No. 04-6068

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MICHELA LEOCATA through MATTHEW T. GILBRIDE, ESQ., CONSERVATOR OF HER ESTATE AND NEXT FRIEND,

Plaintiffs-Appellants,

v.

TOMMY G. THOMPSON, SECRETARY OF THE U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, PATRICIA WILSON-COKER, COMMISSIONER, CONNECTICUT DEPARTMENT OF SOCIAL SERVICES,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE FEDERAL APPELLEE

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STATEMENT OF JURISDICTION

The district court had jurisdiction over plaintiff's claims pursuant to 28 U.S.C. 1331. In a published decision, 343 F. Supp. 2d 144 (D. Conn. Nov. 3, 2004), the district court denied plaintiff's motion for a preliminary injunction and entered a final judgment in favor of both the state and federal defendants. Plaintiff filed a timely notice of appeal on November 12, 2004. Dkt# 60. This Court has appellate jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUE PRESENTED

Whether the district court erred in dismissing claims seeking to compel the payment of Medicaid benefits that would allow plaintiff to remain at the "assisted living facility" where she currently resides.

STATEMENT OF THE CASE

The Medicaid program provides reimbursement for the costs of medical assistance for eligible individuals at nursing facilities ("NFs") but does not generally cover the costs of residential services, including room and board, at assisted living facilities ("ALFs"). Congress drew this distinction in the Medicaid Act at least in part because the Act requires NFs to be certified periodically to meet certain health and safety requirements that assure quality care, while ALFs are not required to meet any specific quality control standards

Plaintiff Michela Leocata is an elderly woman suffering from dementia. At the time she filed her complaint in this case, plaintiff was living at Arden Courts, an assisted living facility in Farmington, Connecticut. Anticipating that she would run out of money to pay for her stay at Arden Courts within a few years - and that she would therefore likely become eligible for Medicaid benefits - plaintiff filed suit against the Commissioner of the Connecticut Department of

Social Services and the federal Secretary of Health and Human Services, seeking to compel the payment of Medicaid benefits that would allow her to remain at Arden Courts rather than relocating to a skilled nursing facility where the costs of her care would likely be covered under Medicaid. Among other things, plaintiff argued that the Medicaid Act's distinction in coverage between the costs of NFs and ALFs violated her constitutional rights to equal protection and due process. Moreover, just a few weeks before the hearing on her motion for a preliminary injunction, plaintiff added a claim under the Americans With Disabilities Act ("ADA"), asserting that the ADA required the State of Connecticut to provide Medicaid benefits to cover the costs of her care in the "most integrated setting" available, and thus to fund her continued stay at Arden Courts.

The district court rejected each of plaintiff's claims. In a published decision, 343 F. Supp. 2d 144, the court held that plaintiff's equal protection and due process claims did not trigger any form of heightened scrutiny - because they did not involve suspect classifications or impair fundamental rights - and that the Medicaid Act's distinction in coverage between NFs and ALFs easily satisfied rational basis review. With regard to plaintiff's ADA claim, the court held that

requiring the State to fund her stay at Arden Courts was not a reasonable accommodation required under the ADA, but instead "would represent a grant of special substantive rights to Leocata." Id. at 156. Accordingly, the court denied plaintiff's request for injunctive relief and dismissed all the claims against both the federal and state defendants. On appeal, plaintiff has abandoned her equal protection and due process claims, limiting her appeal solely to the dismissal of her ADA claim against the State.

STATEMENT

A. The Medicaid Program.

1. The Medicaid program, established in 1965 as Title XIX of the Social Security Act, 42 U.S.C. 1396 et seq., is a cooperative federal-state program that provides medical assistance to certain low-income individuals. Harris v. McRae, 448 U.S. 297, 301 (1980). The primary purpose of the Medicaid program is to

> enabl[e] each State, as far as practicable under the conditions in such State, to furnish * * * medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals whose income and resources are insufficient to meet the costs of necessary medical services.

42 U.S.C. 1396. See also DeJesus v. Perales, 770 F.2d 316, 318 (2d Cir. 1985).

Although State participation in Medicaid is voluntary, once a State elects to participate, it must comply with all the requirements of Title XIX. See Harris, 448 U.S. at 301. Thus, in order to participate in the Medicaid program, a State must have a "plan for medical assistance" that has been approved by the Centers for Medicare & Medicaid Services ("CMS"), which administers the federal Medicaid program on behalf of the Secretary of Health and Human Services ("HHS"). 42 U.S.C. 1396a.

