UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DONNA RADASZEWSKI,
Guardian, on behalf of Eric Radaszewski,

Plaintiff,

vs.

JACKIE GARNER,
Director, Illinois Department of
Public Aid,

Defendant.

No. 01 C 9551
Judge John W. Darrah

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR REMAND

Statement of Facts

This is the second time this case has reached federal court. On September 1, 2000 Donna Radaszewski, the mother of Eric Radaszewski, filed suit in the United States District Court for the Northern District of Illinois seeking declaratory and injunctive relief on his behalf. Eric is presently 22 years of age and is extremely medically fragile suffering from a number of medical conditions that resulted from his enduring brain cancer in 1992 and suffering a mid-brain stroke in 1993. Since those medical events, Eric has required constant, round-the-clock, private duty nursing services without which he will likely die.

Until he reached the age of 21 on August 5, 2000, the defendant's[1] agency, the Illinois Department of Public Aid, ("IDPA") provided funding for 16 hours a day of private duty nursing

[1] The term "defendant" refers to Jackie Garner, the present Director of the Illinois Department of Public Aid. At the time this suit was filed the Director was Ann Patla. Pursuant to Rule 25(d)(1), Ms. Garner was automatically substituted for Ms. Patla and the term includes the actions of each.

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in Eric's home under the federal Medicaid program. As defendant has acknowledged, Eric would be in danger if he were placed in a nursing home because a nursing home's staffing could not provide the level of care that he requires. Through a combination of Medicaid assistance and their own efforts, Eric's parents were able to provide him with the necessary medical services. In August 2000 when Eric reached the age of 21, IDPA reduced its reimbursement to the equivalent of five hours a day of private duty nursing. This created a medical crisis for Eric and his family.

On September 1, 2000, suit was brought claiming that defendant's act of reducing Eric's private duty nursing violated specific provisions of the federal Medicaid statute, 42 U.S.C. §1396 et seq., and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Ms. Radaszewski sought a temporary restraining order which was granted on September 1, 2000. From the outset, defendant's defense to this lawsuit was that this case did not belong in federal court. Defendant argued that Ms. Radaszewski possessed no private right of action under 42 U.S.C §1983 to challenge alleged violations of provisions of the Medicaid statute or the United States Constitution.

When the district court denied Ms. Radaszewski's motion for a preliminary injunction on November 16, 2000, based upon defendant's section 1983 argument and the Court of Appeals for the Seventh Circuit denied her motion for an injunction pending appeal, Ms. Radaszewski brought the present suit in the Circuit Court of the Eighteenth Judicial Circuit in DuPage County, Illinois, seeking an injunction to maintain the level of private duty nursing at 16 hours a day. The DuPage suit was based solely on claims made under Illinois law: that defendant had violated provisions of the Illinois Administrative Procedures Act, 5 ILCS 100/1 *et seq.*, its State Medicaid Plan, Illinois Regulation 89 Ill.Adm.Code §140.35 regarding private duty nursing, and that Eric

was the intended beneficiary of the Illinois Medicaid Plan, a contract which was breached when IDPA reduced Eric's hours of medical assistance from 16 to five hours a day. The circuit court granted Ms. Radaszewski's motion for a temporary restraining order on December 19, 2000, reestablishing Eric's hours of private duty nursing to a level of 16 hours a day. That injunction is presently in effect.

On September 7, 2001, defendant filed in state court a motion to vacate the temporary restraining order and dismiss the case as moot. Defendant argued that her act of promulgating a new rule abolishing private duty nursing for all persons over 21 mooted each of plaintiff's claims made under state law. In response to defendant's motion, Ms. Radaszewski filed on October 15, 2001, a Motion to Extend the Temporary Restraining Order, a Memorandum in Support of Motion to Extend Temporary Restraining Order and in Opposition to Defendant's Motion to Vacate and Dismiss, and a Supplemental Complaint for Injunctive Relief attached hereto as Attachment A. The Supplemental Complaint repeated the four counts of the original complaint filed in December 2000 and added three new counts: a count alleging an additional violation of the Illinois Administrative Procedure Act; a count alleging violation of 42 U.S.C. §12132, Title II of The Americans with Disabilities Act and its implementing regulation, 28 CFR §35.130 (ADA); and a count alleging a violation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 and its implementing regulation, 28 CFR §41.51(d) (Rehabilitation Act).

On November 8, 2001, defendant filed a reply memorandum in support of its pending motion to vacate and dismiss (attached hereto as Attachment B). In that memorandum defendant argued that with respect to Ms. Radaszewski's new count pertaining to the Illinois Administrative Procedure Act that the court had not yet granted plaintiff leave to file its

Supplemental Complaint and that on the merits plaintiff's arguments regarding the state statute were not supportable. (Attachment B at pp. 2 - 7) As to the Supplemental Complaint's counts regarding the ADA and the Rehabilitation Act, defendant in its reply argued only that leave to file the Supplemental Complaint had not been granted and made no arguments regarding the merits. However, on November 14, 2001, defendant filed an additional memorandum entitled, "Defendant's Objections to Plaintiff's Motion for Leave to File Supplemental Complaint and to Extend Temporary Restraining Order." (Attached as Attachment C). In that memorandum defendant argued that if leave to file the Supplemental Complaint was granted, then it objected to extending the injunction and proceeded to argue on the merits the inapplicability of the ADA and the Rehabilitation Act and the application of the Eleventh Amendment as a bar to these claims. (Attachment C, at pages 3 - 6).

On November 15, 2001, the DuPage County Circuit Court granted plaintiff leave to file its supplemental complaint, extended the temporary restraining order, and found that plaintiff had a probability of success on the merits of her claims. (See Attachment D). On December 10, 2001, defendant filed her answer to plaintiff's Supplemental Complaint. (See Attachment E.) In that answer defendant alleged several affirmative defenses, including that plaintiff's count regarding the ADA was barred by the Eleventh Amendment and could not be brought against defendant Director of IDPA. On December 14, 2001, defendant filed a Notice of Removal of the state court case to this Court. Ms. Radaszewski has moved on January 14, 2002, pursuant to 42 U.S.C. §1447(c) that this case be remanded to the state court.

Discussion

Defendant's act of removing this case to federal court is her latest attempt to avoid any decision on the merits regarding its actions of reducing Eric Radaszewski's hours of private duty nursing from 16 to five hours a day. When this case was previously in federal court, defendant argued that there was no right of action for a federal court to consider plaintiff's federal and constitutional claims. While this issue was pending before the Seventh Circuit Court of Appeals, defendant submitted and obtained approval from the United States Department of Health and Human Services of a modification of its State Medicaid Plan which eliminated private duty nursing for persons aged 21 and over. The Seventh Circuit, therefore, never reached the merits of plaintiff's appeal and the case was dismissed as moot without prejudice. (See Attachment F). Defendant sought to moot plaintiff's claims based upon state law by purportedly following the notice and comment provisions of the Illinois Administrative Procedures Act. 5 ILCS 100/1 *et seq*. It is plaintiff's contention that defendant's actions to comply with statutory requirements failed as stated in Count V of her Supplemental Complaint.

In addition to a new count based upon the Illinois Administrative Code, Ms. Radaszewski added two counts to her state court action under the ADA and the Rehabilitation Act. Both counts allege that defendant's attempts to eliminate private duty nursing for all adults taken while this matter was pending in state court were violations of the ADA and the Rehabilitation Act. Defendant responded to these two claims asserting the Eleventh Amendment in its Objections to extending the existing state court injunction. When defendant's motion to vacate was denied and plaintiff was permitted to file her supplemental complaint, defendant filed an answer in state court including affirmative defenses based upon the Eleventh Amendment. By her actions defendant

submitted the merits of plaintiff's claims including defendant's affirmative defenses to the state court. Subsequently defendant removed this case to federal court. Since she has already asserted the Eleventh Amendment regarding plaintiff's federal claims and since, as argued *infra*, plaintiff's claims based upon state law are barred from consideration by this Court under the Eleventh Amendment, see *Pennhurst v. Halderman*, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d. 67 (1984), this act of removal is her latest attempt at avoiding the merits of Ms. Radaszewski's claim that defendant acted unlawfully in reducing Eric's hours of private duty nursing simply because he reached the age of 21.

Defendant's attempt to remove is flawed. The actions she has taken in the state court in defending this case constitute a bar to removal. Moreover, defendant seeks to remove to this Court claims that are not removable under 42 U.S.C. §1441. Accordingly, plaintiff respectfully requests that this Court remand this case to the DuPage County Circuit Court.

I. Removal Is Improper Because Defendant Filed Her Notice of Removal After the Statutorily Required Thirty Day Period.

Defendant waited too long to remove this case to federal court. The plaintiff served on the defendant her Motion for Leave to File Supplemental Complaint and to Extend Temporary Restraining Order on October 15, 2001. She also served on defendant her Supplemental Complaint on October 15, 2001, and then filed the Supplemental Complaint on October 16, 2001. Defendant's Notice of Removal is dated January 14, 2002. The applicable federal statute, 28 U.S.C.§1446(b), provides that in a case where the initial pleading is not removable, the notice of removal must be filed by the state court defendant "within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other

paper from which it may first be ascertained that the case is one which is or has become removable . . . ." [emphasis added.] In the present case, it is clear that the defendant was served with a copy of the amended pleading and motion for leave to file the amended pleading on or about October 15, 2001. The defendant's notice of removal was filed considerably later than 30 days after she received the amended pleading and motion.

Although there is a split among the courts, several decisions have determined that the 30 days period commences to run when the defendant is put on notice that a plaintiff is asserting a claim based upon federal law and the fact that the state court has not ruled on the validity of the federal claim does not toll the 30 day period. See, *Webster v. Sunnyside Corp.*, 836 F. Supp. 629, 630 (S.D. Iowa 1993)(30 day period commenced on date of filing of amended complaint not when motion to amend was granted based upon clear language of the statute); *Jackson v. Brooke*, 626 F. Supp. 1215, 1217 (D. Colorado 1986)(30 day period commenced on date plaintiff filed a response to defendant's motion for summary judgment even though court had not ruled on summary judgment since defendants were apprized that plaintiff was pursuing a federal claim); *Harriman v. Liberian Maritime Corp.*, 204 F. Supp. 205, 206 (D. Mass. 1962)(filing of Motion to Increase Damages began then 20 day period in which to file for removal even though court had not ruled on motion because defendant was put on notice of removability).

In a case strikingly similar to the present case, *Butts v. Hansen*, 650 F.Supp. 996 (D.Minn. 1987), the district court decided that the filing of a motion for temporary restraining order which stated plaintiff's claim for relief under federal law was sufficient notice to defendant of removability to trigger the 30 day time period under 28 U.S.C.§1446(b). In *Butts* the plaintiff had not even filed its complaint at the time that removal took place. The court reasoned that the

pending state case was initiated by the temporary restraining order motion and not necessarily by the complaint because otherwise defendant would have been deprived of a federal forum in the TRO proceedings. See also *Bezy v. Floyd County Plan Commission*, 199 F.R.D. 308 (S.D.Ind. 2001), which ratifies the reasoning of *Butts* and states: "When a TRO seeks redress for federal rights, the defendant's opportunity to present or defend those rights commences with the filing of that motion."

In the present case the plaintiff filed her motion to extend temporary restraining order and supporting memorandum on October 16, 2001. (See Attachment G.) In those documents plaintiff clearly set out her claims based on 42 U.S.C. §§12131-12136 (ADA claim) and Sec. 504 of the Rehabilitation Act, 29 U.S.C. §794. In fact, six pages of the above memorandum were devoted to these two federal claims. On November 14, 2001, the defendant filed objections to the plaintiff's motion to extend temporary restraining order in which she argued against the TRO, including a discussion of the merits of the federal claim. See Attachment C , pp. 4-6.

Thus, the defendant was put on notice of the plaintiff's federal claims as early as October 16, 2001, and the defendant litigated these issues in the proceedings on the motion for extension of TRO. Judge Mehling held oral arguments on this motion on November 15, 2001. At that hearing Judge Mehling decided to extend the TRO and indicated that plaintiff had a probability of succeeding on the merits of her claims, including the federal law claims. It is after losing on the motion for extension of the TRO that defendant sought removal to federal court. Prior to Judge Mehling's ruling on November 15, 2001, defendant was content to litigate the federal law issues in state court. Because defendant had unequivocal notice of plaintiff's federal law claims on or around October 16, 2001, and had litigated those claims in the motion for extension of TRO, her

notice of removal on January 14, 2002, is untimely.

II. Defendant's Actions Taken in State Court Bar Her From Removing This Case to Federal Court

A. Defendant Filed an Answer to Plaintiff's Supplemental Complaint

Recently, in *Wisconsin Department of Corrections v. Schacht*, 524 U.S. 381, 390, 118 S.Ct. 2047 (1998), the United States Supreme Court in a case involving the propriety of a removal, explained that in examining whether the federal court would have jurisdiction to proceed with a removed case the court must examine the status of the case and if the defendant had answered in the state proceeding before removal then the defendant lost his right to remove:

> The status of the case as disclosed by the plaintiff's complaint is controlling in the case of removal, since the defendant must file his petition before the time for answer or forever lose his right to remove.

[Citing with approval, *St. Paul Mercury Indemnity Co. v. Red Cab Co.* 303 U.S. 283, 58 S.Ct. 586 (1938). See also *Texas Wool & Mohair Marketing Ass'n v. Standard Acc. Ins. Co.*, 175 F.2d 835, 838 (5th Cir. 1949)(removal waived where third party defendant answered cross claim before seeking removal). In this case, defendant filed her answer to plaintiff's supplemental case in state court and then sought removal to this court. By so acting she lost her right to remove.

B. By Her Actions Defendant Has Submitted the Merits of Plaintiff's Claims to the State Court and Is Therefore Barred From Removing This Case.

The Seventh Circuit Court of Appeals has articulated that when questions as to propriety of removal arise, any doubts should be construed against removal. *Roe v. O'Donohue*, 38 F.3d 298, 304 (7th Cir. 1994), citing *Shamrock Oil & Gas Co. v. Sheets*, 313 U.S. 100, 108-09, 61 S. Ct. 868 (1941), and *Healy v. Ratta*, 292 U.S. 263, 270, 54 S. Ct. 700 (1934). Courts have found that if an examination of a defendant's actions taken in a state proceeding indicate an intent to

litigate the case in the state court, then those actions are deemed to have waived the right to remove. See *Fate v. Buckeye State Mutual Insurance Co.*, 2001 U.S. Dist. Lexis 20855 (N.D. Ind., December 12, 2001); *Chavez v. Kincaid*, 15 F. Supp.2d 1118, 1125 (D. N.M. 1998). The basis for courts finding that a defendant in a state court action waived its right to remove are affirmative defensive actions taken in the state court regarding the merits of the state court claims. See *Acqualon v. Mac Equipment Incorporated*, 149 F.3d 262, 264 (4th Cir. 1998). Thus, in *Chavez v. Kincaid*, 15 F. Supp 2d at 1125 the defendant in state court filed a motion to dismiss and commenced discovery. In *Westwood v. Fronk*, 2001 U.S. Dist. Lexis 18418 (N.D. W.Va., November 7, 2001) defendant had responded to plaintiff's state court complaint by filing cross claims. Some courts have noted the distinction between a defendant's action in state court of maintaining the status quo versus affirmatively seeking to dispose of the matter. See *Scholz v. RDV Sports, Inc.*, 821 F. Supp 1469, 1470 (M.D. Fla. 1993).

The actions taken by the defendant in this case indicate her initial choice to litigate this case in the Du Page County Circuit Court and not merely maintain the status quo. When Ms. Radaszewski filed a Supplemental Complaint rasing new claims, defendant did not remove but continued to seek dismissal of the case and the vacating of the existing injunction, arguing the merits of plaintiff's new claims and asserting the Eleventh Amendment as a bar to plaintiff's federal claims in state court. (See Attachment C). Previously, defendant had submitted eight pages of detailed arguments regarding plaintiff's Count V of the Supplemental Complaint alleging further violations of the Illinois APA. Then, when the court permitted plaintiff to file her Supplemental Complaint and continued the injunction, defendant, rather than seeking removal to this Court, filed her answer raising as affirmative defenses the applicability of the Eleventh

Amendment to plaintiff's ADA claim. Affirmative defenses are not dissimilar to motions to dismiss and defendants actions indicate her initial intent to litigate the merits of Ms. Radaszewski's federal claims in state court.

