

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

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GLEND A JIMMO, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 5:11-CV-17
)	
SYLVIA MATHEWS BURWELL, Secretary of)	
Health and Human Services,)	
)	
Defendant.)	
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**PLAINTFFS’ RESPONSE TO DEFENDANT’S MEMORANDUM IN SUPPORT
OF PROPOSED CORRECTIVE ACTION PLAN**

INTRODUCTION

The Secretary’s proposed corrective action plan, and her discussion of it, ignore a critical point of what transpired in the Educational Campaign and its aftermath. In determining that the Secretary had breached the Settlement Agreement, this Court recognized that she had violated the implied covenant of good faith and fair dealing, which “exists to ensure that parties to a contract act with faithfulness to an agreed upon common purpose and consistency with the justified expectations of the other party.” *Jimmo v. Sebelius*, 2016 WL 4401371 at *6 (D. Vt. 2016) (quoting *Carmichael v. Adirondack Bottled Gas Corp. of Vt.*, 636 A.2d 1211, 1216 (Vt. 1993)) (additional interior quotation marks omitted). The Secretary violated that covenant because, as plaintiffs demonstrated with “persuasive evidence,” “at least some of the information provided by the Secretary in the Educational Campaign was inaccurate, nonresponsive, and failed to reflect the maintenance coverage standard.” *Id.* at *11. The Court cited the Summary of the National Call for contractors and adjudicators as “[t]he most compelling example” of this

failing, *id.*, but it did not suggest that the Summary represented the Secretary's only error in this regard.

The major cause of these errors is that the Secretary has consistently failed to acknowledge that implementation of the maintenance standard requires a significant change in practice for many providers and adjudicators, not business as usual. Even as the Secretary now proposes to issue a Disavowal Statement, she insists that she "will continue to deny the existence of any 'Improvement Standard' in issuing this disavowal." Def. Mem. in Support of Proposed Corrective Action Plan ("Def. Mem."), at 7. As a result of the Secretary's insistence that the Improvement Standard never existed, she has given inaccurate and misleading messages to the provider community, consistently kept plaintiffs and their counsel at arms' length, and failed to treat plaintiffs and their counsel as partners in achieving the "agreed upon common purpose" that the Settlement Agreement sought to accomplish: implementation of the maintenance standard.

These failures led directly to the numerous mistakes and misrepresentations at the heart of the Educational Campaign's inadequacies. Remedying the Secretary's noncompliance offers an appropriate opportunity to correct those errors by providing for meaningful and significant feedback and input to the Secretary's otherwise unilateral efforts. The Secretary's proposed corrective action plan offers the same likelihood of the problems that caused the Educational Campaign to fail in the first place. To assure that meaningful corrections are made, plaintiffs have proposed a plan that would give plaintiffs' counsel a more active role in achieving the common goals stated in the Settlement Agreement.¹

¹ Although plaintiffs believe that the differences between the parties' proposed plans are straightforward and clearly spelled out in this brief, plaintiffs' counsel would be more than willing to answer the Court's inquiries if oral argument is deemed helpful.

COMPARISON OF THE PROPOSED PLANS SHOWS THAT PLAINTIFFS' PROPOSAL WOULD MORE EFFECTIVELY CORRECT THE ONGOING PROBLEMS CREATED BY THE EDUCATIONAL CAMPAIGN'S DEFICIENCIES

Disavowal of the Improvement Standard

Both parties recognize that a statement disavowing the Improvement Standard is an important aspect of a corrective plan. See Def. Mem., at 6-7 and Ex. A at 2 (¶¶ 1, 3); Plaintiffs' Memorandum re Corrective Action Plan ("Pl. Mem."), at 8-9. The Disavowal Statement would be published on the new Dedicated *Jimmo* Webpage (see *infra* at 3-4) and would be sent to stakeholders in announcing the webpage.

There is a crucial difference in the proposals, however. Under the Secretary's, she would apparently have complete control of the content of that Statement, which would include an explicit denial of the existence of the Improvement Standard. There is no indication that she would allow any input from plaintiffs. By contrast, plaintiffs have suggested exactly what the Statement should say in order to have the desired effect of ensuring that the Improvement Standard is in fact disavowed and that the maintenance standard is correctly described as a change in practice. See Pl. Mem. at 8-9. The Court should approve and adopt plaintiffs' proposed Statement. In the alternative, the Court should order the parties to consult as to the content of the Statement, and, if they are unable to agree, the Court should make the determination.

This Statement has the possibility of achieving significant results, in two ways. First, it would state unequivocally that the maintenance coverage standard controls. Second – and significantly -- it would appear on the website of the Centers for Medicare & Medicaid Services (CMS), and in documents sent out by CMS, thus adding the crucial patina of the controlling government agency. If correctly drafted, the Statement presents an excellent opportunity to get

the word out that did not get out before, *i.e.*, that implementation of the maintenance standard requires a significant change in practice for many providers and adjudicators. For that reason, plaintiffs believe that it is critical that they be given the opportunity to help craft the language. The Secretary has agreed in principle with the need for a Disavowal Statement, but her description of that proposed Statement and the history of the Educational Campaign demonstrate that the content of that vessel cannot be left solely to the Secretary's discretion.

Dedicated *Jimmo* Webpage

Again, the parties superficially agree that CMS should develop a Dedicated *Jimmo* Webpage. And, again, despite that agreement in principle, a significant difference lies in the content. The Secretary's proposed Webpage would be a static site composed of all the previously published documents regarding *Jimmo* and a one-time set of FAQs for which plaintiffs' sole role would be suggesting questions. Def. Mem. at 7-9.