A State's plan must specify, among other things, the categories of individuals who will receive medical assistance under the plan and the specific kinds of medical care and services that will be covered. 42 U.S.C. 1396a(a)(10) & (17). While States are accorded broad flexibility to tailor the scope and coverage of their plans to meet budgetary and other constraints, see Alexander v. Choate, 469 U.S. 287, 303 (1985), the Medicaid Act establishes a number of prerequisites for approval. 42 U.S.C. 1396a(a)(1)-(65). For example, States are required to make medical assistance available to certain "categorically needy" persons, 42 U.S.C. 1396a(a)(10), and to fund medical services for such persons in five general areas: (1) inpatient hospital services, (2) outpatient hospital services, (3) other laboratory and X-ray services,

(4) skilled nursing facilities services and family planning services, and (5) services of physicians, see 42 U.S.C. 1396a(a)(1)-(5). At their option, States may also make medical assistance available to "medically needy" persons. 42 U.S.C. 1396a(a)(10). If a state plan is approved, the State is thereafter eligible for federal financial participation, i.e., reimbursement by the federal government for a specified percentage of the amounts expended as "medical assistance" under the State plan. 42 U.S.C. 1396b(a)(1), 1396d(b).[1] See also Lewis v. 252 F.3d 567, 570 (2d Cir. 2001) (noting that "the federal government partially reimburses the state for the state's expenditures in subsidizing medical services for needy citizens covered by its plan").

2. The Medicaid Act defines "medical assistance" to include a variety of medical, health, and supportive services. 42 U.S.C. 1396d(a). This term includes inpatient care (and room and board) provided by three basic types of facilities: (1) hospitals, (2) nursing facilities, and (3) intermediate care facilities for the mentally retarded ("ICF/MRs"). 42

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[1] Federal financial participation is calculated according to a formula that pays, at a minimum, 50% of a State's costs. See 42 U.S.C. 1396b(a)(1), 1396d(b); 42 C.F.R. 433.10. The federal government also pays at least 50% of the costs that a State incurs in administering its Medicaid program. See 42 U.S.C. 1396b(a)(2)-(5), (7); 42 C.F.R. 433.15.

U.S.C. 1396d(a)(1), (4), (14),(15) & (16). The Act also establishes detailed certification and licensing standards that these facilities must satisfy in order to receive reimbursement from Medicaid. See 42 U.S.C. 1396d(c), (d), (h); 42 U.S.C. 1396r. See also 42 C.F.R. 440.10(a)(3)(iii), 440.150(a)(3), 441.151(b), & 483, Subparts B and I.

The Medicaid Act specifically defines the functions that an institution must perform before it can qualify as a "nursing facility," see 42 U.S.C. 1396r(a), and specifies a variety of other requirements NFs must satisfy relating to the provision of services, residents' rights, and other matters, 42 U.S.C. 1396r(b), (c), (d). The Act also requires that NFs be periodically "certified" (based upon on-site surveys), as meeting applicable health and safety requirements. 42 U.S.C. 1396r(a)(3). See also 42 C.F.R. 483.1, et seq. (establishing standards for skilled nursing facilities under Medicare and NFs under Medicaid). Moreover, the Act requires each NF to enter into a provider agreement with the State and the Secretary (if the facility also participates in Medicare). 42 U.S.C. 1395cc(a); 42 U.S.C. 1396a(a)(27). If it is determined that a NF no longer meets program requirements, various sanctions may be imposed, including termination of the facility's provider agreement. 42 U.S.C. 1396r(h).

In contrast with the detailed standards and certification requirements applicable to NFs, the Medicaid Act makes no explicit reference to assisted living facilities ("ALFs").[2] Because the Act establishes no certification requirements or other standards for such facilities, see Senate Report, at 111 ("Unlike for nursing homes, there are no Federal regulations governing [quality of care in] ALFs"), the Act likewise provides no coverage for room-and-board and other costs at ALFs. This is consistent with Congressional intent "to use limited Medicaid dollars to pay for room and board expenses only in those facilities for which Congress has extracted the quid pro quo of federal quality assurance standards." State of Texas v. Department of Health and Human Services, 61 F.3d 438, 442 (5th Cir. 1995).

