

**IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
CIVIL DIVISION**

ROBERT BLACHOWICZ

PLAINTIFF

VS.

60CV-2019-_____

**STATE OF ARKANSAS DIVISION OF SERVICES
FOR THE BLIND, CASSONDRA WILLIAMS,
DIRECTOR**

DEFENDANT

COMPLAINT

Plaintiff, through his attorneys, Thomas Nichols and Disability Rights Arkansas, Inc., state the following for his Complaint:

I. PARTIES

1. Plaintiff Robert Blachowicz is a person with a disability who is a resident of Pulaski County, Arkansas. At all times material to this complaint, Plaintiff has been eligible for and received services through the State's Division of Services for the Blind in order to assist Plaintiff with obtaining competitive, integrated employment.

2. Defendant Division of Services for the Blind is an agency within the meaning of the Arkansas Administrative Procedure Act, Ark. Code Ann. § 25-15-202(2), and is the "designated state unit" designated to administer and supervise the administration of the vocational rehabilitation program for individuals who are blind in the state of Arkansas. Cassandra Williams is named in her official capacity as Director of the Division of Services for the Blind.

II. JURISDICTION AND VENUE

3. The Court has subject matter jurisdiction pursuant to Ark. Code Ann. §§ 25-15-204, 25-15-207, 25-15-214 and Ark. Code Ann. § 16-111-102.

4. The Court has personal jurisdiction over the parties to this action. Plaintiff is a resident of Arkansas. Division of Services for the Blind is an Arkansas state agency.

5. Venue is proper pursuant to Ark. Code Ann. §§ 25-15-207(b) and 25-15-214.

III. FACTS

6. The United States Department of Education, through the Rehabilitation Services Administration, provides substantial federal funding to the State of Arkansas to provide vocational rehabilitation services.

7. Part of the federal funding allocated to the State of Arkansas is provided to Arkansas Rehabilitation Services, and part is provided to Division of Services for the Blind (DSB).

8. DSB is mandated, in exchange for its receipt of federal funding, to provide specific vocational rehabilitation services to individuals who are blind to assist them with achieving their employment goals.

9. Among those services DSB “*must*” make available under federal regulations is orientation and mobility services for individuals who are blind. 34 C.F.R. § 361.48(k).

10. Orientation and mobility services are traditionally provided by DSB through referral to one of several non-profit organizations located in Little Rock, Louisiana, Colorado, and other locations.

11. When DSB sends an individual to an orientation and mobility program like those identified in the preceding paragraph, DSB funds that service.

12. DSB routinely sent individuals to Little Rock, Louisiana, Colorado, and other locations in order to receive orientation services.

13. On April 11, 2019, the Transformation and Efficiencies in Government Act of 2019 was signed into law. Under the provisions of the Act, DSB transferred from under the supervision of the Department of Human Services to under the supervision of the Department of Commerce, through the Division of Workforce Services. In this transfer, DSB changed its name with the Rehabilitation Services Administration to indicate it was no longer associated with the Department of Human Services.

14. On or about June 26, 2019, DSB became aware that it was required to restart the process of assignment of a new identification number to receive federal funding, due to the name change through the government transformation.

15. On or about July 1, 2019, DSB submitted its State Plan to the Rehabilitation Services Administration, detailing its plans to serve its individual consumers and submitting assurances regarding the services it is currently providing.

16. Among DSB's assurances to the Rehabilitation Services Administration was the representation that DSB had sufficient funds available to provide the entire scope of vocational rehabilitation services to all individuals who are eligible.

17. DSB is not fully funded. DSB has extremely limited funding and is not providing mandated services to its consumers as a result. DSB does not have sufficient

funds to provide the entire scope of vocational rehabilitation services to all individuals who are eligible.

18. On or around August 5, 2019, Plaintiff was informed that DSB would not be paying for any individuals to receive orientation services in any location due to a new policy or practice of denying orientation services to its consumers.

19. Plaintiff was informed of this policy change after its implementation.

20. DSB, upon information and belief, has prioritized services it will make available to its consumers, with tuition for college and emergency services taking top priority.

21. After all tuition and emergency services are paid, if a counselor has any remaining budget for the remainder of the fiscal quarter, he or she may provide other services.

22. The prioritization of services, through unlawful implementation, serves to deny or unduly delay federally mandated services to individuals who are eligible.

23. DSB has made substantive modifications to the scope or duration of services it will provide to its consumers that is inconsistent with, or contrary to, its published policy manual through e-mails to staff.

24. DSB's informal process of substantively modifying the scope or duration of services is not published to the public.

25. DSB failed to consult with Disability Rights Arkansas, Inc., its DSB Board, or any of its consumers prior to implementing this policy that operates as a denial of orientation services.