C. *Wisconsin Department of Corrections v. Schacht* Does Not Require Removal.

The U.S. Supreme Court's decision in *Wisconsin Department of Corrections v. Schacht*, 524 U.S. 381, 118 S.Ct. 2047, 141 L.Ed.2d 364 (1998), does not provide support for the position that defendant may remove this case to federal court and then assert Eleventh Amendment immunity as a defense. In *Schacht*, the Court held that a State defendant's removal of a suit involving federal claims, some of which may be barred by the Eleventh Amendment, does not destroy removal jurisdiction that would otherwise exist. *Schacht*, 524 U.S. at 386. The court concluded that the Eleventh Amendment does not automatically destroy jurisdiction, "rather, the Eleventh Amendment grants the State a legal power to assert a sovereign immunity defense should it choose to do so. The State can waive the defense." *Id.*

Key to the Court's decision was that the State could possibly waive the immunity defense and that the State had not done so at the time of the removal. Neither of these factors applies in the present case. First, to waive sovereign immunity, state officials must have specific authority under a state statute, constitutional provision, or decision. *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 467 (1945). The Seventh Circuit has held that the Attorney General of Illinois is not authorized under Illinois law to waive Illinois' Eleventh Amendment immunity in the course of litigation. *In re Estate of Porter v. James*, F.3d 684, 691 (1994), citing *People v. Patrick J. Gorman Consultants, Inc.*, 111 Ill.App.3d 729, 444 N.E.2d 776, 778 (1st Dist.1982). And more recently, in *Power v. Summers*, 226 F.3d 815, 819 (2000) the Seventh Circuit clarified

that a state agency defendant cannot remove to federal court "and thus consent to suit in the federal court" in the absence of a statutory waiver of sovereign immunity.

Secondly, prior to the removal, defendant already asserted Eleventh Amendment defenses to plaintiff's federal claims. In her Answer to the Supplemental Complaint she stated as her defenses to the ADA claim, Count VI, that the Eleventh Amendment bars consideration of this claim. See Defendant's Answer to Supplemental Complaint for Injunctive Relief, Second and Third Defenses, attached to this Memorandum as Attachment E. She also stated Eleventh Amendment defenses against both plaintiff's federal claims in her state court filing objecting to extension of the court's temporary restraining order. See "Objections to Plaintiff's Motion for Leave to File Supplemental Complaint and to Extend Temporary Restraining Order", Attachment C, p.5. [2]

This assertion of the Eleventh Amendment bar before the removal is a key distinguishing factor between this case and *Schacht*. The *Schacht* Court looked at the case at the time of the removal and found that "Here...at the time of the removal, this case fell within the 'original jurisdiction' of the federal courts. The State's later invocation [meaning, after removal] of the Eleventh Amendment placed the particular claim beyond the power of the federal courts to decide, but it did not destroy removal jurisdiction over the entire case." *Schacht*, 524 U.S. at 374.

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[2] Although under *Pennhurst*, private plaintiffs may not sue a state official for claims arising under state law for any type of relief, the Supreme Court's doctrine stated in *Ex parte Young*, 209 U.S. 123 (1908) has long authorized private plaintiffs to sue state officials in their official capacities in order to enjoin prospectively violations of federal laws. Otherwise under the Eleventh Amendment's prohibitions, plaintiffs may not sue states for violations of federal statutes unless Congress has validly abrogated Eleventh Amendment immunity or the state has consented to suit. *College Savings Bank v. Florida Prepaid Post-secondary Education Expense Bd.*, 527 U.S. 666 (1999).

In the present case the defendant had already invoked the Eleventh Amendment defense at the time of the removal; therefore, removal was inappropriate.

III. This Action Is Not Removable Because a Federal Court May Not Decide State Court Claims Against State Officials

In addition to the waiver arguments described above, this Court may not hear claims against the defendant based on the five state law causes of action contained in plaintiff's Supplemental Complaint, due to the Eleventh Amendment's bar prohibiting federal courts from affording any type of relief against state officials based on violations of state law.

The Supreme Court made clear in *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984), that the Eleventh Amendment prohibits federal courts from affording private plaintiffs any relief, even prospective injunctive relief, against state officials like defendant for violations of state law. The *Pennhurst* plaintiffs sued various state and county officials for violations of both federal and state law. After lengthy litigation in the trial and appellate courts, the case returned to the Supreme Court for the second time after the Third Circuit affirmed injunctive relief against the state officials based on a pendant state law claim alone. The Supreme Court reversed the injunction, concluding that there could be no greater intrusion on state sovereignty than "when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment." *Pennhurst*, 465 U.S. at 106.

As described above, Counts I through V of the Supplemental Complaint state claims against the defendant Director of Public Aid for violations of state law. Accordingly, under *Pennhurst*, this Court cannot afford plaintiff relief on any of these claims. See also *Powers v.*

Summer, 226 F.3d 815 (7th Cir. 2000)(enforcement of a state law against a state official by a federal court is not permitted under the Eleventh Amendment).

Conclusion

For all the foregoing reasons plaintiff respectfully requests that this Court remand this cause to the Circuit Court of the Eighteenth Judicial Circuit for full disposition of all of plaintiff's claims in her Supplemental Complaint.

Respectfully submitted,

Eliot Abarbanel

Eliot Abarbanel
One of Plaintiff's Attorneys

PRAIRIE STATE LEGAL SERVICES, INC.
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I, Eliot Abarbanel, certify that I served a copy of the attached Memorandum In Support of Plaintiff's Motion For Remand + attachments by hand delivery on January 30, 2002 upon:

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DONNA RADASZEWSKI, Guardian, on behalf of Eric Radaszewski, Plaintiff, vs. JACKIE GARNER, Director, Illinois Department of Public Aid, Defendant.	)	No. 01 C 9551 Judge John W. Darrah

ATTACHMENTS TO

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR REMAND

PRAIRIE STATE LEGAL SERVICES, INC.
Eliot Abarbanel
Sarah Megan
Bernard H. Shapiro
350 S. Schmale Road, #150
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630-690-2130

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
DUPAGE COUNTY, ILLINOIS

DONNA RADASZEWSKI, Guardian for Eric Radaszewski, on his behalf,	)	
Plaintiff,	)	
vs.	)	No. 00 CH 1475
JACKIE GARNER, Director, Illinois Department of Public Aid,	)	
Defendant.	)	

SUPPLEMENTAL COMPLAINT FOR INJUNCTIVE RELIEF

Plaintiff Donna Radaszewski, on behalf of her son and ward, Eric Radaszewki, states her Complaint against defendant Ann Patla, Director of the Illinois Department of Public Aid, as follows:

COUNT I: VIOLATION OF THE ILLINOIS ADMINISTRATIVE PROCEDURE ACT
5 ILCS 100/1 et seq. (As Original)

1 Plaintiff Donna Radaszewski is the guardian for her disabled adult son, Eric Radaszewski. She brings this action in her capacity as Eric's guardian on his behalf.

2. Plaintiff and Eric reside in DuPage County, Illinois.

3. Defendant Ann Patla is the Director of the Illinois Department of Public Aid (IDPA).

4. IDPA is the state agency charged with the administration of the Medicaid program in Illinois

5. Eric, born August 5, 1973, is 21 years old.

6. Eric is disabled and receives disability benefits under the federal Supplemental

Security Income program. He is eligible for Medicaid.

7. On February 11, 1992, Eric was diagnosed with medulloblastoma, a brain cancer.

8. On December 24, 1993, Eric suffered a mid-brain stroke after he had undergone surgery, radiation and chemotherapy as treatment for the cancer.

9. The disease, stroke and the subsequent treatment have left Eric with a very low level of body and mental functioning. He is highly medically fragile.

10. It is the opinion of Eric's physician that Eric requires private duty nursing services of a registered nurse, one-on-one, 24 hours per day in order to survive.

11. For the past five years, Eric received private duty nursing care at home by registered nurses 16 hours per day, with 336 additional hours per year of services from registered nurses to provide Eric's parents respite. The balance of his 24 hour per day care came from his parents, who were specially trained to provide the necessary services to avoid medical crisis for Eric.

12 This care was paid for by Medicaid.

13. The Medicaid program is a joint federal and state funded program enacted to provide necessary medical assistance to needy disabled persons and families with dependant children, whose income and resources are insufficient to meet the cost of care. 42 U.S.C. §1396, 305 ILCS 5/5-1.

14. Each State participating in the Medicaid program must submit a Medicaid plan to the Secretary of Health and Human Services (HHS) for approval. 42 U.S.C. §1396.

15. The plan must specify the amount, duration, and scope of each service that the state provides in its Medicaid program. 42 U.S.C. §§1396a(10), U.S.C. §1396d(a), 42 CFR §440.230(a).

16. Private duty nursing is a service that states may chose to include in their Medicaid plans. 42 U.S.C. §1396d(a)(8), 42 U.S.C. §1396a(a)(10)(C), 42 CFR §§440.225, 440.80.

17. Federal regulations define "private duty nursing" as nursing services provided to persons who require more individual and continuous care than is available from a visiting nurse or than is routinely provided by the nursing staff of a hospital or nursing facility. 42 CFR §440.80. Under the regulation, the state has the option to provide private duty nursing services in the recipient's home, at a hospital or at a skilled nursing facility. 42 CFR §440.80(c).

18. In addition to providing the Medicaid coverage described in their Medicaid plans, States have the option of requesting approval from HHS to provide home and community based care services for persons who would otherwise require institutional care that would be paid for by Medicaid. These services are provided under a range of Medicaid waiver programs that are authorized under 42 U.S.C. §§1396a(a)(10)(A)(ii)(VI), 1396n(b)-(e). Under this waiver authority, the Secretary of HHS may grant waivers of certain otherwise applicable Medicaid requirements, including for example financial eligibility requirements and service limitations. Id.

19. Illinois has submitted to HHS and obtained federal approval of its Medicaid plan.

20. The Illinois Medicaid plan includes broad coverage for private duty nursing, with the sole conditions that the private duty nursing is recommended by a physician, that prior approval from the State agency is sought, and that the nursing care not be provided by a relative. The plan includes no limitations as to cost or as to where these services must be provided. The sections of the Illinois Medicaid Plan relating to private duty nursing services, Exhibit A, are attached to and made a part of this Complaint.

21. Illinois also has expanded its Medicaid program by including several home and

community based care Medicaid waiver programs approved by the Secretary of HHS.

22. Under the Home Services waiver program ("HSP"), Illinois provides services that are not otherwise covered under the Medicaid program, including personal care and homemaker services, to enable disabled adults to remain in their home. The cost of services which may be provided to recipients under this waiver program is limited, however, to the average Medicaid cost of care for persons in skilled nursing facilities.

24. Despite the language of the Illinois Medicaid plan covering private duty nursing with only the limitations described in paragraph 20, above, it is Defendant's unwritten policy to impose additional restrictions that eliminate private duty nursing for persons aged 21 or older and instead provide such services only through the HSP, its limited home and community based Medicaid waiver program.

25. As Eric's 21st birthday approached, state officials advised Eric's mother to contact the Office of Rehabilitation Services ("ORS") to apply for the HSP as the sole avenue to obtain continued private duty nursing services for Eric.

26. On February 18, 2000, ORS issued a decision limiting Eric's eligibility for HSP services to a "service cost maximum" of $4,593 per month.

27. This service cost maximum amount reduced funding for Eric's private duty nursing services to the equivalent of five hours per day.

28. Plaintiff filed an administrative appeal on the ORS decision limiting Eric's services under the HSP to $4,593 per month, and an administrative hearing was held on July 25, 2000.

29. At this hearing, Eric's treating physician, Janina Badowska, M..D. testified that it

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in her medical opinion, Eric requires 24 hour one-on-one skilled nursing care from registered nurses and that the level of care offered by the ORS service cost maximum would leave Eric at great medical risk. She further testified that Eric's needs could not be met by staffing levels at a skilled nursing facility.

30. On August 18, 2000, Defendant Ann Patla, as Director of IDPA, issued an administrative decision, affirming the ORS decision limiting funding of Eric's services under the Home Services Program to $4,593 per month, despite a finding of fact in the decision that placing Eric in a nursing facility would place Eric at risk of danger.

31. Under the Illinois Administrative Procedure Act, 5 ILCS 100/1-70, each agency statement of general applicability that implements, applies, interprets, or prescribes law or policy is a "rule" within the meaning of the Act.

32. Defendant's unwritten policy limiting Medicaid coverage for private duty nursing services for adults to the services provided under the HSP waiver program is a rule of general applicability within the meaning of 5 ILCS 100/1-70.

33. Under 5 ILCS 100/5-40, state agencies must adopt rules pursuant to the notice and comment rulemaking procedure specified in the provision.

34. Because Defendant has not followed the notice and comment rule-making procedure set out in 5 ILCS 100/5-40 for the unwritten policy limiting Medicaid coverage for private duty nursing services for adults to the services provided under the HSP waiver program, the policy is invalid under the Illinois Administrative Procedure Act.

35. Eric will suffer irreparable injury if Defendant is not enjoined from applying this invalid rule to deny Eric the full amount and scope of private duty nursing services described in

the Illinois Medicaid plan.

36. Eric has no adequate remedy at law.

37. Eric is indigent and unable to post bond.

WHEREFORE, plaintiff respectfully prays for the following relief:

A. That this Court enter, without a requirement of a bond, a temporary restraining order, preliminary injunction and permanent injunction enjoining Defendant from applying the invalid limitation on the amount and scope of private duty nursing services available under the Illinois Medicaid plan.

B. Such other and further relief as the Court deems equitable and just.

COUNT II: VIOLATION OF THE MEDICAID PLAN (As Original)

1. - 30. Plaintiff re-alleges paragraphs one through thirty of Count I as paragraphs one through thirty of Count II.

31. The Illinois Public Aid Code directs IDPA to establish standards and rules to determine the amount and nature of medical services to be included in the Medicaid program, including private duty nursing services. 305 ILCS 5/5-4, 5-5.

32. The Illinois Medicaid plan sets out such standards and rules.

33. Defendant has violated the Illinois Medicaid plan by failing to provide Eric the full, amount, duration and scope of private duty nursing services set out in the Illinois Medicaid plan.

34. Eric will suffer irreparable injury if Defendant is not enjoined from failing to afford Eric the full amount and scope of private duty nursing services described in the Illinois Medicaid plan.

35. Eric has no adequate remedy at law.

36. Eric is indigent and unable to post bond.

WHEREFORE, plaintiff respectfully prays for the following relief:

A. That this Court enter, without a requirement of a bond, a temporary restraining order, preliminary injunction and permanent injunction enjoining Defendant from failing to afford Eric the full amount, duration and scope of private duty nursing services covered in the Illinois Medicaid plan.

B. Such other and further relief as this Court deems equitable and just.

COUNT III: VIOLATION OF 89 ILL.ADM CODE §140.435 (As Original)

1. - 30. Plaintiff re-alleges paragraphs one through thirty of Count I as paragraphs one through thirty of Count III.

31. The Illinois Public Aid Code directs IDPA to establish standards and rules to determine the amount and nature of medical services to be included in the Medicaid program, including private duty nursing services. 305 ILCS 5/5-4, 5-5.

32. The Department's rule at 89 Ill.Adm.Code §140.435(b)(2),provides that Medicaid payment "shall be made" for private duty nursing services.

33. Defendant's refusal to cover medically necessary private duty nursing services for Eric violates 89 Ill.Adm.Code §140.435(b)(2).

34. Eric has no adequate remedy at law.

35. Eric is indigent and unable to post bond.

WHEREFORE, plaintiff respectfully prays for the following relief:

A. That this Court enter, without a requirement of a bond, a temporary restraining order, preliminary injunction and permanent injunction enjoining Defendant from

failing to provide payment for Eric's medically necessary private duty nursing services.

B. Such other and further relief as this Court deems equitable and just.

COUNT IV: BREACH OF CONTRACT (As Original)

1. - 30. Plaintiff re-alleges paragraphs one through thirty of Count I as paragraphs one through thirty of Count IV.

31. The Illinois Medicaid plan is a contract between the Illinois Department of Public Aid and the federal government.

32. Medicaid recipients, including Eric, are the clearly intended and direct beneficiaries of this contract.

33. By failing to afford Eric the full amount, duration, and scope of private duty nursing included in the Illinois Medicaid Plan, defendant is in breach of contract.

34. Defendant's decision to restrict Eric's nursing services to the cost maximum of the Home Services Program thereby denying him the benefit of the private duty nursing services described in the Illinois Medicaid plan has injured Eric.