Although the costs of ALFs are not generally eligible for federal reimbursement under Medicaid, States may nonetheless provide coverage for certain types of health or supportive

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[2] While the term "assisted living facility" is not defined in the Medicaid Act, ALFs are residential facilities that offer room and board and various personal, supportive, or health services to persons with functional or cognitive impairments. ALFs "range from tony, hotel-like buildings to small group homes that provide services to persons with low income." S. Rep. No. 158(1), 107th Cong., 2d Sess. (2002), Developments in Aging: 1999 and 2000-Volume 1, (available at 2002 WL 1266111), at 110 ("Senate Report"). ALFs provide their residents with little or no medical care. Ibid.

services (e.g., skilled nursing and home health aide care) to eligible individuals who live in their homes, community settings, or ALFs. See 42 U.S.C. 1396d(a)(7) & (24); 42 C.F.R. 440.70 & 440.167. Moreover, the Secretary of HHS may grant a waiver authorizing a State to furnish certain home or community-based ("HCB") services that would not otherwise qualify as "medical assistance" under the Medicaid program, provided these services are furnished to individuals who would require the level of care provided in covered facilities such as hospitals or nursing facilities. See 42 U.S.C. 1396n(c); 42 C.F.R. 440.180 and 441.300. See also Skandalis v. Rowe, 14 F.3d 173, 176 (2d Cir. 1994).

In short, HHS-approved waiver programs allow coverage for HCB services that enable elderly, disabled, or chronically-ill persons, who would otherwise be institutionalized, to live in the community. However, the Medicaid Act expressly prohibits a State from including "room and board" as an HCB service. See 42 U.S.C. 1396n(c)(1). See also 42 U.S.C. 1396t(a)(9), and 1396u(f)(1) (excluding "room and board" from "home and community care" and "community supported living arrangements services"); 42 C.F.R. 441.360(b). Thus, in no event could the costs of room and board at an ALF be covered under Medicaid, even under an approved waiver program for HCB services.

B. Factual Background and Proceedings Below.

1. On June 19, 2002, plaintiff Michela Leocata, an elderly woman suffering from advanced dementia, filed a complaint against the Commissioner of the Connecticut Department of Social Services and the federal Secretary of Health and Human Services,[3] seeking to compel the payment of Medicaid benefits to allow her to remain at Arden Courts, the assisted living facility where she was then living. JA 141. Although plaintiff had never applied for Medicaid, she alleged that she would no longer be able to pay her expenses at Arden Courts in approximately two years, and that she would then become eligible to receive Medicaid benefits. JA 142. Because the relevant Medicaid statutes and regulations "do not allow benefits to be paid to 'assisted living' facilities, but only to 'skilled nursing care' facilities," plaintiff also alleged that she would be forced to enter a Medicaid-certified nursing facility, even though a NF would allegedly be more expensive than an ALF, and would "not be able to adequately address her special needs." JA 143.

Asserting that she would "suffer unnecessarily" if forced to leave Arden Courts, plaintiff claimed that she should not

[3] Pursuant to Fed. R. App. P. 43(c)(2), Michael O. Leavitt, Secretary of Health and Human Services, is substituted for the federal appellee, Tommy Thompson.

be "relegated" to a Medicaid-certified nursing facility "because of her poverty and an arbitrary and capricious series of federal and state statutory, and administrative regulations, which as currently interpreted by the defendants, deny her Due Process and Equal Protection." JA 143 (Compl. ¶ 9). Accordingly, plaintiff sought "a declaratory ruling from the Court, ordering the public defendants to allocate funds, pursuant to the Medicaid program under Title XIX, as administered by the State of Connecticut, to pay for her care at Arden Courts as soon as her private estate is unable to make payment." JA 144 (Compl. ¶ 11).

2. Construing plaintiff's complaint as a due process and equal protection challenge to the distinction in Medicaid coverage for the costs of NFs and the costs of ALFs, both the State of Connecticut and the Secretary of HHS moved to dismiss plaintiff's claims. Dkt# 16, 21. Among other things, both defendants argued that plaintiff lacked standing to proceed because her alleged injury (removal from Arden Courts) was purely conjectural at that point. Both defendants also argued that plaintiff's injuries were not redressable because Arden Courts was neither eligible nor required to accept Medicaid payments on her behalf and that the bulk of plaintiff's costs were for "room-and-board" and other services that would not

qualify for Medicaid reimbursement even if Arden Courts elected to participate in a waiver program allowing Medicaid coverage for certain "assisted living" costs. Finally, both defendants also argued that plaintiff's constitutional claims were without merit because the statutory provisions at issue were rationally related to legitimate government interests.

