IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

DORENA COLEMAN, CURTIS JACKSON, and FEDERICO PEREZ, on behalf of themselves And all others similarly situated, *Plaintiffs,*	§ § § § §	
v.	§	CIVIL ACTION NO. 1:20-CV-00847-RP
CECILE ERWIN YOUNG, Executive Commissioner, VICTORIA FORD, Chief Policy and Regulatory Officer, MAURICE MCCREARY, Chief Operating Officer, and MICHELLE ALLETTO, Chief Program and Services Officer, in their official Capacities with the TEXAS HEALTH AND HUMAN SERVICES COMMISSION, *Defendants.*	§ § § § § § § § § §	

DEFENDANTS' MOTION FOR PARTIAL DISMISSAL

INTRODUCTION AND BACKGROUND

The Texas Medicaid program is a joint federal-state program, created by Title XIX of the Social Security Act, which pays for healthcare services on behalf of eligible needy individuals. *See* 42 U.S.C. § 1396-1396w; *see also El Paso Hosp. Dist. v. Texas Health & Human Servs. Comm'n*, 247 S.W.3d 709, 711 (Tex. 2008); *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 502 (1990) (citing 42 U.S.C. § 1396)). Federal law establishes the basic parameters of the Medicaid program, but each state determines the nature and scope of its program, as detailed in the state plan that is submitted to the federal Center for Medicare and Medicaid Services (CMS), which must approve the plan and any amendments. *See* 42 U.S.C. § 1396a(a)-(b); 42 C.F.R. § 430.10. The State of Texas has designated the Texas Health and Human Services Commission (HHSC) to administer its Medicaid plan. *See* Tex. Hum. Res. Code § 32.021; *see also* Tex. Gov't Code ch. 531 (detailing the Commission/Commissioner's authority and duties).

Plaintiffs Dorena Coleman, Curtis Jackson, and Federico Perez are enrolled in Texas Medicaid. *See* Plaintiffs' Original Class Action Complaint ("Compl.") ¶¶ 23–25. They aver that they have each been diagnosed with Chronic Hepatitis C (HCV) and have been prescribed drugs in a class called "direct acting antivirals" (DAAs). *Id.* ¶¶ 7, 23–25. They allege that "[o]fficials acting pursuant to a policy for which HHSC has responsibility have denied [the] treating physician's request to approve Medicaid coverage for" DAA treatment. *Id.* On this basis, they assert four claims:

- A claim under the Social Security Act's "comparability" provision, 42 U.S.C. § 1396a(a)(10)(B) and 42 C.F.R. § 440.240, that HHSC denies coverage of "medically necessary prescription drugs to some categorically needy individuals with HCV," yet "at the same time provided such coverage to other similarly situated Medicaid beneficiaries with comparable chronic illnesses, with no medically justifiable basis for such differential treatment." Compl. ¶ 144.
- A second claim under the "comparability provision" that HHSC denies coverage of DAAs "to some categorically needy individuals with HCV," yet HHSC "has at the same time provided coverage to other similarly situated Medicaid beneficiaries with HCV, with no medically justifiable basis for such differential treatment." Compl. ¶ 148.
- A claim under the Social Security Act's "reasonable promptness" provision, 42 U.S.C. § 1396a(a)(8), that HHSC "delays coverage of curative DAA treatment to HCV-infected individuals until their disease has progressed to the point of causing severe and potentially irreparable and irreversible liver damage." Compl. ¶ 152.
- A claim under the Social Security Act's "necessary medical assistance" provision, 42 U.S.C. § 1396a(a)(10)(A), that HHSC "categorically denies coverage of DAAs to qualified Medicaid beneficiaries with HCV by refusing to approve prescription requests for prior authorization of treatment coverage with DAAs unless the beneficiary has a fibrosis score at or above a specified level." Compl. ¶ 156.