Plaintiffs envision a webpage that would change as needed and not be a dormant repository of potentially stale documents. Consequently, the *Jimmo* Webpage should have FAQs that are changed or added to over time, as different issues and misunderstandings come to the fore. See Pl. Mem. at 7-8. In addition to plaintiffs' counsel having the right to submit proposed FAQs, the Secretary should only be allowed to reject them for good cause.

The webpage should also include a web portal for posing questions to CMS. In addition to correcting mistakes before they happen, the existence of such a portal will increase the chance of bringing new issues and problems to CMS' attention as they arise. The Secretary has already rejected this concept on the ground that the Court could not order it since it was not explicitly part of the Settlement Agreement. Def. Mem. at 12. The Court's decision to enforce, however, was not premised on violation of the substantive content of the Agreement, but on "the *manner*

in which [the Secretary] conducted the campaign” *Jimmo*, 2016 WL 4401371, at *10. To prevent continuation of the errors and problems that flowed from the manner in which the Educational Campaign was carried out, it is only logical to employ a methodology that will allow for providing answers to questions and alert CMS to developing problems. Again, given that the Secretary has accepted the principle of a webpage, it is imperative that it include features sufficient to render it effective.

New trainings

Again, although both parties now agree in principle that additional training for employees of Medicare Administrative Contractors and Medicare Advantage Organizations would alleviate some of the mistakes growing out of the mishandled Educational Campaign (Def. Mem. at 9-10; Pl. Mem. at 10-11), they disagree on a key point as to how the trainings should be carried out.

The Secretary states that “CMS will provide materials for use in the training to both sets of contractors” (Def. Mem. at 10), but there is no indication that plaintiffs will have any opportunity to review or suggest changes to those materials. See Pl. Mem. at 10-11. The Secretary’s suggested approach will simply perpetuate the mistakes made in the Educational Campaign by cutting plaintiffs’ counsel out of the process. They should have the opportunity to review the training materials at an appropriate time and to suggest corrections. In addition, they should be allowed to monitor the training to ensure that the correct information is disseminated. See Pl. Mem. at 7.

National Call and Summary

The Secretary maintains the pretense that the Court’s evaluation of the Summary of the National Call to contractors and adjudicators requires only correction of the Summary itself. Def. Mem. at 5. The Summary, however, is not the issue; it is merely a reflection of what was

said and not said on the National Call. Thus, the Court set out four questions in the National Call that the Summary indicated did not receive responsive answers. *Jimmo*, 2016 WL 4401371 at *10. Similarly, because “the Summary also reflects the provision of arguably incorrect information,” *id.*, the decision repeats one answer quoted in full in the Summary and explains in detail the threefold nature of the answer’s inaccuracy. *Id.* at *11-*12. The Court’s analysis of the Summary was not intended to suggest that only the Summary was at issue; that analysis was demonstrating how inaccurate the National Call had been. The Court had access to the Summary, but it did not have the transcript of the National Call in front of it.

Consequently, correcting the Summary of the National Call is an irrational exercise. The Secretary is proposing to pretend that what was said on the National Call was in fact not said, or that what was left out was in fact not left out. It is a meaningless response to the real problem, which is the National Call itself. The Secretary refers to the rewritten Summary as a “Clarified Summary” (Def. Mem. at 5), but she would not be clarifying what was said on the Call: she would be inventing what was said on the Call. The solution to this error is not to create a fictional Summary of the National Call, but to redo the Call in all respects (see Pl. Mem. at 10), with correct and responsive answers -- and then to prepare a Summary of *that* Call, as the Settlement Agreement requires. § IX.14(4).

Statement at Open Door Forums

Plaintiffs also proposed that the Disavowal Statement be read at each of eight Open Door Forums. Pl. Mem. at 9. The Secretary’s proposal did not include such a suggestion. Plaintiffs believe that, as these Forums serve many providers and their employees, reading the Disavowal Statement at the beginning of the Forums would be another effective way to correct for the errors of the Educational Campaign. Since the Statement will already have been written for its use on

and about the new webpage, this proposal will not require any significant additional work. An additional sentence, read after the Disavowal Statement at the Open Door Forums, would inform participants of the new *Jimmo* webpage.

Additional monitoring

The Secretary's proposal also did not include a monitoring mechanism. As plaintiffs explained (Pl. Mem. at 11), the Court maintains jurisdiction over the issues raised by the enforcement motion after January 24, 2017, but that should be explicitly stated in the corrective action plan. Plaintiffs also set out four specific points to ensure that monitoring will be effective, and those should also be included within the corrective action plan.

CONCLUSION

1. Although the parties agree that the corrective action plan should include a Disavowal Statement, a Dedicated *Jimmo* Webpage, FAQs, and additional training, the ways in which the proposals envision developing and/or presenting those features depict serious differences between the parties. The Secretary should not be allowed to unilaterally create the Disavowal Statement; plaintiffs' input is critical for avoiding the same problems that plagued the Educational Campaign. The Webpage should be dynamic, not static, with plaintiffs participating in the creation of FAQs and new FAQs as developments demand. A web portal for questions should be added to the webpage. Similarly, additional training should not be left to the Secretary for her unilateral development; plaintiffs should be allowed to participate.

2. The National Call for contractors and adjudicators should be redone. Fictionalizing the content of the original Call by rewriting the Summary is irrational and will not correct the misleading information that was disseminated in that original Call.

3. The Disavowal Statement should be read at the eight Open Door Forums, and the plan should include additional monitoring.

Accordingly, plaintiffs request that the Court reject the Secretary's proposed corrective action plan and adopt plaintiffs' plan in all respects.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2017, I electronically filed with the Clerk of Court Plaintiffs' Response to Defendant's Memorandum in Support of Proposed Corrective Action Plan.

The CM/ECF system will provide service of such filing via Notice of Electronic Filing.

/s/ Gill Deford

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