While the defendants' motions to dismiss were pending, plaintiff filed a motion for a preliminary injunction, and on July 9, 2004 she sought leave to amend her complaint to add a claim under Title II of the ADA, JA 145. The district court granted plaintiff's motion to add an ADA claim, Dkt# 39, and held a hearing on her motion for a preliminary injunction on July 19, 2004.

At the preliminary injunction hearing, the conservator of plaintiff's estate testified that plaintiff would run out of funds to pay for her expenses at Arden Courts by September 2004 and that she would, in his opinion, then become eligible for Medicaid benefits. JA 9. Witnesses also testified that it would be "very traumatic" for plaintiff if she were forced to leave Arden Courts and move to a skilled nursing facility (where the costs of her medical care, including room-and-board, could be covered under Medicaid), because her advanced dementia impairs her ability to form new relationships and it

would be difficult for her to adjust to a new environment. JA 33, 49. However, plaintiff's witnesses conceded that Arden Courts was not a participant in the Medicaid program. JA 59. Moreover, plaintiff offered no evidence as to what portion of her monthly expenses at Arden Courts were for "room and board" costs as opposed to costs for "assisted living" care.

In addition, the State presented evidence that, although it has several pilot programs under which it pays for some assisted living services, the State does not pay for room and board under any of these programs because this is prohibited under the terms of its Medicaid waiver. JA 71-72. See also JA 85. The evidence at the hearing also showed that Arden Courts is not participating in any of these pilot programs, JA 73, that plaintiff has not applied to participate in any of these programs, JA 75, and that Arden Courts is not, in any event, an enrolled provider eligible to receive Medicaid payments from the State under Title XIX, JA 87-88.

3. On November 3, 2004, the district court issued a published decision, 343 F. Supp. 2d 144, rejecting plaintiff's claims that, upon the depletion of her estate, the Medicaid program should be compelled to cover all the costs, including room and board, necessary for her to remain at Arden Courts. The court first held that plaintiff had standing to proceed

because "she faces the imminent injury of being forced to leave Arden Courts." Id. at 148.[4] Noting that "Leocata would seek to stay at Arden Courts if Medicaid would reimburse her room and board costs there," the court concluded that "requiring Medicaid to provide such reimbursement would redress her situation fully." Ibid. Thus, the court expressly predicated its conclusion that plaintiff's injuries were redressable on its understanding that plaintiff was seeking to compel Medicaid coverage for both "assisted living services" and the costs of "room and board" at Arden Courts.

On the merits, the district court rejected plaintiff's claims that the Medicaid program violated her equal protection or due process rights. Because the Medicaid Act's distinction between the coverage provided for services at NFs and ALFs did not involve a suspect class or impair any fundamental rights, the court first held that it was subject only to rational basis review, and held that the Act satisfied this standard. Id. at 150-52. And, relying on Harris v. McRae, 448 U.S. 297 (1980), and O'Bannon v. Town Court Nursing Ctr., 447 U.S. 773 (1980), the court rejected plaintiff's due process claim,

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[4] While acknowledging that plaintiff's "injury may have been speculative at the outset of this litigation," the court found that her funds were now nearly exhausted and she thus faced the "imminent prospect of having to leave Arden Courts due to lack of funds." Id. at 148 n.3.

concluding that "Leocata has no protected liberty or property interest that would require the Medicaid program to fund her continued residence at Arden Court." 343 F. Supp. 2d at 154.

Finally, with regard to plaintiff's ADA claim, the court rejected her argument that the Supreme Court's decision in Olmstead v. L.C. by Zimring, 527 U.S. 581 (1999), "established a general rule that the ADA requires disabled Medicaid recipients to be provided care in the most integrated setting appropriate to their needs, and that she therefore should be accommodated at Arden Courts." Id. at 155. Noting that this Court has construed Olmstead "more narrowly," the district court quoted Rodriguez v. City of New York, 197 F.3d 611 (2d Cir. 1999), for the proposition that Olmstead "holds only that 'States must adhere to the ADA's nondiscrimination requirement with regard to the services they in fact provide.'" 343 F. Supp. 2d at 155 (quoting Rodriguez, 197 F.3d at 619 (quoting Olmstead, 527 U.S. at 603 n.14)).