35. Eric has no adequate remedy at law and requires specific performance of the terms of the Medicaid plan in order to obtain relief.

WHEREFORE, plaintiff respectfully prays for the following relief:

A. That this Court enter, without the requirement of a bond, a temporary restraining order and preliminary injunction enjoining Defendant from failing to afford Eric the full amount, duration and scope of private duty nursing services covered in the Illinois Medicaid plan.

B. That this Court award plaintiff specific performance of the Illinois Medicaid plan provisions and afford Eric the full amount, duration of scope of private duty nursing services covered in the Plan.

C. Such other and further relief as this Court deems equitable and just.

COUNT V: VIOLATION OF THE ILLINOIS ADMINISTRATIVE PROCEDURE ACT

1. - 24. Plaintiff realleges paragraphs one and two, four, six through eighteen, twenty-one and twenty-two, and twenty five through thirty of Count I as paragraphs one through twenty-four of Count V.

25. In March 2001 Jackie Garner replaced defendant Ann Patla as Director of the Illinois Department of Public Aid and endorses all of the actions taken by Ms. Patla relevant to this lawsuit.

26. Eric Radaszewski was born on August 5, 1979.

27. In August, 2000, when Eric turned 21 years old, Illinois' Medicaid plan, as submitted to HHS, included coverage for private duty nursing, with the sole conditions that private duty nursing services be recommended by a physician, that prior approval from the State agency be sought, and that the nursing care not be provided by a relative. A copy of that provision as it existed at that time is attached to this Complaint as Exhibit A.

28. Despite the language of the Illinois State plan covering private duty nursing with the sole limitations described in paragraph 28, above, it was the unwritten policy of the State to impose additional restrictions that eliminate private duty nursing for persons aged 21 or older and instead provide such services only through the HSP, its limited home and community based Medicaid waiver program.

29. On September 1, 2000, plaintiff brought an action in the United States District Court for the Northern District of Illinois against Defendant Patla, seeking to enjoin defendant's reduction of Eric's nursing services. Plaintiff claimed that defendant's actions, deviating from its Medicaid plan, violated the federal Medicaid statute, its implementing regulations and the requirements of due process.

30. The District Court denied plaintiff's motion for a preliminary injunction, and plaintiff appealed that interlocutory order.

31. On December 1, 2000, plaintiff filed the present case, bringing claims founded on state law that could not be included in the federal law suit. Plaintiffs claims, set out as Counts I-IV, included that defendant's unwritten policy to deny Eric private duty nursing violated the notice and comment requirements of the Illinois Administrative Procedure Act, 5 ILCS 100/1 et seq., the requirements set out in its Medicaid plan, and 89 Ill.Adm.Code 140.435(b), and deprived Eric of his rights as a third party beneficiary of the contract between the Department and the federal government.

32. On December 19, 2001, this Court entered an Order denying Defendant's Motion to Dismiss and issued a Temporary Restraining Order enjoining Defendant from reducing Eric's nursing services pending further order.

33. On January 3, 2000, without prior notice to either this Court or to the Seventh Circuit Court of Appeals, the plaintiff or the public, the Department submitted to HHS an amendment to the Illinois Medicaid plan, deleting coverage for private duty nursing services for adults. On February 2, 2001, HHS approved the amendment.

34. On March 16, 2001, IDPA published in the Illinois Register a proposed rule to

amend 89 Ill.Adm.Code §140.435 and §140.436 to delete Medicaid coverage for private duty nursing services. The "Complete Description of the Subjects and Issues Involved" section of the notice of rulemaking stated that the changes "are being made as clarifications...."

35. On May 23, 2001, pursuant to public request, the Department conducted a hearing on the proposed rules.

36. On July 23, 2001, the Department submitted to the Joint Committee on Administrative Rules ("JCAR") its Second Notice of Proposed Rulemaking for the proposed amendment.

37. In the section of the Second Notice describing the public comments objecting to the deletion of Medicaid coverage for private duty nursing services for adults, the Department claimed that "the comments received were not related to the rules, or their intended purpose or potential effect" and that the "proposed amendments do not change the Department's policy on coverage for home health services for adults." Exhibit B, Second Notice of Proposed Rulemaking, page 8.

38. On August 7, 2001, JCAR reviewed the rules without objection.

39. On September 1, 2001, the Department filed a certified copy of the amended rules with the office of the Secretary of State.

40. Under the Illinois Administrative Procedure Act, 5 ILCS 100/1-70 each agency statement of general applicability that implements, applies, interprets, or prescribes law or policy is a rule within the meaning of the Act.

41. Under 5 ILCS 100/5-40, state agencies must adopt rules pursuant to the notice and comment rule making procedure specified in the provision. Among these requirements, an

agency must include in the first notice of rule making a "complete description of the subjects and issues involved." 5 ILCS 100/5-40(b)(3). During the notice period, the agency must accept from interested persons data, views, arguments or comments and it must "consider all submissions received." 5 ILCS 100/5-40(b).

42. In promulgating the amendments to 89 Ill.Adm.Code §140.435 and §140.436, defendant has not followed the letter or the spirit of the requirements set out in 5 ILCS 100/5-40(b). The Department refused to consider the comments of the public on the decision to delete Medicaid coverage for private duty nursing services, having deemed the comments not pertinent to the purpose of the rule making. The Department's Notice of Proposed Rule Making did not include a complete description of the subjects and issues involved, failing to disclose that it was implementing a policy to delete Medicaid coverage for private duty nursing services for adults or the reasons for not covering those services.

43. Eric will suffer irreparable injury if Defendant is not enjoined from applying its invalid rules to deny Eric the full amount and scope of private duty nursing services he has been receiving under the former Illinois Medicaid plan.

44. Eric has no adequate remedy at law.

45. Eric is indigent and unable to post bond.

WHEREFORE, plaintiff respectfully prays for the following relief:

A. That this Court enter, without a requirement of a bond, a temporary restraining order, preliminary injunction and permanent injunction enjoining Defendant from reducing Eric's nursing services pursuant to the invalid amendment to 89 Ill.Adm.Code §140.435 or §140.436.

B. Such other and further relief as the Court deems equitable and just.

COUNT VI: VIOLATION OF THE AMERICANS WITH DISABILITIES ACT: 42 USC §12132 and 28 CFR §35.130.

1. - 39. Plaintiff re-alleges paragraphs one through thirty-nine of Count V as paragraphs one through thirty-nine of Count VI.

40. Under the Department's policy, Eric may receive Medicaid payment for necessary long term care services in institutions, meaning skilled nursing facilities and hospitals, but not at home.

41. In-home nursing care is the most integrated setting for services for Eric, and is at least as cost-effective as treatment he would receive in an institution.

42. Under Title II of the Americans with Disabilities Act, 42 USC §12132 and its implementing regulations at 28 CFR §35.130, public entities must provide services to persons with disabilities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

43. Eric is a qualified individual with a disability within the meaning of Title II of the ADA.

44. The Illinois Department of Public Aid of which defendant Patla is Director is a public entity" within the meaning of Title II of the ADA.

45. The Department's failure to provide Eric Medicaid services for Eric in his home, the most integrated setting for receipt of those services, violates the community integration requirements of Title II of the American with Disabilities Act, 42 USC §12132 and its implementing regulation 28 CFR §35.130.

46. Eric will suffer irreparable injury if Defendant is not enjoined from reducing his Medicaid covered nursing services at home forcing him into an institution where his health will be in imminent danger and he will be segregated from his family and the larger community.

47. Eric has no adequate remedy at law.

48. Eric is indigent and unable to post bond.

WHEREFORE, plaintiff respectfully prays for the following relief:

A. That this Court enter, without a requirement of a bond, a temporary restraining order, preliminary injunction and permanent injunction enjoining Defendant from failing to afford Eric continued nursing services at home rather than in an institution.

B. Such other and further relief as this Court deems equitable and just.

COUNT VII: VIOLATION OF SECTION 504 OF REHABILITATION ACT OF 1973; 29 USC §794 and 28 CFR 41.51(d)

1. - 41. Plaintiff re-alleges paragraphs one through forty-one of Count VI as paragraphs one through forty-one of Count VII.

42. Section 504 of the Rehabilitation Act of 1973 ("Section 504") prohibits discrimination against people with disabilities on the basis of their disabilities in programs and services that receive federal financial assistance. 29 USC §794.

43. Section 504 requires that services must be provided in the most integrated setting appropriate to the needs of individuals with disabilities. 28 CFR §41.51(d).

44. The Department's failure to provide Medicaid services for Eric in his home, the most integrated setting for receipt of those services, even though it will provide Medicaid services in institutions for Eric, violates Section 504.

45. Eric will suffer irreparable injury if Defendant is not enjoined from reducing his Medicaid covered nursing services he currently receives at home, forcing him into an institution where his health will be in imminent danger, and he will be segregated from his family and the larger community.

46. Eric has no adequate remedy at law.

47. Eric is indigent and unable to post bond.

WHEREFORE, plaintiff respectfully prays for the following relief:

A. That this Court enter, without a requirement of a bond, a temporary restraining order, preliminary injunction and permanent injunction enjoining Defendant from failing to afford Eric continued nursing services at home rather than in an institution.

B. Such other and further relief as this Court deems equitable and just.

Respectfully submitted,

Eliot Abarbanel

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IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
DUPAGE COUNTY, ILLINOIS

DONNA RADASZEWSKI, Guardian, on behalf of Eric Radaszewski,	)	
Plaintiff,	)	
vs.	)	No. 00 CH 1475
	)	Judge Mehling
JACKIE GARNER, Director of Illinois Department of Public Aid,	)	
Defendant.	)	

DEFENDANT'S REPLY IN SUPPORT OF MOTION TO VACATE TEMPORARY RESTRAINING ORDER AND DISMISS CASE AS MOOT

Defendant, Jackie Garner, the Director of the Illinois Department of Public Aid, by and through her attorney, James E. Ryan, Attorney General for the State of Illinois, hereby submits this reply memorandum in support of her motion to vacate the temporary restraining order and dismiss this case as moot, stating as follows:

On December 19, 2000, Judge Byrne denied the Defendant's previous attempt to dismiss this case as moot because, at the time of the Court's order, (1) the federal Health Care Financing Administration ("HCFA") had not approved a State Medicaid Plain Amendment, and (2) the Defendant had not properly adopted a new rule pursuant to the Administrative Procedure Act ("APA") to effectuate the policy change. (Mem. Op. And Ord. p. 2, Def's Ex.[1] E). Also on December 19, 2000, Judge Byrne granted the Plaintiff's motion for Temporary Restraining Order ("TRO") and specifically stated that because the Illinois Department of Public Aid ("IDPA") failed

[1] "Def's Ex." indicates reference to the previously-filed, separate volume of exhibits entitled "Exhibits to Defendant's Memorandum in Support of Motion to Vacate Temporary Restraining Order and Dismiss Case as Moot."

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to "properly promulgate its new rule . . . in accordance with the APA," the Plaintiff seemed likely to succeed on the merits. (Mem. Op. And Ord. p. 6, Def's Ex. E).

Subsequent to the entry of the TRO on December 19, 2000, (1) HCFA has approved a State Medicaid Plan Amendment removing private-duty nursing from the State Medicaid Plan, (*See* Def's Ex. G), and (2) the IDPA has properly promulgated an amendment to 89 Ill. Admin. Code § 140.435, in accordance with the APA, that strikes all text relating to Medicaid coverage for private-duty nursing services and makes clear that private payment for private-duty nursing is provided only to children under 21 years of age who are covered under a Medicaid waiver or are identified as needing the service through an Early and Periodic Screening, Diagnosis and Treatment Program ("EPSDT") screening. (*See* Def's Ex. J).

In light of the amendment to 89 Ill. Admin. Code § 140.435 and the reasoning in the Court's December 19, 2000 Memorandum Opinion and Order, the pending complaint is now moot and must be dismissed. Further, the current TRO must be vacated. Plaintiff can not maintain that she is likely to succeed on the merits of her pending complaint because the basis for the December 19, 2000 TRO no longer exists.

The Plaintiff failed to specifically respond to the Defendant's motion to vacate the TRO and dismiss the case as moot. The Plaintiff filed a motion of her own–Plaintiff's Motion for Leave to File Supplemental Complaint and to Extend Temporary Restraining Order. The proposed supplemental complaint re-alleges the four counts from the present complaint and alleges three additional counts. Plaintiff's motion states that the three additional claims set forth in the proposed supplemental complaint provide the justification for extending the TRO. (Pltf's Mot., ¶ 4). Since the alleged bases for extending the TRO are pled only in the proposed supplemental complaint and the Plaintiff has not yet been granted leave to file her supplemental complaint, the Court should rule

on the Defendant's motion to dismiss the pending complaint and vacate the current TRO apart from Plaintiff's motion for leave to file the supplemental pleading.

Although the title of the Plaintiff's memorandum purports to oppose the Defendant's motion, it is not responsive to the Defendant's motion before the Court because the alleged reasons for extending the TRO have not been properly pled at this time. *Joseph J. Henderson & Son v. Crystal Lake*, 318 Ill. App. 3d 880, 848, 743 N.E.2d 713, 716 (2d Dist. 2001) (to succeed on motions for temporary injunctive relief, the moving party must *plead* and prove the necessary elements) (emphasis added). The issues before the Court on the Defendant's motion to dismiss the pending complaint and vacate the current TRO are: (1) whether the State Plan Amendment was approved by HCFA; and (2) whether the IDPA properly promulgated the amendment to 89 Ill. Admin. Code § 140.435 under the APA. If the Court answers both of these questions in the affirmative, this case is moot and the basis for the Court's December 19, 2000, TRO is no longer viable.

To the extent the Plaintiff's memorandum responds to the Defendant's motion by arguing the IDPA has not followed the APA in promulgating the rule mooting this case, the Plaintiff's argument rings hollow.

First, the IDPA did not implement any policy on January 3, 2001. (*See* Pltf's Mem., p. 4). The IDPA merely followed the reasoning of the Court's (per Judge Byrne) December 19, 2000 Memorandum Opinion and Order and sought federal approval to amend the State Medicaid Plan. Once the federal government approved the State Plan Amendment on February 2, 2001, the IDPA initiated the process required by the APA for amending the administrative rule, 89 Ill. Admin. Code § 140.435. The IDPA amended the State Medicaid Plan pursuant to federal procedures and amended the administrative rule under the Illinois APA. There is no evidence, and Plaintiff does not argue,

that the IDPA attempted to enforce the approved State Plan Amendment before the 89 Ill. Admin. Code § 140.435 was amended pursuant to the APA.

Second, in accordance with Section 5-40(b) of the APA, 5 ILCS 100/5-40(b) (West 2000), the First Notice of the proposed amendment to 89 Ill. Admin. Code § 140.435 was published in the Illinois Register on March 16, 2001, (*See* Def's Ex. J), and complied with all relevant requirements of Section 5-40(b). *See* 5 ILCS 100/5-40(b)(1)-(5) (West 2000). The Plaintiff's challenge to the "Complete Description of the Subjects and Issues Involved" section of the First Notice must fail.

Section 5 of the First Notice states:

> In Section 140.435, . . . text relating to coverage for private duty nursing services and in-home nursing services is being stricken. The . . . changes are being made as clarifications because payment is provided for private duty nursing services only for children under the age of 21 who are covered under a waiver, as described in Section 140.645, or are identified as needing the service through an EPSDT screening (Early and Periodic Screening Diagnosis and Treatment Program) as described in Section 140.485.

This description clearly describes the substance of the amendment to 89 Ill. Admin. Code § 140.435 and states that the amendment means the IDPA only pays for private duty nursing services to children under 21 who are covered under a Medicaid waiver or are in need of private duty nursing through an EPSDT screening. Contrary to the Plaintiff's assertion, whether or not the IDPA "should" cover private duty nursing to other individuals not specifically defined in the amendment is irrelevant to defining the rule amendment.

Despite the Plaintiff's semantic problems with the words "change" and "clarification," the language in the First Notice stating, "the . . . changes are being made as clarifications," is not misleading because the description is clear as to the meaning of the amendment, its effect, and to whom it applies. The description of the subjects and issues contained in the First Notice was

sufficient to inform the Plaintiff about the substance of the amendment as evidenced by the fact that the Plaintiff, her husband, and two of her attorneys provided testimony and written comments on the issue. (*See* Def's Ex. L, pp. 4-6 (indicating that Donna and Lester Radaszewski, Sarah Megan, and Eliot Abarbanel submitted comments on the First Notice during the public comment period)).