Defendants Cecile Erwin Young, Victoria Ford, Maurice McCreary, and Michelle Alletto—each of whom are sued in their official capacities under Section 1983—seek the dismissal of Plaintiffs' comparability claims because the comparability provision of the Social Security Act does not apply here. On the face of the complaint, it is clear that there are medical differences between those who have been diagnosed with HCV and those who have been diagnosed with other illnesses. And it is equally clear that there are medical differences among those who have been diagnosed with HCV but suffer different levels of liver damage. The Social Security Act allows states to fashion and provide

different services for different illnesses and at different levels of illness. In doing so, a state does not violate the Social Security Act.

STANDARD OF REVIEW

Dismissal under Federal Rule of Civil Procedure 12(b)(6) is proper when a plaintiff's complaint fails to state a claim upon which relief can be granted. FED. R. CIV. P. 12(b)(6) . To survive a Rule 12(b)(6) motion to dismiss, the plaintiff cannot rely merely on "labels and conclusions," a "formulaic recitation of the elements of a cause of action," or "naked assertion[s] devoid of further factual enhancement." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citations and internal quotation marks omitted); *see also Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007) . Instead, the plaintiff's factual allegations must be enough to "raise a right of relief above the speculative level." *Twombly,* 550 U.S. at 555. The court "accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff," *Martin K. Eby Constr. Co. v. Dall. Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2004) (citation and internal quotation marks omitted), but need not accept as true "conclusory allegations, unwarranted factual inferences, or legal conclusions." *In re Great Lakes Dredge & Dock Co. LLC*, 624 F.3d 201, 210 (5th Cir. 2010) (citations and internal quotation marks omitted).

ARGUMENT

A. Plaintiffs' claims for violations of the "comparability" provision as between Medicaid enrollees with HCV and enrollees with other diseases should be dismissed.

The Social Security Act's "comparability" requirement of the Medicaid Act provides that a state plan for medical assistance made available to an individual "shall not be less in amount, duration, or scope than the medical assistance made available to any other such individual." 42 U.S.C. § 1396a(a)(10)(B). The statute's implementing regulations state that:

> (a) The plan must provide that the services available to any categorically needy beneficiary under the plan are not less in amount, duration, and scope than those services available to a medically needy beneficiary; and

(b) The plan must provide that the services available to any individual in the following groups are equal in amount, duration, and scope for all beneficiaries within the group:

(1) The categorically needy.

(2) A covered medically needy group.

42 C.F.R. § 440.240.

In passing the "comparability provision" Congress sought to ensure that "the primary concern of the states in providing financial assistance should be those persons who lack sufficient income to meet their basic needs—termed the categorically needy." *Rodriguez v. City of New York*, 197 F.3d 611, 615 (2d. Cir. 1999). As the Second Circuit explained, those in the "categorically needy" group "were contrasted with the medically needy, those who have resources to meet most of their basic needs but not their medical ones." *See id.* Thus, "Section 1396a(a)(10)(B) guarantees that if a state elects to provide Medicaid to the medically needy, it must also provide it to the categorically needy and that it may not provide more assistance to the former group than to the latter." *Id.* Moreover, a state may not provide benefits to some categorically needy individuals but not to others. *See id.* (citing *Schweiker v. Hogan*, 457 U.S. 569, 573 n.6 (1982), which stated that Section 1396a(a)(10)(B) ensures "that the medical assistance afforded to an individual who qualified under any categorical assistance program could not be different from that afforded to an individual who qualified under any other program"). Section 1396a(a)(10)(B) "thus precludes states from discriminating against or among the categorically needy." *Id.*

In addition, the "comparability" requirement "mandates comparable services for individuals with comparable needs and is violated when some recipients are treated differently than others where each has the same level of need." *Cota v. Maxwell-Jolly*, 688 F. Supp. 2d 980, 993 (N.D. Cal. 2010). But "nothing in the statute prohibits a state from offering different services to persons in different categories of medical need or with different degrees of medical necessity." *King by King v. Sullivan*, 776 F. Supp. 645, 654 (D. R.I. 1991).

