

1991 WL 22812  
United States District Court, E.D. California.

VALDIVIA  
v.  
CALIFORNIA DEPARTMENT OF HEALTH  
SERVICES.

Civ. No. S90-1226-EJG EM. | Jan. 11, 1991.

## Opinion

### Preliminary Injunction Order

EDWARD J. GARCIA, District Judge:

\*1 This matter was before the court on December 6, 1990 for hearing on plaintiffs' motion for a preliminary injunction against the state defendants. Jeanne Finberg and Toby Edelman appeared on behalf of plaintiffs Valdivia and Kaski; Mark Waxman and Robert Gerst appeared on behalf of the (then-proposed) intervenor; Deputy Attorney General John Pierson and Supervising Deputy Attorney General Dennis Eckhart appeared on behalf of the state defendants; and Margaret Hewing, Linda Ruiz and Assistant United States Attorney Joyce Vermeersch appeared on behalf of the federal defendants. No appearance was made on behalf of the congressional plaintiff. The matter was ordered submitted upon receipt of the state defendants' supplemental brief on or by December 28, 1990. Having heard oral argument and having considered the pleadings, declarations and other written evidence filed herein, the court finds:

1. That the court has jurisdiction of the subject matter of this action, pursuant to 28 U.S.C. § 1331;
2. That the plaintiffs have demonstrated a probability of success on the merits of their complaint;
3. That, without a preliminary injunction, the state defendants' failure to comply with the requirements of the federal nursing home reform law, 42 U.S.C. §§ 1395i-3 and 1396r, and attendant regulations, 42 C.F.R. §§ 483.1-483.80 is likely to cause irreparable harm to plaintiffs;
4. That issuance of a preliminary injunction is in the public interest;

5. That the facts and law clearly favor the plaintiffs; and

6. That imposition of the bond requirement of Federal Rule of Civil Procedure 65(c) would effectively deny plaintiffs access to judicial review.

NOW, THEREFORE, in accordance with the foregoing, IT IS HEREBY ORDERED that, until conclusion of trial of this matter:

1. The defendants CALIFORNIA DEPARTMENT OF HEALTH SERVICES (DHS) and KENNETH W. KIZER, M.D. ("state defendants"), their agents, servants, employees, and all other persons acting under the authority of DHS, are enjoined from failing to comply with, and failing to implement, all provisions of the federal nursing home reform law, including 42 U.S.C. §§ 1395i-3(a)-(h) and 1396r(a)-(h), and the regulations attendant thereto, 42 C.F.R. §§ 483.1-483.80.

2. The state defendants, their agents, servants, employees, and all other persons acting under the authority of DHS, shall immediately take all necessary measures to correct the state's apparent noncompliance in the following areas:<sup>1</sup>

a. Comprehensive resident assessments (42 U.S.C. § 1395i-3(b)(3))<sup>2</sup>—The state shall ensure that the assessments address discharge potential, special treatments or procedures, dental condition, rehabilitation potential and drug therapy, as required by 42 C.F.R. § 483.20(b)(2). The assessments shall be conducted promptly upon admission, promptly after a significant change in a resident's physical or mental condition, and at least once every twelve months. 42 U.S.C. § 1395i-3(b)(3)(C)(i).

\*2 b. Quality of care—The state shall ensure that each resident receives, and each facility provides, the level of care and services required by 42 C.F.R. § 483.25 in the following areas: daily living activities, vision and hearing, pressure sores, urinary incontinence, range of motion, psychosocial functioning, naso-gastric tubes, accidents, nutrition, hydration, special needs, drug therapy and medication errors.

c. Residents' rights—The state shall ensure that facilities protect and promote residents' rights in the following areas, per statutory and regulatory requirements: transfer and discharge (42 U.S.C. § 1395i-3(c)(2)); free choice (42 U.S.C. § 1395i-3(c)(1)(A)(i)); protection of resident funds (42 U.S.C. § 1395i-3(c)(6)); "bedhold" (42 C.F.R. § 483.12(b)); admissions practices (42 U.S.C. §

1395i-3(c)(5)(A)); and physical and chemical restraints (42 U.S.C. § 1395i-3(c)(1)(A)(ii)).

d. Facility compliance and enforcement—The state shall survey and certify facilities in accordance with the requirements of 42 U.S.C. § 1395i-3(g).

e. Reimbursement rates—The state shall submit an approvable state Medicaid plan amendment which takes into account the facilities' costs of complying with the provisions of the nursing home reform law, as required by 42 U.S.C. § 1396a(a)(13)(A) and the Omnibus Budget Reconciliation Act of 1987, Pub.L. No. 100-203, § 4211(b)(2).

3. Within thirty (30) days of the date of this order, the state defendants shall notify all Medicare and/or Medicaid certified nursing facilities in the state that pursuant to this order, all such facilities must comply fully with the statutory and regulatory requirements of the nursing home reform law, including 42 U.S.C. §§ 1395i-3 and 1396r, and 42 C.F.R. §§ 483.1-483.80. The state shall also notify such facilities within thirty (30) days that pursuant to this order, the state will immediately begin surveying and certifying facilities in accordance with the requirements of 42 U.S.C. § 1395i-3(g).

4. Within sixty (60) days of the date of this order, the state shall file, and serve on all parties, a report to the court stating the specific steps that state defendants have taken to comply with each requirement set out in paragraphs (1) through (3) of this order.

5. Upon receipt of the state defendants' report, the court may, in its discretion, schedule a status conference to address the state's compliance with this order. Following the filing of the report, any party may file with the court a written request for such a status conference, stating the reasons for the request.

6. The posting of a security bond by plaintiffs is not required.

A memorandum of decision setting forth the findings of fact and conclusions of law which constitute the basis for issuance of the preliminary injunction will be issued separately pursuant to Federal Rules of Civil Procedure 52(a) and 65(d).

<sup>1</sup> Plaintiffs have also alleged state noncompliance with other federal statutory and regulatory requirements; as to these allegations, the court has determined that plaintiffs have not met their burden on this preliminary injunction motion. This finding does not, of course, excuse the state defendants from complying with *all* relevant statutory and regulatory requirements.

<sup>2</sup> 42 U.S.C. §§ 1395i-3 and 1396r are virtually identical. Unless otherwise noted, any reference in this order to a provision contained in § 1395i-3 shall be construed as a reference to both that provision and the corresponding provision of § 1396r.