26. DSB failed to conduct any public meetings regarding implementing this policy that has the effect of denying orientation services it is expressly required to conduct under federal regulations.

27. DSB failed to publish notice of implementing this policy in any location authorized by Arkansas law to provide notice to affected persons prior to its promulgation.

28. DSB failed to permit or consider public comment on implementing this policy that has the effect of denying services it is expressly required to provide under federal regulations before it was enacted as required by Arkansas law.

29. As a result of this policy, Plaintiff is unable to gain the orientation and mobility services he requires to live independently, based on a rule that was not properly promulgated, and is otherwise in violation of federal regulations governing the provision of vocational rehabilitation services. These services are an integral part of the pursuit for competitive, integrated employment, and Plaintiff will now be unduly delayed in achieving his vocational goal and living independently.

30. As a result of the promulgation of this policy without adequate notice, DSB violated both Arkansas law and federal regulations cited herein. The Arkansas Administrative Procedures Act requires public notice of proposed rules to be provided to the citizens of the state, in order to permit the state's citizens to participate in the promulgation process. The Arkansas Administrative Procedures Act only authorizes promulgation of a regulation as long as public participation has happened through notice and opportunity to comment. Plaintiff, along with other citizens in this state, were denied

the opportunity to comment on promulgated regulations and denied participation in what Arkansas law demands should be a public process.

31. DSB is required to provide notice of any reduction, suspension, or termination of any rehabilitation service. 34 C.F.R. § 361.57(b)(2)(iv).

32. That notice must include the right to obtain review of the determination, the right to pursue mediation, the names and addresses of individuals through whom a mediation or hearing should be requested, the manner in which a mediator or hearing officer will be selected, and the availability of Disability Rights Arkansas, Inc. to represent the individual against whom an adverse action has been supplied. 34 C.F.R. § 361.57(b)(1)(i)-(v).

33. That notice must be supplied at the time the individual's services are reduced, suspended, or terminated. 34 C.F.R. § 361.57(b)(2)(iv).

34. Plaintiff has not received any notification other than an informal statement that DSB is not paying for orientation services at this time.

Administrative Exhaustion Not Applicable

35. Administrative exhaustion is not required for the claims in this Complaint.

36. There is not a current pending administrative action regarding Plaintiff's claim made in this action.

37. Plaintiff's claim is made, in part, pursuant Arkansas law, specifically the Arkansas Administrative Procedures Act.

38. Plaintiff claims that DSB failed to follow the process described in the Administrative Procedures Act for the promulgation of a rule that affects the provision of services to individuals. The hearing officers are only permitted by the federal regulations to make decisions pursuant to “the approved State Plan, federal vocational rehabilitation regulations and state regulations and policies that are consistent with federal requirements.” 34 C.F.R. § 361.57. Hearing officers authorized under the federal regulations are not permitted to make a decision based on a violation of a statute of the State of Arkansas.

39. Even if the hearing officer had jurisdiction and ruled that the policy or practice of denying a federally mandated service was not properly promulgated, the hearing officer could not grant injunctive relief beyond the single individual who appealed, the Administrative Procedures Act renders the policy itself invalid.

40. Further, Plaintiff has not been provided any formal notice of his denial that includes with it a right to appeal, where to send the request for appeal, or any of the other requirements under federal regulation.

41. Plaintiff cannot exhaust his administrative remedies because he has only been told by his counselor that DSB is not sending clients to receive orientation services at this time due to the change in policy.

Sovereign Immunity Not Applicable

42. This Complaint does not seek monetary damages.

43. Sovereign Immunity is not applicable where Plaintiff seeks injunctive relief to remedy state action that is *ultra vires*.

44. The State of Arkansas is granted rulemaking authority through the Administrative Procedures Act. The State is without authority to make rules that affect the provision of services to individuals without adhering to the Administrative Procedures Act.

45. DSB's informal rule promulgation altering the duration or scope of services it will provide individuals without adequate notice under both state and federal regulations renders the implementation of the policy denying services mandated by the federal regulations as *ultra vires*.

IV. CLAIMS

Count I:

Failure to Comply with the Federal Regulations Governing Notice of Substantive Rule Changes

46. Plaintiff incorporates paragraphs 1-45, as if restated herein.

47. Under federal regulations, DSB must conform to certain notice provisions in order to enact regulations or rules that impact the scope or breadth of services available to its consumers.

- a. "Prior to the adoption of any substantive policies or procedures specific to the provision of vocational rehabilitation services under the vocational rehabilitation services portion of the Unified or Combined State Plan, including making any substantive amendment to those policies and

procedures, the designated State agency must conduct public meetings throughout the State, in accordance with the requirements of § 361.20.” 34 C.F.R. § 361.10(c).