Plaintiffs do not argue that HHSC is discriminating between "categorically needy" individuals and "medically needy" individuals. *See* 42 C.F.R. § 440.240(a). Nor do they allege that HHSC is discriminating among "medically needy" individuals, as that term is defined in the Social Security Act. *See* 42 C.F.R. § 440.240(b)(2). Instead, they contend that they are "categorically needy" individuals who have HCV, and are not being provided services that are "equal in amount, duration, and scope" to other categorically needy individuals—individuals with other chronic illnesses. 42 C.F.R. § 440.240(b)(1).

The problem with Plaintiffs' comparability claim is that they have not plausibly alleged what "equal" treatment would look like between someone suffering from HCV compared with someone suffering from other chronic diseases such as "diabetes or rheumatoid arthritis or Parkinson's disease." Compl. ¶ 84. Those diseases, of course, are dramatically different from HCV. They target different bodily functions, require different treatment protocols, and have different long-term outcomes. Plaintiffs do not allege, for example, that enrollees with those chronic illnesses need DAA medications (and are receiving such medications) compared to enrollees with HCV. Indeed, Plaintiffs do not even explain what treatment protocols enrollees with those diseases require, let alone how those protocols are similar in amount, duration and scope to the protocols that they allege that enrollees with HCV are entitled to receive. And without allegations of the "amount, duration, and scope" that other Medicaid enrollees with chronic conditions allegedly receive that enrollees with HCV do not, Plaintiffs have not stated sufficient facts to show that such treatment would be "equal" to the treatment that Plaintiffs should be receiving.

Even if Plaintiffs had alleged sufficient facts regarding the kind of treatment that other chronic diseases require, their claim would face another obstacle: Congress provided states with "broad discretion to implement" their Medicaid programs. *See, e.g.*, *Detgen ex rel. Detgen v. Janek*, 752 F.3d 627, 631 (5th Cir. 2014) ("States have broad discretion to implement the Medicaid Act."); *Lankford v.*

Sherman, 451 F.3d 496, 509 (8th Cir. 2006). Plaintiffs' comparability claim would require the Court to "delve into the medical necessity of particular types of care," *Watson v. Weeks*, 436 F.3d 1152, 1162 (9th Cir. 2006), and to compare necessary care across a spectrum of illnesses, which is a task beyond the courts' purview to determine, *see id.* (noting that if Congress had intended to provide a cause of action for violations of the Social Security Act's provisions related to the "reasonable standards" for determining eligibility for medical assistance, Congress would have given "more concrete standards in the statute for determining eligibility based on medical need.").

Accordingly, Plaintiffs have failed to state a viable "comparability" claim between Medicaid enrollees with HCV and Medicaid enrollees with other, broadly defined "chronic illnesses." This claim should therefore be dismissed.

B. Plaintiffs' "comparability" provision claim based on allegedly different treatment of Medicaid enrollees with HCV should also be dismissed.

For related reasons, Plaintiffs' claims based on the alleged differences in treatment between individuals who have HCV also fail. As explained above, the Social Security Act does not prohibit "a state from offering different services to persons in different categories of medical need or with different degrees of medical necessity." *Sullivan*, 776 F. Supp. at 654. Plaintiffs allege that all enrollees with HCV who are prescribed DAAs are entitled to DAAs under the Social Security Act's comparability provision, but their allegations make clear that HCV is generally a disease that affects individuals differently at different stages of the illness. *See, e.g.*, Compl. ¶¶ 37–40. For this reason, even assuming that all facts pleaded in the Complaint are true (as the Court must at this stage), Plaintiffs have not shown that authorizing DAAs to some individuals with Chronic Hepatitis C, but not others, would constitute "unequal" services under the Social Security Act.

CONCLUSION

For the reasons discussed above, Plaintiffs' "comparability" claims should be dismissed.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2020, a true and correct copy of the foregoing document was served via the Court's CM/ECF system to all counsel of record.

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