The Plaintiff's citations to court decisions interpreting the federal APA are unavailing. (Pltf's Mem., pp. 6-7). In *National Tour Brokers Ass'n v. United States*, 591 F.2d 896 (D.C. Cir. 1978), a federal agency's notice indicated that it was looking toward formulating legislation to be proposed to Congress–not administrative rulemaking. *Id.* at 899. The regulations in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), and *DeBraun v. Meissner*, 958 F. Supp. 227 (E.D. Pa. 1997), were invalidated because the respective federal administrative agencies adopted rules that were materially different from those originally proposed in the notices of rulemaking. *Kooritzky*, 17 F.3d at 1513; *DeBraun*, 958 F. Supp. 232. The Plaintiff's case is distinguishable from these federal cases because (1) the First Notice is clear that the IDPA was proceeding with the rulemaking procedures under Illinois APA, and (2) the relevant portion of the proposed rule, (Def's Ex. J), striking all references to private duty nursing and in home nursing services in 89 Ill. Admin. Code § 140.435, is identical to the adopted rule, (Def's Ex. P). *See Tucker v. Atwood*, 880 F.2d 1250, 1251 (11th Cir. 1989) (in case where proposed and final version of rule were the same, the agency's description, stating only that the regulations "redefine [ ] circumstances requiring use of an Affirmative Fair Housing Marketing Plan," adequately described the subjects and issues involved, notwithstanding the plaintiff's contention that the description failed to express the specific effect of the rules). In any event, under the federal APA, notice is adequate if it informs interested parties of the issues to be addressed in the rulemaking proceeding with sufficient clarity and specificity to allow them to participate in a meaningful and informed manner. *American Medical Association v. United States*,

887 F.2d 760, 767 (7th Cir. 1989). In this case, the IDPA's First Notice adequately informed the Plaintiff of the proposed rule amendment and sufficiently allowed the Plaintiff, her husband, and her attorneys to participate in the rulemaking proceedings.

Third, the Plaintiff disingenuously alleges that the IDPA shortened the public comment period to 30 days in violation of the APA's 45-day requirement for public comment. (Pltf's Mem., p. 5). Section 5-40(b) requires that the first notice period last at least 45 days and is silent on the length of time an agency must set aside to accept written comments. *See* 5 ILCS 100/5-40(b) (West 2000). In this case, the IDPA *requested* written comments within 30 days of publication of the First Notice and specifically stated, "[t]he Department will consider all written comments it receives during the first notice period . . ." (Def's Ex. J). Because the IDPA did not limit the written comment period to 30 days, the only question is whether the first notice period lasted the requisite 45 days. It did.

The First Notice was published on March 16, 2001 and a public hearing was conducted on May 23, 2001–68 days later–at which time witnesses were permitted to submit both oral and written testimony. The first notice period lasted 129 days, (*See* Def's Ex. J, K, L and M), and was in excess of the 45-day minimum required by the APA. 5 ILCS 100/5-40(b) (West 2000). The fact that the Plaintiff, her husband, and her attorneys testified at the public hearing 68 days after the First Notice provides further evidence that the IDPA did not limit the public comment period to 30 days. (Def's Ex. L, pp. 4-6).

Fourth, contrary to the Plaintiff's allegations, the IDPA did not refuse to consider public comments submitted during the first notice period. (*See* Pltf's Mem., pp. 5-6). The IDPA considered oral and written testimony submitted during the first notice period from approximately 25 individuals, including the Plaintiff, her husband and her attorneys. (Def's Ex. L, pp. 4-7). The

IDPA provided considered responses to the public comments. (Def's Ex. L, pp. 7-14). In several instances, although not on the issue relevant to the Plaintiff, the IDPA made changes to the proposed amendments based on the public comments. (Def's Ex. L, p. 14). While the IDPA did not adopt the arguments raised by the Plaintiff's supporters during the public comment period, their submissions were nevertheless accepted and considered in the rulemaking process.

Plaintiff's reliance on *Senn Park Nursing Center v. Miller*, 104 Ill. 2d 169, 470 N.E.2d 1029 (1984) is unfounded. In *Senn Park*, the Illinois Supreme Court examined an administrative rule promulgated pursuant to the APA's emergency rulemaking procedures. *Id.* at 183-86, 470 N.E.2d at 1036-37. In the present case, the IDPA has followed the general rulemaking procedures of 5 ILCS 100/5-40 (West 2000), including the provision allowing for public hearing and comment. 5 ILCS 100/5-40(b) (West 2000). The APA requires only that the IDPA accept oral or written submissions containing the Plaintiff's arguments and comments–it does not require the IDPA to actually adopt those arguments and comments in the final administrative rule. *See* 5 ILCS 100/5-40(b) (West 2000). In accordance with the APA, the IDPA accepted the Plaintiff's testimony and the testimony of her supporters. (Def's Ex. L). Despite the fact that the IDPA did not adopt her arguments, the Plaintiff cannot argue that the IDPA refused to consider her comments.

The remaining arguments in the Plaintiff's Memorandum in Support of Motion to Extend Temporary Restraining Order and in Opposition to Defendant's Motion to Vacate and Dismiss–violation of the Americans with Disabilities Act and violation of the Rehabilitation Act–are directed to the Plaintiff's Motion for Leave to File Supplemental Complaint and To Extend Temporary Restraining Order. These arguments are related to the new allegations contained in the Plaintiff's proposed Supplementary Complaint and are not responsive to the Defendant's motion to dismiss the pending complaint and vacate the current TRO. The additional reasons Plaintiff raises

for continuing the TRO are not properly before the Court at this time because Plaintiff has not been granted leave to file her supplemental complaint–the pleading upon which her motion for extension of the TRO is based. Until the additional bases for extending the TRO are properly pled, the Court cannot consider these reasons for extending the TRO. *See Joseph J. Henderson & Son,* 318 Ill. App. 3d at 848, 743 N.E.2d at 716. However, the Defendant reserves the right to respond to the new grounds asserted for a TRO in the event the Court grants the Plaintiff leave to file a supplemental complaint and the new grounds for Plaintiff's motion to extend the current TRO are properly presented before this Court.

On the Defendant's motion to dismiss the pending complaint and vacate the current TRO, the IDPA has properly promulgated the amendment to 89 Ill. Admin. Code § 140.435 in accordance with the general rulemaking provisions of the APA. *See* 5 ILCS 100/5-40 (West 2000). In light of the Court's December 19, 2000 Memorandum Opinion and Order, there is no basis for continuing the current TRO and the pending complaint must be dismissed as moot. *See Illinois Health Care Association v. Walters*, 303 Ill.App.3d 435, 710 N.E.2d 403, 407-08 (1st Dist. 1999) (in action where nursing homes alleged that IDPA had failed to comply with APA in enacting certain rules and that it had violated State Prompt Payment Act, subsequent adoption of rules pursuant to statutory procedures and amendment of Payment Act to eliminate coverage of nursing homes cured violations complained of by plaintiffs and mooted their requests for injunctive relief).

WHEREFORE, the Defendant respectfully requests this Court to (1) grant her Motion to Vacate Temporary Restraining Order and Dismiss Case as Moot, (2) vacate the Temporary Restraining Order entered by this Court on December 19, 2000, and (3) dismiss this case as moot.

Respectfully submitted,

JAMES E. RYAN
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By: _____

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United States Court of Appeals,
Eleventh Circuit.

Lillian TUCKER, Demetrio Carrion, Emma Carrion, Virginia Cruz, individually and on behalf of all others similarly situated, Concerned Citizens of Hardee County, Inc., Plaintiffs-Appellants,
v.
Anita Booth ATWOOD, County Supervisor for Hardee County, Florida, for the Farmers' Home Administration, Mitchell Drew, State Director in the State of Florida for the Farmers' Home Administration, and Clayton K. Yeutter, Secretary of the United States Department of Agriculture, Defendants-Appellees.

No. 88-3880.

Aug. 21, 1989.

Challenge was made to regulations of the Farmers Home Administration. The United States District Court for the Middle District of Florida, No. 84-1491-CIV T-15, William J. Castagna, J., upheld regulations, and appeal was taken. The Court of Appeals held that the FmHA provided sufficient notice of rule making prior to adoption of regulations dealing with affirmative fair housing marketing plans.

Affirmed.

West Headnotes

[1] Administrative Law and Procedure ⚖395
15Ak395 Most Cited Cases

Under the Administrative Procedure Act, notice of rule making is sufficient if it provides description of subjects and issues involved. 5 U.S.C.A. § 553(b).

[2] United States ⚖53(7)
393k53(7) Most Cited Cases

FmHA provided adequate notice of rule making prior to enacting regulations regarding affirmative fair housing marketing plans; pertinent proposed regulations were published along with description of proposals one year before regulations were finally adopted. 5 U.S.C.A. § 553(b).

*1250 Robert T. Connolly, Florida Rural Legal Services, Inc., Bartow, Fla., for plaintiffs-appellants.

Dennis Moore, Asst. U.S. Atty., U.S. Atty's. Office, Tampa, Fla., for defendants-appellees.

Appeal from the United States District Court for the Middle District of Florida.

Before HILL and EDMONDSON, Circuit Judges and GARZA [FN*], Senior Circuit Judge.

FN* Honorable Reynaldo G. Garza, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

PER CURIAM:

Appellants challenge regulations of the Farmers Home Administration ("FmHA") on several grounds. Although we affirm the judgment of the district court largely on the basis of that court's opinion, we write for ourselves on the adequacy of notice of proposed regulations.

[1][2] Under the Administrative Procedure Act, 5 U.S.C. Sec. 553(b) (1982) ("APA"), notice of rule making is sufficient if it provides a description of the subjects and issues involved. *Du Pont de Nemours v. Train,* 541 F.2d 1018, 1027 (4th Cir.1976), *aff'd in part and rev'd in part,* 430 U.S. 112, 97 S.Ct. 965, 51 L.Ed.2d 204 (1977); *California Citizens Band Association v. United States,* 375 F.2d 43 (9th Cir.), *cert. *1251 denied,* 389 U.S. 844, 88 S.Ct. 96, 19 L.Ed.2d 112 (1967); *see Lloyd Nolan Hosp. & Clinic v. Heckler,* 762 F.2d 1561 (11th Cir.1985). The pertinent proposed regulations were published in June 1984, a year before the regulations were finally adopted. A look at these regulations (in pertinent part, the proposal and the final version were the same) shows that private- sector brokers must comply with affirmative fair housing marketing plans only under certain circumstances.

Appellants complain that this provision relaxes previously existing standards and stress that the proposed rules failed to mention this relaxation specifically. The APA requires no more than "... a description of the subjects and issues involved." 5 U.S.C. Sec. 553(b)(3) (1982). In addition to

publishing the text of the proposed rules, the FmHA published a description of the proposals, which states "[that the regulations] ... (j) Redefine [ ] circumstances requiring use of an Affirmative Fair Housing Marketing Plan." 49 Fed.Reg. 23,359, 23,360 (1984). This statement describes the subjects and issues involved and therefore gives adequate notice.

AFFIRMED.

END OF DOCUMENT

887 F.2d 760
64 A.F.T.R.2d 89-5715, 89-2 USTC P 9585
(Cite as: 887 F.2d 760)

H

United States Court of Appeals,
Seventh Circuit.

AMERICAN MEDICAL ASSOCIATION, Plaintiff-Appellee, Cross-Appellant,
v.
UNITED STATES of America, Defendant-Appellant, Cross-Appellee.

Nos. 88-3012, 88-3086.

Argued June 6, 1989.
Decided Oct. 12, 1989.

Tax-exempt professional medical association sought refund of federal income taxes imposed on income earned from sale of advertising in association's periodicals. On appeal from rulings of the United States District Court for the Northern District of Illinois, Milton I. Shadur, J., 668 F.Supp. 1085, 683 F.Supp. 358, 691 F.Supp. 1170, the Court of Appeals, Cudahy, Circuit Judge, held that: (1) association received adequate notice of IRS' proposed regulations on allocation of membership dues to circulation income even though approach finally adopted by IRS was substantially different from notice of proposed rulemaking, and allocation rules were not plainly inconsistent with relevant provisions of Internal Revenue Code; (2) dues placed in "association equity" account could be considered current membership receipts and portion of payments allocated to circulation income in year received; (3) costs of producing editorial content of journals distributed free of charge to promote association's advertising business were "direct advertising costs" directly deductible from advertising income; and (4) dues received from association members who were also members of control group were to be included in dues allocated to circulation income.

Affirmed in part and reversed in part.

West Headnotes

[1] Administrative Law and Procedure ⚖395
15Ak395 Most Cited Cases

Final rule is not invalid for lack of adequate notice if rule finally adopted is "a logical outgrowth" of original proposal. 5 U.S.C.A. § 553.

[2] Administrative Law and Procedure ⚖392.1
15Ak392.1 Most Cited Cases
(Formerly 15Ak392)

Agency's change of course, so long as generally consistent with tenor of its original proposals, indicates that agency treats notice-and-comment process seriously and is willing to modify its position where public's reaction persuades agency that its initial regulatory suggestions were flawed. 5 U.S.C.A. § 553.

[3] Administrative Law and Procedure ⚖395
15Ak395 Most Cited Cases

[3] Internal Revenue ⚖4047
220k4047 Most Cited Cases

Tax-exempt professional medical association received adequate notice of Internal Revenue Service's proposed regulations on allocation of membership dues to circulation income from its journals, even though rule that was finally adopted substantially differed from that described in notice of proposed rulemaking, and final rule was not invalid under Administrative Procedure Act for lack of proper notice; final rule was "contained" in proposed version, and merely eliminated some of alternative calculation methods specified therein. 5 U.S.C.A. § 553(b)(3).

[4] Internal Revenue ⚖3037
220k3037 Most Cited Cases

Courts should generally defer to Internal Revenue Service's interpretation of Internal Revenue Code in regulations meant to implement Code's provisions.

[5] Internal Revenue ⚖4047
220k4047 Most Cited Cases

IRS regulations governing allocations of tax exempt professional medical association's membership dues receipts to circulation income of association's periodicals were not plainly inconsistent with Internal Revenue Code provisions governing unrelated business income tax. 26 U.S.C.(1982 Ed.) §§ 511-513.

[6] Internal Revenue ⇐4068
220k4068 Most Cited Cases

Membership dues placed in tax exempt professional medical association's "association equity" reserve account and not employed to cover current expenses in tax years in question could be included in "membership receipts" for purpose of determining allocation of membership dues to circulation income from association's periodicals in calculating unrelated business income tax. 26 U.S.C.(1982 Ed.) §§ 511-513.

[7] Internal Revenue ⇐4068
220k4068 Most Cited Cases

Costs of producing articles and copies of tax-exempt professional medical association's journals that were distributed free of charge as part of association's controlled circulation were "direct advertising costs" fully deductible from advertising income for purposes of calculating unrelated business income tax. 26 U.S.C.(1982 Ed.) §§ 511-513.

[8] Internal Revenue ⇐4068
220k4068 Most Cited Cases

Dues received from members of tax-exempt professional organization who were also members of control group were to be included in dues allocated to circulation income from association's journals for purposes of calculating unrelated business income tax. 26 U.S.C.(1982 Ed.) §§ 511-513.
15Ak395 Most Cited Cases
(Formerly 15Ak392)
15Ak395 Most Cited Cases
*762 George A. Platz, Michael L. Schultz, Frank V. Battle, Jr., Sidley & Austin, Chicago, Ill., for American Medical Ass'n.

Gary R. Allen, William S. Rose, Jr., Asst. Atty. Gen., Dept. of Justice, Tax Div., Appellate Section, Washington, D.C., Eileen M. Marutzky, Asst. U.S. Atty., Chicago, Ill., Robert S. Pomerance, David M. Moore, Thomas R. Jones, Dept. of Justice, Tax Div., Robert A. Saltzstein, Joseph J. Saunders, Stephen M. Feldman, Washington, D.C., for U.S.

Before CUDAHY, MANION and KANNE, Circuit Judges.

CUDAHY, Circuit Judge.