Because plaintiff "does not allege that defendants have denied her any Medicaid benefits due to her disability," or "any discriminatory animus by defendants against persons with dementia," the court held that she had not stated a valid discrimination claim under the ADA. Id. at 156. Thus, as the court further explained, requiring the State to fund her stay

at Arden Courts would not be a reasonable accommodation under the ADA, but instead "would represent a grant of special substantive rights to Leocata." Id. at 156. Accordingly, the district court denied plaintiff's motion for a preliminary injunction and dismissed all the claims against both the federal and state defendants.

SUMMARY OF ARGUMENT

The district court properly dismissed plaintiff's claims seeking to compel the payment of Medicaid benefits that would allow her to remain at Arden Courts, the assisted living facility where she was living at the time she filed suit. As the court recognized, the distinction drawn in the Medicaid Act - between coverage for the costs of medical care (and "room and board") provided at nursing facilities (NFs) and coverage for the costs of residential services provided at assisted living facilities (ALFs) - is rationally related to legitimate government interests and thus does not violate the Equal Protection or Due Process clauses of the Constitution. Because plaintiff has not challenged these rulings on appeal, the district court's decision with respect to the only legal claims that could provide any basis for relief against the federal Secretary of HHS must be affirmed.

With respect to plaintiff's ADA claim - the sole legal claim now remaining in this case - the district court's decision must also be affirmed for at least two reasons. First, the ADA does not apply to the federal government, and this claim thus provides no basis for exercising jurisdiction over the federal Secretary of HHS. Second, plaintiff's ADA claim fails because any decision providing the relief she has requested - Medicaid reimbursement for all her expenses at Arden Courts - would require a court to hold that the general anti-discrimination provisions of the ADA trump (or implicitly repeal) the more specific Medicaid scheme, which does not generally allow coverage for "assisted living services," and specifically prohibits funding for the costs of "room and board" under the limited waiver programs allowing States to provide some coverage for "assisted living services" in home or community-based settings. See 42 U.S.C. 1396n(c)(1). Because no basis exists for concluding that Congress intended for the ADA's general anti-discrimination provisions to override specific provisions of the Medicaid Act, the dismissal of plaintiff's ADA claim is required on this basis alone, and the Court need not address any additional issues concerning the scope of the State's "reasonable accommodation" obligations under the ADA and Olmstead.

STANDARD OF REVIEW

The district court's dismissal of plaintiff's claims is subject to de novo review in this Court. See York v. Assoc. of the Bar of the City of New York, 286 F.3d 122, 125 (2d Cir. 2002). The court's denial of injunctive relief is reviewed for abuse of discretion. See Mywebgrocer, LLC v. Hometown Info., Inc., 375 F.3d 190, 192 (2d Cir. 2004).

ARGUMENT

THE DISTRICT COURT PROPERLY DISMISSED PLAINTIFF'S CLAIMS SEEKING TO COMPEL THE PAYMENT OF MEDICAID BENEFITS TO COVER ALL HER EXPENSES AT ARDEN COURTS.

The district court correctly held that the Medicaid Act does not violate plaintiff's equal protection or due process rights by providing coverage for the costs of medical care (and "room and board") at nursing facilities (NFs), while not providing coverage for the costs of residential services provided at assisted living facilities (ALFs). Because she has not made any arguments in her opening brief challenging the court's equal protection or due process rulings, plaintiff has abandoned these issues on appeal. See LoSacco v. City of Middletown, 71 F.3d 88, 92 (2d Cir. 1995). With respect to the only legal claims in this case that could provide any basis for relief against the federal Secretary of HHS, the district court's decision must therefore be affirmed.

The only legal argument plaintiff has preserved on appeal is her claim that the ADA - as interpreted in Olmstead - requires the State of Connecticut to provide Medicaid benefits to cover all the costs of her continued stay at Arden Courts, including room and board. However, the ADA's prohibition on disability discrimination by a "public entity," 42 U.S.C. 12132, does not apply to the federal government, see 42 U.S.C. 12131(1) (defining "public entities" governed by the ADA). Because "Title II of the ADA is not applicable to the federal government," Cellular Phone Taskforce v. FCC, 217 F.3d 72, 73 (2d Cir. 2000), plaintiff's ADA claim provides no basis for exercising jurisdiction over the federal Secretary of HHS.