- b. “The vocational rehabilitation services portion of the Unified or Combined State Plan must assure that prior to the adoption of any substantive policies or procedures governing the provision of vocational rehabilitation services under the Unified or Combined State Plan, the designated State agency conducts public meetings throughout the State to provide the public, including individuals with disabilities, an opportunity to comment on the policies or procedures.” 34 C.F.R. § 361.20(a)(1).

48. Under the federal rulemaking notice requirements, not every rulemaking requires public meetings and an opportunity to comment; only those changes that are substantive in nature – those that would “directly impact the nature and scope of the services provided to individuals with disabilities, or the manner in which individuals interact with the designated State agency, or in matters related to the delivery of vocational rehabilitation services.” 34 C.F.R. § 361.20(a)(2).

49. The federal regulations provide examples of what substantive changes would include. Fundamental alterations to the rights and responsibilities of DSB consumers and changes that affect the nature and scope of vocational rehabilitation services provided by the DSB both require notice and an opportunity to respond under the federal regulations. 34 C.F.R. § 361.20(a)(2)(i), (iii).

50. The federal regulations require that notice be provided to DSB's Board prior to enacting a policy that makes substantive changes to its delivery of vocational rehabilitation services. 34 C.F.R. § 361.20(c).

51. The federal regulations require that DSB actively consults with the director of the Client Assistance Program within Disability Rights Arkansas, Inc., and takes into account the views of the director of the Client Assistance Program prior to making any substantive changes to the delivery of vocational rehabilitation services. 34 C.F.R. § 361.20(d).

52. DSB failed to provide any notice to its consumers, the general public, or any other organization mandated by the federal regulations prior to its implementation of the substantive change to DSB's provision of services prohibiting individuals who are blind from receiving orientation services.

53. The deprivation of adequate due process, including notice and the opportunity for public comment required by the federal regulations prior to the implementation of a substantive change in DSB's provision of services violates federal regulations governing notice.

Count II:
Failure to Comply with the Arkansas Administrative Procedure Act

54. Plaintiff incorporates paragraphs 1-53, as if restated herein.

55. Agencies are only granted rulemaking authority by statute. It follows that agencies, such as DSB, are required to take certain steps, prescribed by statute, prior to the adoption, amendment, or repeal of an agency rule.

56. One such step is the requirement that the agency provide the public with notice at least thirty (30) days prior to its intended action to allow interested parties a reasonable opportunity to review, comment, and/or ask questions about the proposed change, and to otherwise participate in the rulemaking process. See Ark. Code Ann. § 25-15-204.

57. Notice must include “[a] statement of the terms or substance of the intended action or a description of the subjects and issues involved.” Ark. Code Ann. § 25-15-204(a)(1)(B)(i).

58. DSB failed to comply with the notice requirements within Ark. Code Ann. § 25-15-204 by failing to follow any of the prescribed steps to promulgate a rule that would drastically reduce, or in some cases, wholly terminate services to its consumers. Although DSB informed its consumers after the rule was in effect, through e-mails, text messages or phone calls, it did not offer any opportunity for public comment or legislative review.

59. DSB did not provide any information within the notice that would have alerted individuals that DSB was intending such a drastic change to its program that would impact beneficiaries of the program.

60. DSB’s failure to comply with the rulemaking process required by Ark. Code Ann. § 25-15-204 has and will continue to harm Plaintiff by depriving him of vocational rehabilitation services to which they are entitled under federal law and state rules and regulations. Further, DSB has deprived them of the opportunity to participate in a meaningful rulemaking process.

61. Accordingly, Plaintiff respectfully requests a declaratory judgment, pursuant to Ark. Code Ann. § 25-15-207, rendering invalid the informal promulgation of the policy or practice restricting mandatory orientation services to consumers of DSB.

Count III:
Ultra Vires Action

62. Plaintiff incorporates paragraphs 1-61 as if restated herein.

63. The Arkansas Administrative Procedure Act, Ark. Code Ann. § 25-15-204, prescribes the only steps through which an agency can create a rule.

64. DSB has failed to comply with the requirements of the Arkansas Administrative Procedure Act, Ark. Code Ann. § 25-15-204, in the rulemaking process that led to the establishment of the policy directive limiting the amount of assistance DSB would authorize.

65. DSB's failure to substantially comply with Ark. Code Ann. § 25-15-204, renders the implementation of the policy directive *ultra vires* and supports the issuance of injunctive relief preventing DSB from enforcing a policy or practice limiting orientation and mobility services for individuals who are blind.