This case involves the allocation of income and expenses between a charitable organization's tax-exempt activities and its taxable business endeavors for purposes of computing the charity's "unrelated business income tax" under 26 U.S.C. sections 511 to 513. The American Medical Association (the "AMA"), a tax-exempt charitable organization, filed suit in the Northern District of Illinois seeking a refund for the tax years 1975 through 1978. The AMA argued that the Internal Revenue Service (the "IRS") had improperly calculated its income from the non-exempt unrelated business of publishing advertising in the organization's publications. In a series of opinions, reported at 668 F.Supp. 1085 (1987), 668 F.Supp. 1101 (1987), 688 F.Supp. 358 (1988) and 691 F.Supp. 1170 (1988), the district court substantially agreed with the AMA's statutory and regulatory arguments, and ordered the United States to pay the AMA the full amount of the refund requested. We affirm in part and reverse in part.

I.

The AMA is a tax-exempt membership organization under section 501(c)(6) of the Internal Revenue Code. [FN1] Its charitable function is "to promote the science and art of medicine and the betterment of public health." In aid of this purpose the AMA publishes the *Journal of the American Medical Association* ("JAMA") and the *American Medical News* ("AM News"). Most of the AMA's members pay annual dues to belong to the organization. Between 1975 and 1978, AMA members received JAMA and AM News at no additional cost as a benefit of membership.

FN1. Although the provisions of the tax laws relevant to this appeal were not substantially altered by the 1986 Tax Reform Act, all references in this opinion are to the (now-superseded) Internal Revenue Code of 1954 as amended, 26 U.S.C.

JAMA and AM News both contain articles of relevance to the practice of medicine. But the journals also contain paid advertising. During the relevant period the AMA sent complimentary copies of JAMA and AM News to targeted groups of physicians who make up an especially desirable audience for firms likely to advertise in the journals. The parties stipulated that the AMA's sole purpose in engaging in this complimentary "controlled

circulation" was to increase advertising revenues. Many of the AMA's dues-paying members were also on the controlled circulation list and therefore would have been entitled to receive JAMA and AM News even if they were not AMA members. However, the AMA apparently did not inform these physicians that they were entitled to complimentary copies of the journals. Nor did the AMA refund any portion of these physicians' membership dues in recognition of the fact that they need not have paid for the periodicals.

Between 1975 and 1978, the AMA placed a portion of the membership dues it received in an "association equity" account, which was intended to serve as a reserve fund to offset any deficit which might occur in future years if the association's revenues were insufficient to cover expenses. The amounts deposited in the association equity account remained on the AMA's books as a reserve until 1985, when the AMA withdrew some of these funds to compensate for a shortfall in its revenue.

There is no dispute that the editorial or readership content of the two periodicals furthers the AMA's charitable mission, and *763 therefore any revenue attributable to the publication and distribution of articles in JAMA and AM News is exempt from taxation. And the AMA has admitted that the advertising in JAMA and AM News is a business endeavor unrelated to the AMA's charitable purpose, and is therefore taxable. This case presents several questions involving the allocation of income and expenses between the exempt and taxable aspects of JAMA and AM News, and the allocation of membership dues between these periodicals and the AMA's other (exempt) activities.

The statutory scheme applicable to these journals is fairly straightforward. Section 511 of the Code provides that the "unrelated business taxable income" of a charitable organization is subject to the tax applied to corporate income under section 11. Section 512(a)(1) defines "unrelated business taxable income" as

> the gross income derived by any organization from any unrelated trade or business (as defined in section 513) regularly carried on by it, *less the deductions* allowed by this chapter *which are directly connected with the carrying on of such trade or business*....

(emphasis added). Finally, section 513(a) defines an "unrelated trade or business" as

> any trade or business the conduct of which is not substantially related (aside from the need of such organization for income or funds or the use it makes of the profits derived) to the exercise or performance by such organization of its charitable ... purpose or function constituting the basis for its exemption under section 501....

In a provision added in 1969, and significantly titled "Advertising, etc., activities," section 513(c) further explains:

> the term "trade or business" includes any activity which is carried on for the production of income from the sale of goods or the performance of services. For purposes of the preceding sentence, an activity does not lose identity as a trade or business merely because it is carried on within a larger aggregate of similar activities or within a larger complex of other endeavors which may, or may not, be related to the exempt purposes of the organization.

The Supreme Court construed these provisions in *United States v. American College of Physicians,* 475 U.S. 834, 106 S.Ct. 1591, 89 L.Ed.2d 841 (1986). *American College* involved a charitable organization's medical journal which, as here, contained both articles which furthered the organization's exempt function and paid advertisements. The Supreme Court held that section 513(c) clearly indicated Congress' intent to treat advertising in an otherwise tax-exempt publication as a separate "trade or business," which may be taxable if the "conduct of [the advertising business] is not substantially related ... to the ... performance by such organization of its charitable ... purpose." *Id.* at 839-40, 106 S.Ct. at 1594-95. To determine whether the advertising content of a journal is "substantially related" to the organization's educational mission, the IRS must look to the manner in which the advertising is selected and displayed; *i.e.,* whether only advertising of new technologies or medications is allowed, whether the charity coordinates the subject matter and content of the ads, etc. *Id.* at 848-50, 106 S.Ct. at 1599-1600. The organization's tax exemption extends to its publication of advertising only if the advertisements "contribute[ ] importantly" to the charity's exempt purpose. *Id.* at 847, 106 S.Ct. at 1599; *see also United States v. American Bar Endowment,* 477 U.S. 105, 109-16, 106 S.Ct. 2426, 2429-32, 91 L.Ed.2d 89 (1986).

American College specifically endorsed the so-called "fragmentation" principle, whereby a charitable organization's publications are divided into two components: (1) the tax-exempt publication of the journal's "editorial" or "readership content"; and (2) the taxable enterprise of selling and publishing advertising. The United States and the AMA agree on these general principles; in fact, the AMA has even conceded that the advertisements in JAMA and AM News are not "substantially related" to the AMA's educational mission, and therefore constitute an "unrelated" business under **764 American College.* The parties' disagreement centers on the application of the "fragmentation" principle to the facts of this case.

The IRS has adopted detailed regulations which govern the allocation of revenues and expenses between a journal's exempt editorial and non-exempt advertising activities. Regulation 1.512(a)-1(f)(6) provides for division of a periodical's costs into two categories:

> (ii)(a) The direct advertising costs of an exempt organization periodical include all expenses, depreciation and similar items of deduction which are directly connected with the sale and publication of advertising.... The items allowable as deductions under this subdivision do not include any items of deduction attributable to the production or distribution of the readership content of the periodical.
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> * * *
>
> (iii) The "readership" costs of an exempt organization periodical include expenses, depreciation or similar items which are directly connected with the production and distribution of the readership content of the periodical.... [R]eadership costs include all the items of deduction attributable to an exempt organization periodical which are not allocated to direct advertising costs under subdivision (ii) ...

26 C.F.R. § 1.512(a)-1(f)(6). "Direct advertising costs" are fully deductible from gross advertising income, Reg. (f)(2)(i); "readership costs" are only deductible from gross advertising income to the extent they exceed circulation income. Reg. (f)(2)(ii)(b). "Circulation income," in turn, is defined as

> the income attributable to the production, distribution or circulation of a periodical (other than gross advertising income).... Where the right to receive an exempt organization periodical is associated with membership ... in such organization for which dues ... are received (hereinafter referred to as "membership receipts"), circulation income includes the portion of such membership receipts allocable to the periodical (hereinafter referred to as "allocable membership receipts").

Reg. 1.512(a)-1(f)(3)(iii). Regulation (f)(3)(iii) goes on to explain that "allocable membership receipts" should generally represent the amount which a taxable organization would have charged for the periodical in an arms-length transaction with the member. The regulation refers taxpayers to regulation (f)(4) "for a discussion of the factors to be considered in determining allocable membership receipts." Regulation (f)(4) provides three methods for determining the share of membership receipts which should be deemed to constitute a member's payment for the right to receive the periodical. Only the third method of calculating allocable membership receipts is applicable to JAMA and AM News. That method is described as a "pro rata allocation."

> Since it may generally be assumed that membership receipts and gross advertising income are equally available for all of the exempt activities (including the periodical) of the organization, the share of membership receipts allocated to the periodical, where [methods 1 and 2] do not apply, shall be an amount equal to the organization's membership receipts multiplied by a fraction the numerator of which is the total periodical costs and the denominator of which is such costs plus the costs of other exempt activities of the organization.

Reg. 1.512(a)-1(f)(4)(iii). Therefore, the amount of dues to be allocated to circulation income under the pro rata allocation method equals total membership receipts multiplied by the ratio of total periodical costs to the costs of all exempt activities.

The AMA raises a number of challenges to the validity of these allocation rules, and to the IRS's application of these principles in this case. However, before discussing the AMA's arguments in detail, it is worth noting that the AMA's goal throughout this litigation has been to reduce, to the maximum extent allowable, its tax liability from its "unrelated" advertising business. [FN2] *765 Therefore, the AMA would like to decrease the amount of its (taxable) advertising income by

increasing the expenses (labelled "direct advertising costs") which are fully deductible from advertising income. And, since any loss attributable to the readership content of JAMA and AM News is also deductible from advertising income (in something of a departure from strict application of the "fragmentation" principle), the AMA is also interested in producing a loss on the readership side of the journals. Such a loss may be created, in part, by decreasing the amount of circulation income derived through the allocation of membership dues to circulation income in the form of a hypothetical subscription price which members pay (as part of their total membership dues) for the right to receive the journals.

> FN2. Of course the AMA is entitled to seek to minimize its tax liability to the fullest extent permitted by law. *Gregory v. Helvering,* 293 U.S. 465, 468-69, 55 S.Ct. 266, 267, 79 L.Ed. 596 (1935), *aff'g,* 69 F.2d 809, 810 (2d Cir.1934) (L. Hand, J.); *Yosha v. Commissioner,* 861 F.2d 494, 497 (7th Cir.1988).

The AMA argues, most generally, that the allocation regulations are invalid because the IRS did not comply with the notice and comment requirements of the Administrative Procedure Act (the "APA") in promulgating the rules. In the alternative, the AMA urges that the regulations are invalid because they conflict with the statutory provisions governing the unrelated business income tax.

The AMA also makes a series of fact-specific arguments. First, it argues that membership dues which were placed in the "associationequity" reserve account, and which were not employed to cover current expenses in the tax years in question, should not have been included in "membership receipts" for the purpose of determining the allocation of membership dues to circulation income. The AMA's next two arguments relate to its practice of distributing complimentary copies of JAMA and AM News as part of its "controlled circulation." The AMA argues, first, that the cost of producing the articles in these complimentary copies (which would normally be considered "readership costs" and deductible only from tax-exempt circulation income) should be considered "direct advertising costs" since the AMA's sole purpose in distributing these copies was to promote its advertising business. Second, the AMA argues that the dues of physicians who were AMA members, but who were entitled to receive the journals anyway due to their membership in the control groups, should not be included in allocable membership receipts, since it is absurd to suggest that these physicians paid for a journal which they would have received free of charge in any case.

The district court accepted the AMA's arguments in substantial part. In its first opinion, the court held that the costs of producing the editorial content of journals distributed free of charge to promote the AMA's advertising business were "direct advertising costs" directly deductible from advertising income. 668 F.Supp. 1085, 1094-96 (N.D.Ill.1987). The court also ruled that the dues placed in the AMA's "association equity" account should not have been considered current membership receipts, and therefore no portion of these payments should have been allocated to circulation income in the year received. *Id.* at 1096-97. Finally, the court ruled, contrary to the AMA view, that the dues received from AMA members who were also members of the control group were to be included in the dues allocated to circulation income. *Id.* at 1097-98.

The court's second opinion rejected the AMA's argument that the allocation rules were inconsistent with the governing provisions of the tax code. 668 F.Supp. 1101, 1102-04 (N.D.Ill.1987). However, the court found the regulations invalid because their promulgation did not comply with the notice requirements of the APA, since the final allocation rules adopted "an entirely different approach to the determination of allocable membership receipts" than the initial proposal. *Id.* at 1104-06. Since the court concluded that it was impossible to determine the AMA's tax liability without the benefit of any (valid) allocation rules, the action was stayed to allow the IRS to promulgate new allocation rules in a manner *766 consistent with the APA. *Id.* at 1107-08.

The district court's third opinion, 688 F.Supp. 358 (N.D.Ill.1988), rejected the Government's petition for reconsideration of the court's APA ruling. The court held that the Government had waived the argument that the allocation rules were not subject to the notice-and-comment provisions of the APA since the rules were "interpretative," rather than "legislative." *See* 5 U.S.C. § 553(b)(A), (d)(2).

Following this rebuff the Government refused to re-promulgate the allocation rules. Therefore, in its fourth opinion, the court granted the AMA a refund in the full amount requested in the complaint. 691 F.Supp. 1170 (N.D.Ill.1988).

II.

The AMA argues most generally that the rules governing the allocation of a portion of membership dues receipts to circulation income are invalid because the public did not receive adequate notice of the IRS's regulatory intentions before the final rules were issued. The AMA contends that the inadequate notice violated section 553(b)(3) of the APA, which requires an agency proposing a new rule to include in the notice of proposed rulemaking (the "NPR") "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3).

The allocation rule finally adopted, see 26 C.F.R. § 1.512(a)-1(f)(4), provides three methods for determining the portion of membership dues which will be allocated to circulation income. (In essence, these allocation rules are meant to determine a hypothetical subscription price which members of a charitable organization pay for the organization's journals as part of their single, undivided dues payment.) First, if 20% or more of the journal's circulation consists of sales to nonmembers, then this arms-length sale price is deemed to be the price paid by members. Reg. (f)(4)(i). If this first method does not apply, and 20% or more of the association's members elect not to receive the journal in exchange for a reduction in their dues assessment, the amount of the dues reduction is determined to be the imputed price of the journal to members who receive it. Reg. (f)(4)(ii). Finally, if these two allocation methods are inapplicable, the allocable portion of membership dues is calculated by determining the ratio of the association's costs for producing the journal in relation to the cost of all of the association's exempt activities. The regulation then prescribes that allocable membership dues bear the same relationship to total dues receipts as the proportion of the costs of the journal to the cost of all activities. This is the "pro rata allocation method" of regulation (f)(4)(iii). [FN3] These three allocation rules are apparently the exclusive methods of determining allocable membership receipts under the final rule.

FN3. A simple hypothetical may clarify our rather unwieldy verbal statement of this third allocation method. Assume a tax-exempt organization receives a total of $200 in dues revenues. The association's journal costs $30 to produce; the total cost of producing all of the association's exempt activities (including the journal) is $150. Therefore, the cost of the journal is one-fifth of the total activity costs. Under the pro rata allocation method, one-fifth of membership receipts, or $40, would be allocated to circulation income.

In contrast to the ironclad, exhaustive methodology of the final version, the proposed allocation rule enumerated seven *factors* which would be *considered* in allocating dues receipts to circulation income. 36 Fed.Reg. 18,316, 18,318-20 (1971). The NPR specifically stated that other factors beyond those mentioned would be considered where appropriate. *Id.* at 18,31 8. Moreover, the third of the seven factors listed in the proposed rule provided that:

> The fact that a taxable organization issues a periodical which is comparable to an exempt organization periodical and makes a practice of distributing substantially all of its circulation at no charge is substantial evidence that none of the membership receipts of the exempt organization are allocable to its periodical.

Id. The AMA believes that this (never-promulgated) provision would have permitted it to allocate no membership receipts to *767 circulation income, since the AMA's taxable competitors distribute most of their periodicals through complimentary controlled circulation. However, under the final rule's pro rata allocation method, the IRS allocated approximately $33 per member, or almost $6 million, to circulation income.

The district court concluded that the final rule adopted "an entirely different approach to the determination of allocable membership receipts" and "deviated so drastically" from the NPR that the final rule was invalid due to the inadequacy of the notice of the terms of the final rule. 668 F.Supp. at 1105-06. We agree with the district court that the final rule indeed worked a substantial change to the NPR: gone is the flexible, case-by-case "totality of the circumstances" approach of the original proposal; in its stead the IRS has substituted a limited set of precise rules which must be applied in all cases. But we do not agree with the district

court's holding that this change in approach (which was occasioned by the numerous criticisms of the NPR's vagueness and malleability) renders the rule invalid under the APA.

