Legislative Commentary: Sullivan Made the Right Choice in Rejecting the Oregon Plan

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SULLIVAN MADE THE RIGHT CHOICE IN REJECTING THE OREGON PLAN

by Tom Mason†

HEALTH AND HUMAN Services Secretary Dr. Louis W. Sullivan's August 3 decision to withhold Federal approval of the controversial Oregon Medicaid rationing plan¹ has elicited a firestorm of comment. Medical ethicists, like Daniel Callahan have clucked their disapproval² and The New York Times has written two editorials criticizing the decision and accusing the Bush administration of engaging in election year politics.³ As one of the Oregon law makers intimately involved the controversy I have been asked to share my perspective on the decision to reject the plan.

Let me start by saying that I haven't read a single evaluation of Secretary Sullivan's conclusion that even begins to understand, much less appreciate, the real issues raised by his rejection. Similarly, the outspoken supporters of the plan have never been willing to admit the real reasons for the "tough choices" the proposal requires between life for some and death for others.

Secretary Sullivan rejected the plan because it conflicted with the Americans with Disabilities Act ("ADA"), recently enacted, comprehensive and rigorous federal legislation designed to protect the rights of handicapped Americans. The Secretary decided that the prioritization process was legally flawed because the data derived from a telephone survey which was used to define "quality of

† Oregon State Representative, District 11.


². See Robert Pear, Too-Bitter Medicine, N.Y. TIMES, Aug. 5, 1992 at A8.

life” quantified “stereotypic assumptions” about disabled persons. Respondents to the phone survey, which generated the numerical values eventually used in the prioritization formula, were generally not handicapped and therefore the Secretary concluded, would “systematically undervalue the quality of life of those with disabilities.”

Secretary Sullivan was also concerned that other components of the ranking process reflected discrimination against disabled Americans as well:

“According to the [the Oregon Health Services] Commission Report, the Commissioners ranked all categories and made hand adjustments to the list on the basis of certain community values, including ‘quality of life’ and ‘ability to function.’ These two values place importance on ‘restored’ and ‘independence’ and thus expressly value a person without a disability more highly than a person with a disability in the allocation of medical treatment. . . .[A]ny methodology that would intentionally ration health care resources by associating quality of life considerations with disabilities does not comport with the mandate of the ADA.”

Finally, the Secretary points out that the plan’s “refusal to cover life support” for some low birthweight babies may also conflict with the Child Abuse Amendments of 1984 which established standards for treatment of medically fragile infants, and presupposed the rendering of life support services to such infants.

The only surprising thing about the decision is that it took federal officials so long to see the obvious. His analysis is a bureaucratic version of the old fairy tale in which a forthright child points out what her elders have been afraid to say -- the emperor has no clothes! Of course the rationing plan discriminates, that is what it is all about. Decision makers in Oregon were so intent upon being the first to adopt an elitist health care rationing program that it never occurred to them that process involved discrimination. Discrimination almost always involves a benign act on the part of perpetrator -- a simple failure to comprehend that the act of discrimination requires a presumption upon the relative value of human sensibilities, human lives. That is what the Oregon plan does throughout, it values one person’s life over another for subjective reasons, the ultimate act of discrimination.

Overall Sullivan’s objections are extremely well taken, and in my opinion not the type of reservations which can be accommo-

4. Letter from Secretary of Health and Human Services Dr. Louis W. Sullivan to Governor Barbara Roberts and accompanying explanation, August 3, 1992 (on file with author).
REJECTING THE OREGON PLAN

dated by minor amendments to the plan. The rejection, however, along with almost all other commentaries on the plan, ignores the political motivation for the whole proposal.

Why is there so much interest in medical care in one of America’s smallest states? As we confront the health care dilemma we search desperately for new solutions, new paradigms. It is fairly obvious that the Canadian health care system is seen by many as the most viable alternative to the American status quo. In Canada the government is the sole purchaser of health care and dictates what providers will receive for their services. The Oregon proposal, for expanding Medicaid but reducing services, is now looked upon by the American medical establishment as the alternative model to the Canadian system. Every major medical provider group in Oregon supported the new plan.

Effective health care availability in Canada is based upon paying less for services, i.e. real cost control or reduction. In Oregon the expansion of the availability of health care was based upon providing less services, literally one hundred and eighty degrees from Canada. The dirty little secret of the Oregon plan is that not only does it not control medical costs, but it actually mandates that providers get paid more! The law says that providers will get their actual costs and it has been estimated that this will increase Oregon Medicaid fees by more than thirty percent. This is why the Oregon plan is so attractive to medical industry. Not only does it offer a viable counter-proposal to Canada, but it preserves, if not increases, incomes. If this Oregon scheme is adopted it will give the opponents of a national health care system yet another excuse for postponing the inevitable.

There has been a woeful lack of appreciation of the political significance of the Oregon plan. Academics, and “medical ethicists” have been absolutely enamored with the proposal. It has given them a grand opportunity for discussion and a chance to make a hard “ethical” decision to approve the rationing of health care. Like so many young doctors with their first patients they can not wait to use their new found power. The discussion of health care rationing has turned into a modern day exercise in the selling of indulgences by a new priesthood.

It is probably well to conclude by revisiting the actual situation which produced the Oregon plan. The proposal was another chapter in a controversy over health care rationing which started several years ago in the state. During the 1987 legislature session, a joint appropriations sub-committee eliminated Medicaid funding for or-
gan transplants. Funds saved by the elimination of the program were later used for the expansion of Oregon's juvenile detention center, MacClaren. The following dialog occurred at the end of the hearing:

   Senator Roberts: "I think that no one here likes the decisions we've made, but I guess I always think of that book Sophie's Choice, particularly when we are dealing with the situation (transplant funding) you are referring to, Tom, that you actually say to somebody, 'No, we can't save your life.'

   Representative Mason: "Mr. Chairman, I would buy that if I didn't see you pumping $680,000 into MacClaren. That sticks in my craw. I'm sorry. How you can put MacClaren on one side and soft organ transplants on the other side is totally beyond me. I just don't understand that. People need those transplants. Instead, you are beefing up a jail."

   Senator Roberts: "I know that."

   Seven months later this exercise in real politic took its first victim, seven year old Coby Howard, who died due to a lack of a bone marrow transplant. Notwithstanding the policy questions, this is what health care rationing is about. Secretary Sullivan did the right thing in rejecting the Oregon plan. William Styron's heroine Sophie was forced to choose between the life of her son or her daughter by the ultimate embodiment of morally bankrupt government, a Nazi concentration camp officer. We owe it to our children, to our families and to ourselves not to be forced into making such choices.

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5. Hearing on HB-5027 Before the Human Resources Subcomm. of the Joint Committee on Ways and Means, 64th Oregon Legislative Assembly, (May 15, 1987), (Final action on Department of Human Resources budgets, Tape 148-B), HB-5027 Budget Report.