendment to the United States Constitution and as provided in the Medicaid Act, 42 U.S.C. § 1396a(a)(3);

5. Affirming the Court's Decision granting Defendant's motion for summary judgment in part, finding that, at the time that Defendant implemented New York Soc. Serv. Law § 365-a(2)(g)(iii) and (iv) and 18 N.Y.C.R.R. § 505.5(g)(1) and (2), there were no factual issues that Plaintiffs could raise in a fair hearing regarding their eligibility for compression stockings and orthopedic footwear and Defendant did not violate the Plaintiffs' rights to fair hearings under the Due Process Clause of the Fourteenth Amendment to the United States Constitution and as provided in the Medicaid Act, 42 U.S.C. § 1396a(a)(3); and
6. Affirming the Court's Decision granting Plaintiffs' motion for summary judgment in part and finding that New York Soc. Serv. Law § 365-a(2)(g)(iii) and (iv) and 18 N.Y.C.R.R. § 505.5(g)(1) and (2) violate the prohibition against discrimination on the basis of disability provided in 42 U.S.C. § 12132, 28 C.F.R. § 35.130(b)(7) (Americans with Disabilities Act (ADA)) and Section 504 of the Rehabilitation Act under 29 U.S.C. § 794 as to Medicaid beneficiaries with medical conditions that qualify as "disabilities" within the meaning of the ADA and section 504 and are at risk of institutionalization; and

WHEREAS the Second Circuit Court of Appeals vacated the injunction issued by the district court and remanded the case to this Court for entry of appropriate relief;

WHEREAS on April 14, 2016, the Second Circuit Court of Appeals entered the mandate;

WHEREAS the parties desire to resolve this case in the most efficient way for the Defendant and the plaintiff class and without additional disputes;

WHEREAS the parties have agreed to the entry of declaratory relief and permanent injunctive relief and the Court adopts that agreement.

THEREFORE:

1. New York Soc. Serv. Law § 365-a(2)(g)(iii) and (iv), and 18 N.Y.C.R.R. § 505.5(g)(1) and (2) violate the comparability requirement of the Medicaid Act, 42 U.S.C. § 1396a(a)(10)(B), as to categorically needy beneficiaries and are declared invalid on this basis;
2. New York Soc. Serv. Law § 365-a(2)(g)(iii) and (iv), and 18 N.Y.C.R.R. § 505.5(g)(1) and (2) violate the prohibition against discrimination on the basis of disability provided in 42 U.S.C. § 12132, 28 C.F.R. § 35.130(b)(7) (Americans with Disabilities Act (ADA)) and Section 504 of the Rehabilitation Act under 29 U.S.C. § 794 as to Medicaid beneficiaries with medical conditions that qualify as “disabilities” within the meaning of the ADA and section 504 and are at risk of institutionalization and are declared invalid on this basis;
3. Defendant and his employees, agents and contractors are permanently enjoined from enforcing New York Soc. Serv. Law § 365-a(2)(g)(iii) and (iv) through its policies and regulation 18 N.Y.C.R.R. § 505.5(g)(1) and (2);
4. The Defendant will make necessary amendments to 18 N.Y.C.R.R. § 505.5(g) consistent with the permanent injunction of New York Soc. Serv. Law § 365-a(2)(g)(iii) and (iv);
5. The Court shall retain jurisdiction over this action for twenty-four (24) months from the date of this Order.
6. The parties will attempt to resolve attorneys’ fees and costs pursuant to the Stipulation entered on February 27, 2014 (Dkt. #46). If the parties are not able to reach resolution, Plaintiffs will promptly move the Court for attorneys’ fees and costs.

SO ORDERED.

/s/ Charles J. Siragusa
CHARLES J. SIRAGUSA
U.S. District Judge
DATE: 7/1/16