[1] Two types of notice of proposed rules are authorized by section 553: either notice which specifies the "terms or substance" of the contemplated regulation or notice which merely identifies the "subjects and issues involved" in the rulemaking proceeding inaugurated by the notice. Thus the statutory language makes clear that the notice need not identify every precise proposal which the agency may ultimately adopt; notice is adequate if it apprises interested parties of the issues to be addressed in the rule-making proceeding with sufficient clarity and specificity to allow them to participate in the rulemaking in a meaningful and informed manner. [FN4] Stated another way, a final rule is not invalid for lack of adequate notice if the rule finally adopted is "a logical outgrowth" of the original proposal. [FN5]

FN4. The legislative history of the APA makes this point quite explicitly. *See* S.Rep. No. 752, 79th Cong., 1st Sess. 14 (1945) ("Agency notice must be sufficient to fairly apprise interested parties of the issues involved."), *reprinted in* Senate Judiciary Comm., *Administrative Procedure Act: Legislative History,* 187, 200 (Comm. Print 1946) ("*Legislative History* "); H.Rep. No. 1980, 79th Cong., 2d Sess. 24 (1946), *reprinted in Legislative History* 235, 258. The *Attorney General's Manual on the Administrative Procedure Act* (1947), often considered an especially persuasive aid to interpretation of the APA, also noted that, even where the agency *could* publish the specific wording of a proposed rule, it was still permissible to publish instead "a more general 'description of the subjects and issues involved.' " *Id.* at 29. For a sampling of the cases which have held that an agency need not publish in an NPR the precise terms of a rule finally adopted, see *Chocolate Mfrs. Ass'n v. Block,* 755 F.2d 1098, 1104 (4th Cir.1985); *American Transfer & Storage Co. v. ICC,* 719 F.2d 1283, 1303 (5th Cir.1983); *Sierra Club v. Costle,* 657 F.2d 298, 352 (D.C.Cir.1981); *Daniel Int'l Corp. v. OSHA,* 656 F.2d 925, 932 (4th Cir.1981); *Bonney Motor Express, Inc. v. United States,* 640 F.2d 646, 650 (5th Cir.1981); *Spartan Radiocasting Co. v. FCC,* 619 F.2d 314, 321-22 (4th Cir.1980); *Consolidation Coal Co. v. Costle,* 604 F.2d 239, 248-49 (4th Cir.1979), *rev'd on other grounds sub nom. EPA v. National Crushed Stone Ass'n,* 449 U.S. 64, 101 S.Ct. 295, 66 L.Ed.2d 268 (1980).

FN5. *South Terminal Corp. v. EPA,* 504 F.2d 646, 659 (1st Cir.1974); *see also AFL-CIO v. Donovan,* 757 F.2d 330, 338 (D.C.Cir.1985); *Chocolate Mfrs. Ass'n v. Block,* 755 F.2d 1098, 1105 (4th Cir.1985).

[2] That an agency changes its approach to the difficult problems it must address does not signify the failure of the administrative process. Instead, an agency's change of course, so long as generally consistent with the tenor of its original proposals, indicates that the agency treats the notice-and-comment process seriously, and is willing to modify its position where the public's reaction persuades the agency that its initial regulatory suggestions were flawed. [FN6] As Judge Leventhal explained,

FN6. *See Pennzoil Co. v. FERC,* 645 F.2d 360, 372 (5th Cir.1981) (agency's *reversal of position* on contested issue "demonstrates not that the agency acted arbitrarily, but simply that the administrative process was working.... [M]odification of proposed rules in light of written and oral presentations is the heart of the rulemaking process."), *cert. denied,* 454 U.S. 1142, 102 S.Ct. 1000, 71 L.Ed.2d 293 (1982).

> [t]he requirement of submission of a proposed rule for comment does not automatically generate a new opportunity for comment merely because the rule promulgated by the agency differs from the *768 rule it proposed, partly at least in response to submissions.... A contrary rule would lead to the absurdity that in rulemaking under the APA the agency can learn from the comments on its proposals only at the peril of starting a new procedural round of commentary.

International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 632 & n. 51 (D.C.Cir.1973). [FN7]

FN7. Other courts have also stressed that section 553 should not be construed to place administrative agencies in the dilemma of either ignoring comments (in which case a final rule may be invalidated due to the agency's intransigence) or modifying its proposals in response to comments, thus triggering another round of notice and commentary. *See, e.g., Trans-Pacific Freight Conference v. Federal Maritime Comm'n,* 650 F.2d 1235, 1249 (D.C.Cir.1980) (Wilkey, J.), *cert. denied,* 451 U.S. 984, 101 S.Ct. 2315, 68 L.Ed.2d 840 (1981); *South Terminal Corp. v.*

EPA, 504 F.2d 646, 659 (1st Cir.1974).

Of course, in this context the enunciation of general legal principles is not especially helpful. The adequacy of notice in any case must be determined by a close examination of the facts of the particular proceeding which produced a challenged rule. However, without reciting in detail the facts of other cases, we note that courts have upheld final rules which differed from proposals in the following significant respects: outright reversal of the agency's initial position; elimination of compliance options contained in an NPR; collapsing, or further subdividing, distinct categories of regulated entities established in a proposed rule; exempting certain entities from the coverage of final rules; or altering the method of calculating or measuring a quantity relevant to a party's obligations under the rule. [FN8]

FN8. *See, e.g., Natural Resources Defense Council v. EPA*, 824 F.2d 1258, 1283-84 (1st Cir.1987); *American Transfer & Storage Co. v. ICC*, 719 F.2d 1283, 1303 (5th Cir.1983); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547-48 (D.C.Cir.1983); *Connecticut Light & Power Co. v. NRC*, 673 F.2d 525, 532-34 (D.C.Cir.), *cert. denied*, 459 U.S. 835, 103 S.Ct. 79, 74 L.Ed.2d 76 (1982); *Daniel Int'l Corp. v. OSHA*, 656 F.2d 925, 931-32 (4th Cir.1981); *Pennzoil Co. v. FERC*, 645 F.2d 360, 371-72 (5th Cir.1981), *cert. denied*, 454 U.S. 1142, 102 S.Ct. 1000, 71 L.Ed.2d 293 (1982); *Consolidation Coal Co. v. Costle*, 604 F.2d 239, 246-49 (4th Cir.1979), *rev'd on other grounds sub nom. EPA v. National Crushed Stone Ass'n*, 449 U.S. 64, 101 S.Ct. 295, 66 L.Ed.2d 268 (1980); *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 642-44 (1st Cir.1979), *cert. denied sub nom. Eli Lilly & Co. v. Costle*, 444 U.S. 1096, 100 S.Ct. 1063, 62 L.Ed.2d 784 (1980); *American Iron & Steel Inst. v. EPA*, 568 F.2d 284, 293-94 (3d Cir.1977); *South Terminal Corp. v. EPA*, 504 F.2d 646, 658-59 (1st Cir.1974); *Abington Memorial Hosp. v. Heckler*, 576 F.Supp. 1081, 1085 (E.D.Pa.1983), *district court's opinion adopted*, 750 F.2d 242, 243 (3d Cir.1984), *cert. denied*, 474 U.S. 863, 106 S.Ct. 180, 88 L.Ed.2d 149 (1985).

On the other hand, a rule will be invalidated if no notice was given of an issue addressed by the final rules. Moreover, courts have held on numerous occasions that notice is inadequate where an issue was only addressed in the most general terms in the initial proposal, or where a final rule changes a pre-existing agency practice which was only mentioned in an NPR in order to place unrelated changes in the overall regulatory scheme into their proper context. [FN9]

FN9. *AFL-CIO v. Donovan*, 757 F.2d 330, 339 (D.C.Cir.1985); *Chocolate Mfrs. Ass'n v. Block*, 755 F.2d 1098, 1106 (4th Cir.1985); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 548-49 (D.C.Cir.1983); *Kollett v. Harris*, 619 F.2d 134, 144 & n. 13 (1st Cir.1980); *American Standard, Inc. v. United States*, 220 Ct.Cl. 411, 602 F.2d 256, 267-69 (1979); *id.*, 602 F.2d at 269 (Nichols, J., concurring).

[3] The crucial issue, then, is whether parties affected by a final rule were put on notice that "their interests [were] 'at stake' "; [FN10] in other words, the relevant inquiry is whether or not potential commentators would have known that an issue in which they were interested was "on the table" and was to be addressed by a final rule. From this perspective it is irrelevant whether the proposal contained in the NPR was favorable to a particular party's interests; the obligation to comment is not limited to those *adversely* affected by a proposal. "[A]pproval of a practice in a proposed rule may properly alert interested parties that the practice may be disapproved in the final rule in the event of adverse comments." [FN11] *769 Even a favorable proposal should notify an interested party that a particular issue has been opened for discussion. The publication of a *proposed* rule does not forever bind the agency to the approach contained in the NPR; if interested parties favor a particular regulatory proposal, they should intervene in the rulemaking to support the approach an agency has tentatively advanced.

FN10. *Spartan Radiocasting Co. v. FCC*, 619 F.2d 314, 321 (4th Cir.1980) (quoting *South Terminal Corp. v. EPA*, 504 F.2d 646, 659 (1st Cir. 1974)).

FN11. *Chocolate Mfrs. Ass'n v. Block*, 755 F.2d 1098, 1107 (4th Cir.1985); *see also Association of Am. Railroads v. Adams*, 485 F.Supp. 1077, 1085 (D.D.C.1978) ("Essentially, the [petitioner] asserts the right of a party agreeing with an agency's initial proposal to refrain from commenting thereon and then to insist that the proposed rule not be changed to its detriment. The Court feels compelled to reject this position.").

Judged by these standards, it is clear that the AMA received adequate notice of the IRS's proposed regulations on the allocation of membership dues to circulation income. The approach finally adopted by the IRS, while substantially different from the NPR, was a "logical outgrowth" of the original proposal. The final rule dealt with the identical issue of dues allocation, merely altering the allocation regime to assure greater consistency and fairness. The allocation rules finally adopted were not a wholly new approach to the issue of dues allocation. Instead the final rule was "contained" in the proposed version, and merely eliminated some of the alternative calculation methods specified in the NPR. Thus all aspects of the final rule were available to the public for comment. Moreover, the possibility that membership dues might be imputed in part to a tax-exempt organization's periodicals was an issue which had not previously been addressed by IRS regulations or established practice. The NPR for the first time dealt with an issue of great importance to organizations like the AMA. All such organizations must have recognized that the IRS was writing on a clean slate; the AMA cannot argue that it relied on established past practice as a justification for its non-participation. The AMA's sole explanation for its failure to comment is that the rule as initially proposed looked fine to it, and therefore the association saw no need to intervene in the rulemaking. But as we have seen, an agency's proposed rule is merely that, a proposal. While an agency must explain and justify its departures from a proposed rule, it is not straitjacketed into the approach initially suggested on pain of triggering a further round of notice-and-comment. The AMA was given a meaningful opportunity to comment on the IRS's dues allocation rules, and those rules will not be invalidated for lack of proper notice.

III.

The AMA also contends that the allocation rules are inconsistent with the Code sections governing the unrelated business income tax. The regulations establish a dichotomy between "direct advertising costs" and "readership costs"; readership costs (those expenses associated with the production and distribution of the editorial content of a periodical) are not fully deductible from advertising income. The AMA argues that the readership content of its journals contributes to the production of advertising revenue; to the extent the regulations prohibit the deduction of readership costs directly from advertising income, they are inconsistent with the statutory mandate that expenses "directly connected with" an unrelated business should be fully deductible. *See* § 512(a)(1). The AMA also contends that the allocation rules are invalid because they ignore competitive factors in allocating membership receipts to circulation income. According to the AMA the overriding purpose of the unrelated business income tax was to equalize competition between taxable and tax-exempt entities operating similar enterprises; to the extent the regulations prohibit the AMA from demonstrating that the subscription price charged by its competitors is lower than the result of the pro rata allocation method, the regulations impermissibly depart from the "competition-equalizing" purpose of the statute.

[4] At the outset we note that the Supreme Court has indicated that courts should generally defer to the IRS's interpretation *770 of the Internal Revenue Code in regulations meant to implement the Code's provisions. Treasury regulations " ' "must be sustained unless unreasonable and plainly inconsistent with the revenue statutes," and "should not be overruled except for weighty reasons." ' " [FN12] "The choice among reasonable interpretations is for the Commissioner, not the courts." *National Muffler Dealers Ass'n, Inc. v. United States,* 440 U.S. 472, 488, 99 S.Ct. 1304, 1312, 59 L.Ed.2d 519 (1979); *Chevron USA Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842-45, 104 S.Ct. 2778, 2781-83, 81 L.Ed.2d 694 (1984).

FN12. *Thor Power Tool Co. v. Commissioner,* 439 U.S. 522, 533, 99 S.Ct. 773, 781, 58 L.Ed.2d 785 (1979) (quoting *Bingler v. Johnson,* 394 U.S. 741, 750, 89 S.Ct. 1439, 1445, 22 L.Ed.2d 695 (1969) (quoting *Commissioner v. South Texas Lumber Co.,* 333 U.S. 496, 501, 68 S.Ct. 695, 698, 92 L.Ed. 831 (1948))); *see also United States v. Vogel Fertilizer Co.,* 455 U.S. 16, 24-26 (1982); *National Muffler Dealers Ass'n, Inc. v. United States,* 440 U.S. 472, 476, 99 S.Ct. 1304, 1306, 59 L.Ed.2d 519 (1979) (IRS's regulations, " 'if found to "implement the congressional mandate in some reasonable manner," must be upheld' ") (quoting *United States v. Cartwright,* 411 U.S. 546, 550, 93 S.Ct. 1713, 1716, 36 L.Ed.2d 528 (1973) (quoting *United States v. Correll,* 389 U.S. 299, 307, 88 S.Ct. 445, 449, 19 L.Ed.2d 537 (1967))); *Fulman v. United States,* 434 U.S. 528, 533, 98 S.Ct. 841, 845, 55 L.Ed.2d 1 (1978);

Water Quality Ass'n Employees' Benefit Corp. v. United States, 795 F.2d 1303, 1305-06 (7th Cir.1986).

[5] The regulations related to the deductibility of a periodical's expenses generally parrot the statutory language. The statute states that expenses are fully deductible from taxable income if they are "directly connected with" the conduct of the unrelated business; the regulation similarly provides that "direct advertising costs," which are fully deductible, are those costs which are "directly connected with the sale and publication of advertising." Reg. 1.512(a)-1(f)(6)(ii)(a). So far, there would not appear to be any problem.

However, the regulation goes on to state that "readership costs," (those costs which are "directly connected with the production and distribution of the readership content of the periodical"), are *only* deductible from advertising revenues to the extent that those costs exceed circulation income; *i.e.,* only to the extent that the editorial side of the journal produces a "loss." Reg. 1.512(a)-1(d)(2), (f)(1). [FN13] These are the provisions with which the AMA vigorously disagrees. For as the AMA sees things, the readership content of a journal contributes to its publisher's ability to sell advertising--a journal with high-quality articles is presumably more widely read and advertisers are accordingly more likely to place ads for their products in such a periodical. By failing to take account of the symbiotic relationship between advertising and editorial content, the regulation impermissibly fails to allow the deduction of costs which are in reality "directly connected with" the sale and publication of advertising.

FN13. The definition of fully deductible advertising costs specifically *excludes* "items of deduction attributable to the production or distribution of the readership content of the periodical." Reg. 1.512(a)- 1(f)(6)(ii)(a). Thus it is clear that the regulations generally do not contemplate the direct deduction of readership costs from advertising income.

While the AMA's argument is perhaps minimally plausible, we do not believe the AMA has carried the heavy burden of demonstrating that the IRS's contrary approach is "plainly inconsistent" with the tax code. First, we note that the AMA's position here is somewhat ironic--the AMA has been accorded a tax exemption for the readership content of its journals because the publication of a periodical furthers the organization's charitable purposes by disseminating knowledge to its members. The AMA (and many other tax-exempt organizations) initially argued that even the *advertising* revenue of its periodicals was tax exempt, because the advertising subsidized the readership content of the journal and thereby contributed to the organization's exempt purposes. That position was ultimately defeated by the addition of section 513(c) to the Code, and the decision in *United States v. American College of Physicians,* 475 U.S. 834, 106 S.Ct. 1591, 89 L.Ed.2d 841 (1986). The AMA now essentially reverses its position, portraying its journals as, in large part, vehicles for advertising, *771 and seeks to have a portion of editorial costs deducted directly from taxable advertising income.