66. Plaintiffs are all recipients of vocational rehabilitation services, governed by 34 C.F.R. Part 361.

67. Among the mandates applied through the regulations governing DSB include: "As appropriate to the vocational rehabilitation needs of each individual and consistent with each individual's informed choice, [DSB] **must** ensure that the following vocational rehabilitation services are available [. . .](k) Reader services, rehabilitation

teaching services, and orientation and mobility services for individuals who are blind.”
34 C.F.R. § 361.48.

68. DSB is currently wholesale denying “orientation and mobility services for individuals who are blind” due to a policy that does not conform to State law or federal regulation.

69. DSB’s actions are contrary to the federal regulations governing it, rendering the implementation of the policy directive *ultra vires* and supporting the issuance of permanent injunctive relief preventing DSB from enforcing the policy or practice herein described.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court grant relief as follows:

1. Issue a declaratory judgment that DSB’s implementation of the policy or practice of denying specific services mandated by federal regulation is unlawful as an *ultra vires* action for failing to conform to the requirements of the Arkansas Administrative Procedure Act, and federal regulations cited herein, and that all denials of services restricted due to the policy or practice up to the date of judgment are invalid.

2. Grant a permanent injunction preventing DSB from implementing an unlawfully promulgated prioritization policy that operates to deny federally mandated services.

3. Retain jurisdiction over the action to ensure DSB’s compliance with the orders of the Court.

4. For Plaintiff’s costs and attorney’s fees expended herein.

5. Provide further relief that the Court deems just and proper.

Respectfully submitted,

/s/ Thomas Nichols

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STATE OF ARKANSAS DIVISION OF SERVICES
FOR THE BLIND, CASSONDRA WILLIAMS,
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DEFENDANT

AFFIDAVIT OF ROBERT BLACHOWICZ

1. I am a 28-year-old resident of Little Rock, Pulaski County, Arkansas.
2. I am an individual who is blind.
3. I have had a progressive visual impairment since birth, which developed into total blindness before I was an adult.
4. I cannot read printed text.
5. I am currently unemployed.
6. I would like to work, but I require orientation skills to assist me with daily living and generalized orientation in order to seek competitive, integrated employment.
7. I am a consumer of the Division of Services for the Blind, the state's vocational rehabilitation services provider for individuals who are blind.
8. As part of the vocational rehabilitation process, Division of Services for the Blind agreed to send me to the Louisiana Center for the Blind.
9. Louisiana Center for the Blind is a non-profit organization operated by the National Federation of the Blind.

10. Louisiana Center for the Blind offers services such as orientation, cooking, cleaning, reading braille, using assistive technology, and other skills that would enable an individual who is blind to live and work independently.

11. Division of Services for the Blind, to my knowledge, has routinely sent individuals who are blind to Louisiana, Colorado, Missouri, and Little Rock to similar programs to assist those individuals with gaining the skills previously identified.

12. Division of Services for the Blind has implemented a policy or practice that prohibits sending any individuals to any programs to assist them with the skills that one would learn at Louisiana Center for the Blind or similar programs.

13. Division of Services for the Blind indicated to me that nobody would be permitted to attend any programs that provide orientation services at this time.

14. To my knowledge, Division of Services for the Blind failed to notify the public of this policy or practice that affects the provision of services, in order to permit public comment prior to its implementation.

15. I would have provided public comment had I known that Division of Services for the Blind was considering or implementing this policy.

16. As a result of this policy, I am unable to obtain orientation services to assist me with daily living skills, further impairing my ability to obtain competitive, integrated employment.

17. At this time, I require a person to assist me as a guide; accordingly, I often stay at home.

18. I have a five-month-old child with my fiancé.

19. At this time, I require assistance to care for my child.

20. While I receive support from family to provide care for my child, Division of Services for the Blind's policy or practice impairing my ability to obtain daily living skills also impairs my ability to provide care independently to my child.

21. Every day that passes in which I have not received orientation skills is another day that I am not independent or self-sufficient for myself or my child.

22. Every day that passes in which I have not received orientation skills is another day that I am unemployed and reliant on Social Security Disability and Supplemental Security Income.

23. Every day that I am unemployed will continue to impair my employability in a competitive, integrated environment.

24. With the current services provided by Division of Services for the Blind, I am neither independent, nor employable.

DATED: August 6, 2019

VERIFICATION

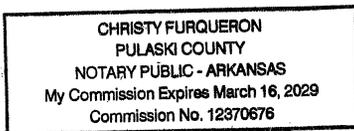
STATE OF ARKANSAS)
)ss.
COUNTY OF PULASKI)

I, Robert Blachowicz, state upon oath that I am aware of the statements made herein, and that the statements are true and correct to the best of my knowledge and belief.



Robert Blachowicz

Subscribed and sworn before me, a notary public, on this 6th day of August, 2019



Notary Public

My Commission Expires: