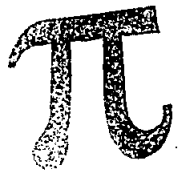

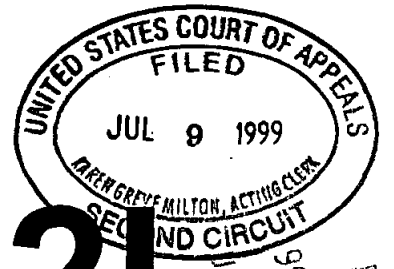

99-7572L

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

99-7586(CON), 99-7588(CON), 99-7604(CON), 99-7618(CON)

JUANA RODRIGUEZ, by her son and next friend, Wilfredo Rodriguez, AMELIA RUSSO; MARY WEINBLAD, by her daughter and next friend, Susan Downes, CRISTOS GOUVATSOS, SIDONIE BENNETT, individually and on the behalf of all others similarly situated,

Plaintiffs-Appellees,

MOLLIE PECKMAN, by her son and next of friend, Alex Peckman,

Intervenor-Plaintiff-Appellee,

-against-

CITY OF NEW YORK, IRENE LAPIDEZ, Commissioner Nassau County Department, of Social Services, COMMISSIONER OF THE WESTCHESTER DEPARTMENT COUNTY DEPARTMENT OF SOCIAL SERVICES, COMMISSIONER, SUFFOLK COUNTY DEPARTMENT OF SOCIAL SERVICES, THE NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES,

Intervenors-Defendants-Appellants,

DENNIS WHALEN, Acting Commissioner of the New York State Department of Health, BRIAN WING, Commissioner of the New York State Office of Temporary and Disability Assistance,

Defendants-Appellants,

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR STATE DEFENDANTS-APPELLANTS WHALEN AND WING

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SAS

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Preliminary Statement

Defendants-appellants Dennis Whalen, Acting Commissioner of the New York State Department of Health, and Brian Wing, Commissioner of the New York State Office of Temporary and Disability Assistance (collectively the "State"), submit this reply brief in further support of their appeal from the district court's order and judgment permanently enjoining the State to add the undefined function of continuous "safety monitoring as a separate task" to its Medicaid personal care services program.

Neither the Supreme Court's recent decision in Olmstead v. L.C., 67 U.S.L.W. 4567 (June 22, 1999) (Point I, infra), nor the federal Medicaid "comparability" requirements (Point II, infra) provide support for the district court's injunction. It was not "discriminatory" for the State to determine that mentally disabled plaintiffs who required additional care not available in the State's personal care services program were ineligible for that program. Indeed, Olmstead reaffirms that states have broad discretion in fashioning and administering their programs which provide care and services to the disabled.

POINT I

THE SUPREME COURT'S RULING IN OLMSTEAD V. L.C. DOES NOT REQUIRE THE STATE TO CHANGE THE BASIC NATURE OF ITS MEDICAID PERSONAL CARE SERVICES PROGRAM TO ADDRESS THE NEEDS OF THE MENTALLY DISABLED INDIVIDUALS WHO ARE INAPPROPRIATE CANDIDATES FOR CARE IN THIS PROGRAM

Plaintiffs rely heavily on the Supreme Court's recent decision in Olmstead v. L.C., 67 U.S.L.W. 4567 (June 22, 1999), for the proposition that the district court properly enjoined the State to include "safety monitoring as a separate task" in its Medicaid personal care services program. Their reliance is misplaced, both because Olmstead is distinguishable on its facts, and because it reaffirms that the states have broad discretion to fashion and administer their programs servicing the disabled.

First, in Olmstead it was undisputed that the plaintiffs there were appropriate candidates for treatment in the program to which they sought access:

> In this case . . . there is no genuine dispute concerning the status of L.C. and E.W. as individuals "qualified" for noninstitutional care: The State's own professionals determined that community-based treatment would be appropriate for L.C. and E.W.

67 U.S.L.W. at 4573.

Here, by contrast, plaintiffs challenged State determinations that certain mentally disabled individuals were not

appropriate candidates for treatment within the State's personal care services program, not that they were appropriate candidates who were denied access solely for financial reasons. For example, as we pointed out in our main brief, plaintiff Russo, who suffered from Alzheimer's disease, was denied eligibility because, inter alia, she was forgetful, frequently wandered, created fire hazards, and was physically abusive to an aide and needed twenty-four hour supervision. A 2056-57. Similarly, plaintiff David, who suffered from cognitive meulet syndrome (mental confusion), and plaintiff Reece, who wandered to the point that her home care aide was required to barricade her door at night, were denied eligibility because of their need for continuous, intensive supervision. A 3337-38, 3324-26.

Nothing in Olmstead authorizes a court to substitute its views on program eligibility for those of the defendants. To the contrary, Olmstead states:

> Consistent with [ADA] provisions, the State generally may rely on the reasonable assessments of its own professionals in determining whether an individual "meets the essential eligibility requirements" for habilitation in a community-based program. Absent such qualification, it would be inappropriate to remove a patient from the more restrictive setting. See 28 CFR § 35.130(d) (1998) (public entity shall administer services and programs in "the most integrated setting *appropriate* to the needs of qualified individuals with disabilities" (emphasis added)); cf. School Bd. of Nassau Cty. v. Arline, 480

> U.S. 273, 288 (1987) ("[C]ourts normally should defer to the reasonable medical judgments of public health officials.")

67 U.S.L.W. 4572-73.

Second, Olmstead cannot reasonably be read to authorize federal courts to alter basic program eligibility requirements, or to effect changes in the level of services offered in particular programs. Indeed, the Court expressly disclaimed such a construction of its decision:

> We do not in this opinion hold that the ADA imposes on the States a "standard of care" for whatever medical services they render, or that the ADA requires States to "provide a certain level of benefits to individuals with disabilities."

Olmstead, 67 U.S.L.W. at 4573 n. 14.

Yet, that is precisely the thrust of the district court's injunction. By requiring "safety monitoring as a separate task", the court has imposed its own "standard of care" upon the State's personal care services program, and has enjoined the State to provide "a certain level of benefits" for the mentally disabled. The district court's injunction cannot be reconciled with the fact that, at most, the ADA requires only "reasonable" modifications in

State programs, not their fundamental re-construction.[1] We submit that a "reasonable modification" does not contemplate the transformation of a program from one that provides assistance with discrete home care tasks into one that provides continuous twenty-four hour monitoring of dementia patients.[2] From a functional standpoint, the injunction in this case impermissibly creates a new program that provides a service which is separate and distinct from assistance with routine home care tasks. Justice Kennedy's concurrence in Olmstead notes, however, that;

> [g]rave constitutional concerns are raised when a federal court is given the authority to review the State's

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[1] Plaintiffs mistakenly contend that New York State's fiscal assessment law (Social Services Law § 367-k) is "currently in effect" to purportedly mitigate the consequences of the district court's injunction. Plaintiffs' Brief at pp. 11, 33. However, SSL § 367-k expired on July 1, 1999. Chapter 433, Section 16, N.Y. Session Laws of 1997.

[2] Plaintiffs' claim that the Health Care Financing Administration has somehow affirmed their view of the personal care services program is baseless. HCFA's transmittal letter of January 1, 1999 clearly reiterated that this program is oriented toward the assistance with completion of tasks, not amorphous and unlimited "safety monitoring." State Medicaid Manual, Part 4, HCFA Pub. 45-4 Transmittal No. 72 (Med-Guide-TB ¶ 150,239). As with physically disabled persons, cognitively impaired individuals may receive assistance "to ensure that the individual performs the task properly." Id. at ¶ C(1). The injunction here, by contrast, requires that personal care services be provided for purposes of "safety monitoring" irrespective of whether an individual needs assistance with tasks or activities. A 4546.

> choices in basic matters such as establishing or declining to establish new programs. It is not reasonable to read the ADA to permit court intervention in these decisions.

67 U.S.L.W. at 4576.[3]

Finally, plaintiffs' contention that the State does not have a "comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings", is erroneous (Plaintiff's Brief at p. 36, citing Olmstead, 67 U.S.L.W. at 4574). Plaintiffs concede that "many cognitively impaired individuals are currently served" in the

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[3] To the extent that the district court applied a test to the State's policy that was more stringent than a "rational basis" test, it arguably interpreted the ADA as mandating relief in excess of Congress's authority under the 11th and 14th Amendments to the Constitution. Cf. Kilcullen v. New York State Department of Transportation, 33 F. Supp. 2d 133, 152 (N.D.N.Y. 1999) (invalidating ADA requirement for state "to accommodate any form of disability up to the point of undue hardship" as beyond Congress' authority); Brown v. North Carolina Division of Motor Vehicles, 166 F.3d 698, 708 (4th Cir. 1999) (invalidating ADA regulation prohibiting the imposition of a minimal fee to cover cost of disabled accessibility programs because it exceeded "rational basis" test under the 11th and 14th Amendments).

It is noteworthy that the Supreme Court expressly stated in Olmstead that it did not pass upon the underlying validity of the ADA's "most integrated setting" requirement or other ADA requirements: "We recite these regulations with the caveat that we do not here determine their validity ... [W]e do not understand petitioners to challenge the regulatory formulations themselves as outside the congressional authorization." 67 U.S.L.W. at 4570.

personal care services program. Plaintiff's Brief at 12. Plaintiffs utterly failed below to demonstrate that more than a few individuals have been denied access to the State's personal care services program because of task-based assessment. The fact that a few individuals were determined ineligible after careful assessment and review of their cases by the local social services district professionals hardly demonstrates that there is a systemic denial of reasonable program access for an appreciable number of qualified individuals.[4]

POINT II

PLAINTIFFS HAVE FAILED TO SHOW THAT THE STATE VIOLATES FEDERAL MEDICAID LAW BY LIMITING ITS PERSONAL CARE SERVICES PROGRAM TO THE PROVISION OF ASSISTANCE WITH RECOGNIZED DAILY TASKS AND ACTIVITIES

Plaintiffs have failed to provide authority for the proposition that, under 42 U.S.C. 1396a(a)(10)(B), widely disparate medical needs such as housekeeping assistance, or routine skin care, are "comparable" to the unlimited safety monitoring of

[4] The district court itself found that individualized challenges to particular fact-intensive assessments by local social services districts are sufficiently redressable by the State's fair hearing process and Article 78 review in the State courts. Rodriguez v. DeBuono, 177 F.R.D. 143, 177 (S.D.N.Y. 1997).

mentally ill patients who pose a constant danger to themselves. Indeed, Parry v. Crawford, 990 F. Supp. 1250 (D. Nev. 1998), cited at p. 38 of Plaintiffs' Brief, only serves to illustrate that the needs which are at issue in this case are not "comparable." In Parry, the State failed to show that individuals who were mentally retarded had medical needs that differed for comparability purposes from individuals with conditions such as Cerebral Palsy and Epilepsy that "related to mental retardation." 990 F. Supp. at 1257.

Here, however, plaintiffs and the district court have failed to identify authority which suggests that routine home care needs such as assistance with shopping, cleaning, toileting and bathing, "are related" to the need for continuous safety monitoring of individuals who wander and engage in self-destructive behavior.

The Federal Medicaid Regulations At Issue Are Not Privately Enforceable

Plaintiffs also failed to support their contention that the federal Medicaid regulations relied upon by the district court are privately enforceable, and were violated by the defendants. Plaintiffs' hyperbole (e.g., Plaintiffs' Brief at p. 45) is not an adequate substitute for proof that the State's personal care services program fails to satisfy the needs of the vast majority of

Medicaid recipients. Nor do plaintiffs cite authority for their contention that a Medicaid plan is required to provide the precise level of care sought by each and every recipient. To the contrary, the Supreme Court has recognized that the states must be allowed discretion in developing their Medicaid plans, and that requiring the distribution of benefits to be invariably the "most favorable" to the handicapped would "impose a virtually unworkable requirement on state Medicaid administrators." Alexander v. Choate, 469 U.S. 287, 309 (1985); Beal v. Doe, 432 U.S. 438, 446 (1977) (states have "wide discretion" under Title XIX to determine the extent of coverage of Medicaid services).

Lack Of Harm

Finally, notwithstanding plaintiffs' continued refrain that there is a grave risk of harm to Medicaid recipients if they do not receive "safety monitoring as a separate task" of home care, the fact remains that plaintiffs have been unable to produce a single individual who actually suffered any demonstrable harm because a reputed need for this "service" was denied. To this date, and despite the passage of two and one half years without any preliminary injunctive relief, plaintiffs' allegations of harm remain speculative. The district court plainly erred in finding that there was a threat of "irreparable harm" when none has been

shown, and task-based assessment has been in existence for nearly ten years.

CONCLUSION

For all of the foregoing reasons, the district court's order and judgment should be reversed and the permanent injunction should be vacated.

Dated: New York, New York
July 8, 1999

Respectfully submitted,

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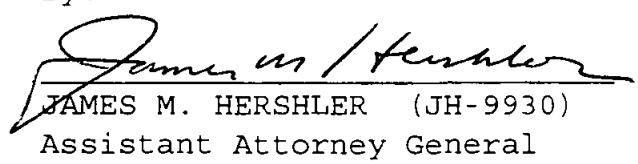

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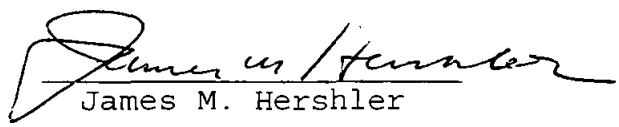
CERTIFICATION OF COMPLIANCE

I, James M. Hershler, counsel for State Defendants-Appellants Whalen and Wing, hereby certify that the within brief is in compliance with FRAP 32(a)(7) in that: (1) the brief utilizes non-proportional (monospaced) typeface with no more than 10.5 characters per inch, and (2) the brief contains 2380 words.



James M. Hershler