Certainly, the AMA makes a valid point that the editorial content of its journals contributes in some manner to the success of the advertising business. Presumably few AMA members would read, and therefore few advertisers would advertise in, a journal which was one-hundred percent advertising. However, it is entirely plausible to label this general benefit which the articles confer on the advertising "indirect" (and therefore not fully deductible from advertising revenue), especially when advertising is viewed (as it must be under the "fragmentation" principle, *see* section 513(c) of the Code) as a separate and independent enterprise. The costs of producing the readership content of the AMA's journals is most directly connected with the editorial "business" of the journals; these costs are attributable only indirectly to the other business (advertising) which the AMA also conducts within the confines of a single periodical. *See* Reg. 1.512(a)- 1(a) ("to be 'directly connected with' the conduct of unrelated business for purposes of section 512, an item of deduction must have proximate and primary relationship to the carrying on of that business"). If two businesses occupy a single building, and one business increases its sales volume, thereby increasing the customer traffic through the common building, benefitting the second, independent enterprise, we would without hesitation label the effect on the latter business "indirect." The situation of the AMA's publications is identical--the AMA essentially carries on two separate businesses "under the same roof"; when one business does well and increases the allure

of the building as a whole to customers, the effect on the second business is "indirect" and therefore the first enterprise's expenses are not immediately deductible from the latter's income. It is certainly reasonable for the IRS to have concluded that, in general, "readership costs" of the AMA's periodicals are not "directly connected with" the conduct of the AMA's advertising business.

The AMA argues that the Second Circuit's decision in *Rensselaer Polytechnic Institute v. Commissioner,* 732 F.2d 1058 (1984), requires that the AMA be allowed to deduct some portion of readership costs from advertising income. *Rensselaer* involved a fieldhouse operated by a tax-exempt educational institution. The fieldhouse was used for both tax-exempt, student events (*e.g.,* college athletics), and for commercial functions, such as commercial ice shows. The staging of commercial events at the fieldhouse constituted an "unrelated business." The allocation question before the Second Circuit involved certain "fixed costs" of operating the structure-- repairs, depreciation, salaries of fieldhouse personnel, etc. The court held that those fixed expenses should be allocated to the school's tax-exempt and taxable businesses based on the number of hours for which the fieldhouse was used for each activity, since the fixed costs were attributable to both student and commercial events. *Id.* at 1061-62; *see also Disabled Am. Veterans v. United States,* 704 F.2d 1570, 1573-74 (Fed.Cir.1983).

Rensselaer is distinguishable from this case. *Rensselaer* involved the cost of goods or services which actually benefited both the tax-exempt function and the unrelated trade or business. *Rensselaer* would control the present case if the AMA wished to apportion the costs of a printing press, paper stock or employees used in both the editorial and advertising businesses based on the extent to which each business employed the common resource. Such an apportionment would clearly be proper, since the expense benefited both activities in some measure.

But *Rensselaer* does not address the independent question whether, assuming costs are directly tied to only one activity, those costs may *still* be deductible from the other activity, because the activities themselves benefit each other in some undefined fashion. In *Rensselaer* the school did not argue that a portion of the costs of its student functions should be deducted from its taxable income because staging student events promoted commercial leasing by demonstrating to the entertainment *772 industry that the fieldhouse was an attractive venue fully capable of handling major events. (As a factual matter, such an argument might well be accurate-- commercial promoters would doubtless be hesitant to stage a major entertainment event in a stadium which was seldom used, and with which the local audience was unfamiliar.) We have no doubt that, if such an argument *had* been presented, the Second Circuit would have rejected it for the same reasons we reject the AMA's argument here-- while one activity may benefit the other in some generalized way, that beneficial effect is more properly viewed as only "indirectly connected" to the benefited business.

The AMA also contends that the regulations are invalid because they ignore the situation of the AMA's taxable competitors in determining the portion of membership dues receipts to be allocated to circulation income. The AMA argues that the approach of the regulations is inconsistent with the fundamental purpose of the unrelated business income tax, which was to equalize competition between taxable and tax-exempt organizations plying the same trade. The AMA argues that this "competition-equalizing" goal can be attained only by placing the AMA's journals on the "same [*i.e.,* identical] tax basis" as its commercial competitors. The simple answer to this argument is that, although the equalization of competition was indeed a major goal of the unrelated business tax, Congress never intended to place tax-exempt organizations on a tax basis identical to that of their commercial competitors. Congress instead endorsed the "fragmentation" principle, whereby a charity's periodicals are divided into two components. In light of Congress' adoption of the "fragmentation" concept, it is not possible to place the AMA's journals on an identical footing with competing publications. Taxable publications labor under no "fragmentation" requirement; there is no need for a taxable publisher to segregate its income or expenses into components, some taxed, others not. A commercial publisher is taxed on all aspects of its business. Therefore, although it is certainly instructive to recall the purposes underlying the enactment of the unrelated business income tax, direct analogies to the tax treatment of commercial

publishers are of limited assistance in deciding specific allocation questions involving tax- exempt organizations.

Moreover, while the equalization of competition between taxable and tax-exempt entities was a major goal of the unrelated business income tax, it was by no means the statute's sole objective. As the Fifth Circuit concluded after conducting a detailed examination of the legislative history of the unrelated business income tax; "although Congress enacted the predecessors of section 511-513 to eliminate a perceived form of unfair competition, that aim existed as a corollary to the larger goals of producing revenue and achieving equity in the tax system." *Louisiana Credit Union League v. United States,* 693 F.2d 525, 540 (5th Cir.1982); *see also Rensselaer,* 732 F.2d at 1063-64 & n. 2 (Mansfield, J., dissenting). This interpretation of the unrelated business income tax should not be constrained by a narrow focus on only one of several objects which motivated Congress to enact the tax.

We will not second-guess the IRS's decision to eliminate from its proposed rules the allocation method using as a benchmark periodicals of comparable *taxable* enterprises in computing the portion, if any, of a charitable organization's membership dues to be considered an implicit subscription payment. The IRS could reasonably conclude that the efforts required to attempt to determine whether another publication was "comparable" were not worthwhile. This is true especially if, as in the final rule here, allocable membership receipts could be determined using factors internal to the charity, such as the relation of periodical costs to the cost of all exempt activities. Although the AMA's alternative allocation approach is *also* reasonable (and in fact was included in the IRS's initial proposal), it is for the IRS to choose among a number of rational approaches to a difficult question of income measurement. We therefore conclude that the IRS regulations governing the allocation of membership *773 dues to circulation income are not inconsistent with the relevant provisions of the Internal Revenue Code.

IV.

[6] The AMA argues that membership dues which it placed in an "association equity" account should not have been counted as current membership receipts in order to determine the amount of membership dues which should be considered a member's payment for the right to receive the AMA's periodicals. The amounts paid into the association equity account were not used to meet the AMA's expenses in the tax years in question, but were instead employed as a reserve fund to meet possible future operating deficits. The parties stipulated that the amounts placed in this reserve were in fact not employed by the AMA to compensate for revenue shortfalls until the 1985 tax year.

The IRS regulation outlining the "pro rata allocation method" for membership dues states that this method for determining an imputed subscription price for a charity's publications rests on the assumption "that membership receipts and gross advertising income are equally available for all of the exempt activities (including the periodical) of the organization." Reg. 1.512(a)- 1(f)(4)(iii). Where membership receipts are not employed to meet current expenses (and are not, in fact, even "available" to pay current expenses due to a self-imposed restriction on the use of the funds), the AMA contends that the explicit premise of the pro rata allocation method does not apply, and therefore that portion of dues which is set aside to meet future expenses must be excluded from the pro rata calculation. The district court accepted this argument. 668 F.Supp. at 1096-97.

We cannot agree with the AMA's argument. The fundamental premise of regulation (f)(4)(iii) is that the activities of a charitable organization produce revenue in the same proportion that the costs of those activities bear to one another. But the regulation does *not* necessarily assume that all membership receipts are actually expended to meet activity costs; instead, it is entirely consistent with the regulation to find that the activities of an exempt organization produce a "profit," in the sense that those activities produce revenues in excess of their costs. All the regulation assumes is that, if the organization in fact reaps a "profit" from its activities, that profit was produced by all of the association's activities in equal measure (*i.e.,* the "profit margin" of each activity is assumed to be the same). Members need not believe they are receiving the benefits of membership "at cost"; it is perfectly rational to assume that members realize they are paying more for services than those services cost the organization to provide. Therefore, although the

AMA's revenues exceeded the costs of its operations, and the surplus was placed in a "rainy-day fund," this does not mean that, when members paid their annual dues, they were not paying for the various benefits of membership in proportion to what those activities cost the association to provide. It is perfectly rational for regulation (f)(4)(iii) to assume that members pay for services in the same proportion as the cost of those services to the organization, even if revenues in fact exceed expenses.

The AMA also suggests that the excess dues placed in the "association equity" account should be likened to capital contributions. The problem with this argument is that the AMA's members received nothing in return for their "investment" in the AMA other than the right to receive the benefits of membership in the single annual period for which dues were assessed. In exchange for a capital contribution the contributor receives a future or residual claim, for example, for return of capital as dividends or as the proceeds of liquidation. A capital contribution is in the nature of an investment whereby the investor purchases a continuing interest in an enterprise. [FN14] In *774 this case there is no evidence that AMA members received anything more for their annual membership fee than an annual membership; they received no claim of future benefit.

> FN14. *See, e.g., Commissioner v. Fink,* 483 U.S. 89, 97, 107 S.Ct. 2729, 2734, 97 L.Ed.2d 74 (1987) (contributors must intend "to protect or increase the value of their investment in the corporation"); *In the Matter of Larson,* 862 F.2d 112, 117 (7th Cir.1988) (capital contribution characterized by fact that investor expects to recoup her investment, hopefully with a profit, in the event the corporation is successful).

We have found only one reported decision which is even remotely similar to the present case. In *Washington Athletic Club v. United States,* 614 F.2d 670 (9th Cir.1980), a non-profit membership organization established a "capital improvement fund" to finance various construction projects intended to expand the services provided by the club. Members were assessed a surcharge, payable as part of their annual dues, which was placed in the club's improvement fund. The funds contained in the capital improvement account were not used to meet current operating expenses. Nevertheless the court held that the monies paid by members into the capital improvement fund were current income of the organization, *not* tax-exempt capital contributions. The court noted that members were required to pay the surcharge in order to enjoy the club's facilities in the current period, and that payment of the surcharge did not confer any continuing benefit on members after the close of the year for which dues were paid. *Id.* at 675. Nor were a member's contributions to the capital improvement account cumulative; a member who had paid into the capital improvement account for a number of years was in no better position than a member who paid into the account only once. *Id.* Since members received no benefit through payment of the surcharge other than the rights attendant to an annual membership in the club, the members lacked an "investment motive" in making the payments, and therefore treatment of the monies received as a capital contribution was inappropriate. *Id.*

The reasoning of *Washington Athletic Club* is persuasive, and directly applicable here. The AMA's members received no continuing benefit from their payments into the association equity account; the sum paid as an annual membership fee entitled the member only to the benefits of membership in the year of payment. Therefore the funds placed in the association equity account were current "income" of the AMA, and should be allocated as revenue to the AMA's various activities in accordance with the pro rata allocation method. [FN15]

> FN15. If the AMA were consistent in its view that monies placed in the association equity account should be likened to capital contributions, it would argue that those monies should *never* be considered income, even when later expended to cure an operating deficit. However, the AMA has conceded that the association equity funds would be treated as income when actually employed to pay current expenses of the organization.

In essence the AMA's argument concerning membership dues placed in a reserve account presents a question of income realization. The AMA argues, in effect, that it should not be required to recognize income in the current tax year where it has set aside the monies received to meet future expenses. But this is contrary to the general rule that income must be recognized when the

recipient has the unrestricted right to use the funds. This is true even though the income recipient may incur future expenses performing the services currently paid for, or may, in the future, be required to refund the money. [FN16] A taxpayer *775 may not defer the recognition of income (or, what is virtually the same thing, anticipate a future expense), by unilaterally establishing reserve accounts to meet contingent liabilities. [FN17] Of course, if "all the events" necessary to establish the taxpayer's future liability have already occurred, or the taxpayer has assumed a definite obligation to provide services beyond the current tax year, the current deduction of a future expense, or the deferral of income recognition, may be allowed. [FN18] But the AMA does not argue that its future liabilities were certain in the tax years in question, nor did the AMA incur any liability to provide services to current members in future years. Therefore there is no justification for allowing the AMA to defer income recognition until the years in which the association equity account was actually drawn down to meet current expenses. [FN19]

FN16. Under the "claim of right" doctrine a taxpayer must recognize as current income money received over which the taxpayer exercises unrestricted control, unless the taxpayer is "under an unequivocal ... duty to repay it, so that he is really just the custodian of the money." *Illinois Power Co. v. Commissioner,* 792 F.2d 683, 689 (7th Cir.1986); *see also United States v. Lewis,* 340 U.S. 590, 71 S.Ct. 522, 95 L.Ed. 560 (1951); *North Am. Oil Co. v. Burnet,* 286 U.S. 417, 424, 52 S.Ct. 613, 615, 76 L.Ed. 1197 (1932) (Brandeis, J.) ("If a taxpayer receives earnings under a claim of right and without restriction as to its disposition, he has received income which he is required to [pay tax on], even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent."). Relying on this principle courts have generally held that a public utility must recognize a security deposit as an "advance payment of income," and thus currently taxable, if the utility has the unrestricted use of the money, is not required to pay full market-rate interest on the funds and the deposit is intended to secure the payment of the customer's utility bill, and therefore may never be refunded if the customer's payments are delinquent. *Indianapolis Power & Light Co. v. Commissioner,* 857 F.2d 1162 (7th Cir.1988); *City Gas Co. of Fla. v. Commissioner,* 689 F.2d 943 (11th Cir.1982).

FN17. *Brown v. Helvering,* 291 U.S. 193, 54 S.Ct. 356, 78 L.Ed. 725 (1934) (Brandeis, J.) (taxpayer must recognize as current income amounts placed in reserve account to meet contingent future liabilities).

FN18. Regarding the current deductibility of an expense to be paid in the future where "all the events" necessary to establish liability have occurred during the tax year, *see generally United States v. General Dynamics Corp.,* 481 U.S. 239, 242-46, 107 S.Ct. 1732, 1735-37, 95 L.Ed.2d 226 (1987), and cases cited therein. Even where money currently paid is intended as a prepayment for services to be performed in future years, the courts have allowed income recognition to be deferred in only limited circumstances. Thus, where future services will be performed at random times over the term of a service contract, rather than equally in each time period, the courts have generally required that the taxpayer recognize current income in the entire amount of the payment received. *Schlude v. Commissioner,* 372 U.S. 128, 83 S.Ct. 601, 9 L.Ed.2d 633 (1963); *American Auto. Ass'n v. United States,* 367 U.S. 687, 81 S.Ct. 1727, 6 L.Ed.2d 1109 (1961); *Automobile Club of Mich. v. Commissioner,* 353 U.S. 180, 77 S.Ct. 707, 1 L.Ed.2d 746 (1957); *RCA Corp. v. United States,* 664 F.2d 881, 886-89 (2d Cir.1981) , *cert. denied,* 457 U.S. 1133, 102 S.Ct. 2958, 73 L.Ed.2d 1349 (1982). For a general discussion of the current tax consequences of contingent future events, and the relationship between tax accounting and generally accepted financial accounting principles, *see Thor Power Tool Co. v. Commissioner,* 439 U.S. 522, 541- 44, 99 S.Ct. 773, 780, 58 L.Ed.2d 785 (1979).

FN19. In many respects the IRS's refusal to give effect to the AMA's association equity account as a valid means to defer income recognition is functionally identical to the judgment under section 446 of the Code that a taxpayer's accounting method "does [not] clearly reflect income." The Supreme Court has stressed that the Commissioner has been accorded a great deal of discretion in assessing the accuracy of a taxpayer's method of accounting; the IRS's determination in this regard "should not be interfered with unless clearly unlawful." *Lucas v. American Code Co.,* 280 U.S. 445, 449, 50 S.Ct. 202, 203, 74 L.Ed. 538 (1930); *see also United States v. Hughes Properties, Inc.,* 476 U.S. 593, 603, 106 S.Ct. 2092, 2097, 90 L.Ed.2d 569 (1986); *Thor Power Tool Co. v. Commissioner,* 439 U.S. 522, 532, 99 S.Ct. 773, 780, 58 L.Ed.2d 785 (1979). This consideration suggests yet another reason why we should be reluctant to invalidate the IRS's determination that

funds assigned to the association equity account constitute current "income" of the AMA.

V.