Moreover, the district court's dismissal of the ADA claim should be affirmed because the general anti-discrimination provisions of the ADA cannot reasonably be construed to implicitly repeal the specific provisions of the Medicaid Act, which preclude the relief plaintiff is seeking in this case: a ruling that the State must provide Medicaid coverage for all of her expenses, including room and board, at Arden Courts.[5]

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[5] As the district court recognized, being forced to leave Arden Courts is the injury on which plaintiff's standing is predicated, and that injury would only be redressable "if Medicaid would reimburse her room and board costs there." 343 F. Supp. 2d at 148.

As both the Supreme Court and this Court have frequently emphasized, specific statutes covering narrow subject areas are not preempted or submerged by later-enacted general statutes. See Traynor v. Turnage, 485 U.S. 535, 548 (1988). Moreover, "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." United States v. City of New York, 359 F.3d 83, 97 (2d Cir. 2004) (quoting Morton v. Mancari, 417 U.S. 535, 551 (1974)).

Applying these core principles of statutory construction, plaintiff's ADA claim in this case must be dismissed because a decision providing the relief she has requested - Medicaid reimbursement for all her expenses at Arden Courts - would contravene both the general policy determination that Congress has made to limit Medicaid coverage for room and board and other residential services except where it is provided in nursing homes and other regulated facilities, and would further conflict with the specific provisions of the Medicaid Act prohibiting coverage for room and board under waiver programs allowing States to provide some coverage for "assisted living services" in home or community-based settings, see 42 U.S.C. 1396n(c)(1). See also 42 U.S.C.

1396t(a)(9), and 1396u(f)(1) (excluding "room and board" from "home and community care" and "community supported living arrangements services"); 42 C.F.R. 441.360(b). Because nothing in the ADA suggests that it should be construed to trump what at least one court of appeals has described as Congressional "intent to use limited Medicaid dollars to pay for room and board expenses only in those facilities for which Congress has extracted the quid pro quo of federal quality assurance standards," State of Texas, 61 F.3d at 442, plaintiff's ADA claim in this case fails on this ground alone.

In short, even if Arden Courts established its eligibility (and agreed to participate) in a pilot program authorized by the State of Connecticut to provide Medicaid coverage for certain "assisted living services" in community-based settings,[6] the ADA could not be construed to override the Medicaid Act's express prohibition on coverage for room and board under State waiver programs. 42 U.S.C. 1396n(c)(1).

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[6] The evidence at the preliminary injunction hearing showed that Arden Courts is not currently participating (and has no plans to participate) in any of the State's pilot programs allowing Medicaid coverage for "assisted living services," JA 73-74, and thus is not eligible to receive any Medicaid funds, JA 87-88. Because Arden Courts could not be compelled to participate in such programs (or to accept Medicaid funds), plaintiff's injuries could not be redressed simply by a decision ordering the State to pay all her expenses at Arden Courts.

Because the only way plaintiff could obtain the relief she is seeking - Medicaid coverage for all her expenses at Arden Courts - is through a ruling that the general anti-discrimination provisions of the ADA implicitly repealed specific provisions of the Medicaid Act, the district court properly dismissed her ADA claim. See Traynor, 485 U.S. at 548-51 (holding that general provisions of Rehabilitation Act did not implicitly repeal specific Veterans' Administration regulation).

Accordingly, this Court should affirm the district court's dismissal of plaintiff's ADA claim without reaching the secondary question (and the only question briefed by plaintiff on appeal) whether compelling the State of Connecticut to provide Medicaid coverage for assisted living costs outside of nursing homes and other regulated facilities would constitute a reasonable modification of the State's existing Medicaid program.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the district court.

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MARCH 2005

CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)(B)

I hereby certify that this brief complies with the type-face and volume limitations set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) as follows: the type face is Courier New, monospaced, twelve-point font (ten characters per inch), and the number of words in this brief is 4580 according to the word count of Corel Wordperfect 9.

CHARLES W. SCARBOROUGH

CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2005, I am causing copies of the foregoing Brief for the Federal Appellee to be sent to the Court and to the following counsel by federal express, overnight, mail:

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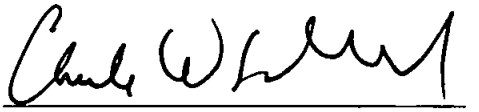

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