[7] The AMA distributes a substantial number of copies of both JAMA and AM News free of charge. This "controlled circulation" is specifically directed at physicians who constitute an especially attractive audience for persons likely to advertise in the journals. The parties stipulated that the sole purpose behind the AMA's controlled circulation was to appeal to advertisers. The AMA now contends, and the district court found, that the costs of producing the editorial content of the copies of the journals sent to control group members should be considered "direct advertising costs," fully deductible from advertising revenue. According to the AMA and thedistrict court, an item of expense is "directly connected with" the AMA's advertising activities if the "costs are incurred *solely* for the purpose of increasing advertising revenues." 668 F.Supp. at 1095 (emphasis in original).

The IRS's regulations define "direct advertising costs" to exclude "items of deduction attributable to the production or distribution of the readership content of the *776 periodical." Reg. 1.512(a)-1(f)(6)(ii)(a). The IRS argues that these regulations adopt a purely objective standard for determining the nature of an expense--if the expense is related to the production or distribution of the journal's articles, it is a "readership cost" deductible from advertising income only if circulation income is negative; if the expense is proximately related to production or distribution of advertising it is a "direct advertising cost" and fully deductible from advertising revenue. Under the Government's reading of the regulations the subjective intent of the publisher in incurring any particular expense is irrelevant to the categorization of the expense as a readership or advertising cost. Thus, the expenses associated with the production of the readership content of copies of the AMA's journals distributed to control group members would be deductible directly from circulation income only, despite the fact that the AMA's motivation in producing and distributing these copies of the journals was *solely* to promote its advertising business.

We believe that the IRS has adopted an overly restrictive construction of its regulations. Although the regulations define readership costs as any cost "attributable to" the production or distribution of articles in a tax- exempt organization's journals, the rules need not be read to limit the deductibility of the cost of producing articles where such costs are motivated *solely* by an intent to increase advertising revenues. Where the clearly dominant motivation of a given expenditure is to contribute to the taxable, unrelated enterprise, that cost is "directly connected with" the taxable enterprise and therefore deductible in its entirety from the income of the unrelated trade or business.

Under the regulations, an expense is "directly connected with" an unrelated trade or business where the item of deduction "ha[s] [a] proximate and primary relationship to the carrying on of that business." Reg. 1.512(a)-1(a). The required connection between an expense and the unrelated business is similar to the nexus required to support the deduction of a business expense or bad debt. *Rensselaer Polytechnic Inst. v. Commissioner,* 732 F.2d 1058, 1062 (2d Cir.1984). And the general rule is that an item of expense is deductible as a "business" expense or bad debt if "the dominant motivation" of the taxpayer in incurring the expense was to further the particular business enterprise. *See United States v. Generes,* 405 U.S. 93, 103-05, 92 S.Ct. 827, 833-34, 31 L.Ed.2d 62 (1972); *Whipple v. Commissioner,* 373 U.S. 193, 204, 83 S.Ct. 1168, 1175, 10 L.Ed.2d 288 (1963). We see no reason to adopt a different rule in determining whether a tax-exempt organization's expenditures are "directly connected with" an unrelated trade or business. If the dominant motivation of an expenditure is to further the unrelated business, it should be fully deductible from the income of that business.

The Supreme Court's decision in the *American College* case provides further support for an intent-based standard for deductibility of publication expenses. The Court held in *American College* that the determination whether advertising in exempt organization periodicals is in fact a taxable, "unrelated" business must depend on the facts and circumstances of a particular advertising program. 475 U.S. at 847-50, 106 S.Ct. at 1598-1600. The Court specifically rejected the government's argument that advertising was *per se* "unrelated" to a charity's purposes and therefore always taxable. In similar fashion, we reject the Government's

advocacy of a *per se* rule that the cost of producing articles can *never* be a direct advertising cost, even where it is undisputed that the expense was incurred only to promote a charity's advertising business.

This holding is not inconsistent with our earlier ruling that the IRS's regulations are generally consistent with the governing provisions of the tax code. In that context, we rejected the AMA's broad argument that the editorial content of a journal directly produces advertising revenue simply because of the relationship of advertising and articles in a single publication. However, while the regulations are on sound ground in prohibiting as a general rule the full deductibility of readership expenses, in *777 certain circumstances such costs are part of the journal's advertising enterprise. This is true where it is absolutely clear that the costs would not have been incurred but for the journal's efforts to promote its advertising business. Where the dominant motivation of a readership expense is demonstrably to increase advertising revenues, that expense is deductible as a "direct advertising cost." We therefore affirm the district court's judgment that the costs of producing articles in copies of the AMA's journals distributed free of charge as part of the AMA's controlled circulation are fully deductible "direct advertising costs."

VI.

[8] Finally the AMA argues that membership dues should not be allocated to circulation income where the dues-paying AMA member was entitled to receive complimentary copies of JAMA and AM News through the AMA's "controlled circulation." The AMA argues, in essence, that these physicians should not be deemed to have paid for a periodical (through a portion of their membership dues) which they were entitled to receive free of charge. Regulation (f)(3), which states that dues will be allocated to circulation income if the "right to receive" the periodical "is associated with membership," should be read to embody a "notion of exclusivity." We take it this "notion of exclusivity" would mean that a portion of dues should be attributed to circulation income only if the member receives the periodical *solely because of his membership* in the organization. The AMA also relies on Regulation (f)(3)'s statement that, in general, membership receipts allocated to circulation income should approximate the price that would be paid in a comparable arms-length transaction. Thus, in the AMA's eyes, "the central issue [is] whether a commercial publisher would distribute JAMA and AM News free of charge" to physicians in the control group who are also dues-paying AMA members.

We believe that the AMA fundamentally misstates the issue. If we are to rely on analogies to hypothetical arms-length transactions by taxable publishers, the relevant analogy would be to a commercial publisher who receives paid subscriptions from physicians otherwise entitled to receive the periodical free. The physicians had no idea they were entitled to complimentary subscriptions. And our hypothetical publisher ("laughing all the way to the bank," as the saying goes) retains the money paid by the unknowing physicians, meanwhile purging their names from the controlled circulation list (to insure that the doctors do not receive two copies of the journal). Is the money received by the taxable publisher income? Of course it is. Although our over-generous physicians paid more for the journal than they needed to, this does not change the basic fact--they *did* pay for the journal, and the publisher was only too happy to keep the unnecessary payment. The situation might be different if the publisher returned the subscription payment to the physicians, explaining that payment was unnecessary--but there is no indication that the AMA informed the relevant group of physicians to put their money to better use.

Adoption of the AMA's position would also produce the anomaly that these control group/AMA members would have paid *more* for the AMA's *other* services than noncontrol group AMA members. The AMA now argues that these physicians, schooled in the ways of medical journals, *must have* known that AMA membership was unnecessary if the periodicals were all they wanted, and therefore *must have* intended their dues payments to apply only to the AMA's other activities. However as Judge Shadur observed, "[n]othing [in the record] is offered to support that ipse dixit." 668 F.Supp. at 1098 n. 22. Since the burden of proof is on the AMA in this refund action, this lack of record evidence is fatal to the AMA's contentions regarding its members' motivations in paying dues. We therefore affirm the district court's conclusion that dues from members who were also in the control group should be allocated to

circulation income to the same extent as the dues of other AMA members.

*778 VII.

For the foregoing reasons the judgment of the district court is

AFFIRMED IN PART AND REVERSED IN PART.

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Appellate Court of Illinois,
First District, Fifth Division.

ILLINOIS HEALTH CARE ASSOCIATION and Heartland Manor Nursing Center, Inc., Plaintiffs-Appellants,
v.
Joan WALTERS, as Director of the Department of Public Aid, Defendant-Appellee.

No. 1-97-3820.

Jan. 29, 1999.
Rehearing Denied April 8, 1999.

Nursing home trade organization, and individual nursing home, sued Director of the Illinois Department of Public Aid (IDPA), alleging that reimbursement rates for Medicaid patients were inadequate and violated the Illinois Public Aid Code, and also that IDPA's billing system violated the Prompt Payment Act. After finding was directed in favor of defendant, the Appellate Court, 268 Ill.App.3d 988, 206 Ill.Dec. 848, 645 N.E.2d 1370, reversed and remanded. On remand, the Circuit Court, Cook County, Edwin M. Berman and Robert V. Boharic, JJ., dismissed action for lack of subject matter jurisdiction. Plaintiffs appealed, and the Appellate Court, Theis, J., held that: (1) claim alleging that method of calculating reimbursement rates violated Medicaid reimbursement provisions of Public Aid Code, and seeking to have rates calculated in particular manner using desired method, was action against the State, over which Court of Claims had exclusive subject matter jurisdiction, and (2) enactment of statutes and regulations mooted injunctive aspects of other counts, and thus brought those counts within jurisdiction of Court of Claims.

Affirmed.

West Headnotes

[1] Courts ⇐472.1
106k472.1 Most Cited Cases

If suit is filed against the State, jurisdiction may be exercised only by Court of Claims.

[2] States ⇐191.10
360k191.10 Most Cited Cases

Whether suit is brought against the State, so that jurisdiction may only be exercised by Court of Claims, does not depend on named parties in suit, but rather, on issues raised and relief sought.

[3] Courts ⇐472.1
106k472.1 Most Cited Cases

[3] States ⇐191.10
360k191.10 Most Cited Cases

If suit is brought against State official, but judgment could operate to control actions of the State or subject it to liability, then suit is in actuality against the State, and only Court of Claims may exercise jurisdiction.

[4] Courts ⇐472.1
106k472.1 Most Cited Cases

[4] States ⇐191.10
360k191.10 Most Cited Cases

Suit which alleges that State officer acts in excess of his or her statutory authority is not suit against the State, and thus is not one over which Court of Claims has exclusive jurisdiction, because it is presumed that the State does not violate its laws or the Constitution.

[5] Courts ⇐472.1
106k472.1 Most Cited Cases

[5] States ⇐184.2(2)
360k184.2(2) Most Cited Cases

Action in which nursing home trade organization, and individual nursing home, sued Director of Illinois Department of Public Aid (IDPA), alleging that IDPA's method of calculating reimbursement rates violated Medicaid reimbursement provisions of Public Aid Code, and seeking to have rates calculated in particular manner using desired method, was in actuality action against the State, over which Court of Claims had exclusive jurisdiction. S.H.A. 305 ILCS 5/5-5.4, 5-5.5.

[6] Courts ⇐472.1
106k472.1 Most Cited Cases

[6] States ⚿191.10
360k191.10 Most Cited Cases

Distinction exists between cases based on a present claim for damages, which are considered actions against the State which must be brought in Court of Claims, and those seeking to enjoin State official from taking future action in excess of her delegated authority, which are not considered to be against the State.

[7] Courts ⚿472.1
106k472.1 Most Cited Cases

[7] States ⚿184.2(2)
360k184.2(2) Most Cited Cases

Matter in which nursing home trade organization, and individual nursing home, sued Director of Illinois Department of Public Aid (IDPA), alleging that IDPA had not used most currently available cost reports to set Medicaid reimbursement rates, was action seeking to enforce present claim, and thus was action against the State over which Court of Claims had exclusive jurisdiction, where change in governing statute had modified requirement and thus mooted any requested injunctive relief, leaving only claim for declaratory judgment as to whether statute was violated during prior years. S.H.A. 305 ILCS 5/5- 5.4(1).

[8] Courts ⚿472.1
106k472.1 Most Cited Cases

[8] States ⚿184.2(2)
360k184.2(2) Most Cited Cases

Action in which nursing home trade organization, and individual nursing home, sued Director of Illinois Department of Public Aid (IDPA), alleging that IDPA had failed to comply with Administrative Procedure Act (APA) when enacting rules such as "Inspection of Care Guidelines," and sought court order mandating such compliance, was action against the State, over which Court of Claims had exclusive jurisdiction, where IDPA had since adopted rules pursuant to statutory procedures, which mooted request for injunctive relief.

[9] Courts ⚿472.1
106k472.1 Most Cited Cases

[9] States ⚿184.2(2)
360k184.2(2) Most Cited Cases

Action in which nursing home trade organization, and individual nursing home, sued Director of Illinois Department of Public Aid (IDPA), alleging that IDPA had failed to comply with State Prompt Payment Act, and sought court order mandating such compliance, was action against the State, over which Court of Claims had exclusive jurisdiction, where Act had been amended to eliminate its coverage as to nursing homes, thus mooting any need by IDPA to reform its billing system to conform with procedures mandated by Act. S.H.A. 30 ILCS 540/1.

**404 *436 ***774 James J. Casey and Paul C. Ziebert of Ross & Hardies, Chicago, for Appellants.

James E. Ryan, Attorney General, Barbara Preiner, Solicitor General (James C. O'Connell, David Adler, Special Assistant Attorneys General, of counsel), for Appellee.

Justice THEIS delivered the opinion of the court:

Plaintiffs Illinois Health Care Association (IHCA) and Heartland Manor Nursing Center, Inc. (Heartland), appeal from the circuit court's order dismissing the amended complaint for lack of subject matter jurisdiction. The court found that this action was against the state and, therefore, only the Illinois Court of Claims could exercise *437 jurisdiction. On appeal, plaintiffs argue that the circuit court erred in finding that it lacked jurisdiction because this action was not against the state. For the following reasons, we affirm the judgment of the circuit court.

On September 12, 1989, plaintiffs filed an amended complaint in the circuit court of Cook County against the Director [FN1] of the Illinois Department of Public Aid (IDPA). Plaintiff IHCA is a professional trade organization which represents several hundred nursing homes in Illinois. Plaintiff Heartland is an Illinois nursing home and a member of the IHCA. In count I, plaintiffs alleged that the IDPA's method of calculating reimbursement rates paid to nursing homes violated the Medicaid reimbursement provisions of the Illinois Public Aid Code. Ill.Rev.Stat.1985, ch. 23, pars. 5-5.4, 5-5.5. Plaintiffs claimed in count II that the IDPA violated the Illinois Administrative Procedure Act

(Ill.Rev.Stat.1985, ch. 127, par. 1001 *et seq.*) because certain regulations were not promulgated in accordance with the prescribed rule-making procedures. Plaintiffs challenged IDPA's billing system as violative of "AN ACT to require prompt payments by the State of Illinois * * * " (the State Prompt Payment Act) (Ill.Rev.Stat.1985, ch. 127, par. 132.401 *et seq.*) in count III. All three counts **405 ***775 requested declaratory, injunctive, and money damages relief.

FN1. Joan Walters is the successor to Robert W. Wright, the original named defendant in this case.

In light of this case's long procedural history, only the pertinent background information will be narrated. Partial summary judgment in plaintiffs' favor had been granted as to count II, so the case went to trial on counts I and III. After presentation of plaintiffs' case in chief, the court granted defendant's motion pursuant to section 2-1110 of the Code of Civil Procedure. 735 ILCS 5/2-1110 (West 1992). This finding was reversed on appeal in *Illinois Health Care Ass'n v. Wright,* 268 Ill.App.3d 988, 999, 206 Ill.Dec. 848, 645 N.E.2d 1370, 1376 (1994), with instructions to determine whether the circuit court or the Illinois Court of Claims had subject matter jurisdiction in this case. Upon remand, the circuit court dismissed the case for lack of jurisdiction as to counts I and III. Despite the previous decision granting partial summary judgment as to count II, the court subsequently also dismissed that count for lack of jurisdiction.

[1] On appeal, the only issue to be determined is whether this is an action against the state. If a suit is filed against the state, jurisdiction may be exercised only by the Illinois Court of Claims. *Senn Park Nursing Center v. Miller,* 104 Ill.2d 169, 186, 83 Ill.Dec. 609, 470 N.E.2d 1029, 1038 (1984). Relying primarily on *Senn Park,* plaintiffs contend that their case is *438 not against the state because defendant exceeded her statutory authority. Accordingly, plaintiffs argue, this action is properly heard in the circuit court.

[2][3][4] Whether a suit is brought against the state does not depend on the named parties in the suit but, rather, on the issues raised and the relief sought. *Senn Park,* 104 Ill.2d at 186, 83 Ill.Dec. 609, 470 N.E.2d at 1038. If a suit is brought against a state official, yet the judgment could operate to control the actions of the state or subject it to liability, then the suit is, in actuality, against the state. *Senn Park,* 104 Ill.2d at 187, 83 Ill.Dec. 609, 470 N.E.2d at 1038. This preserves the doctrine of sovereign immunity by preventing interference of both the state's performance of governmental functions and its control over state funds. *Senn Park,* 104 Ill.2d at 188, 83 Ill.Dec. 609, 470 N.E.2d at 1039. On the other hand, where a state officer acts in excess of his or her statutory authority, the suit is not against the state because it is presumed that the state does not violate its laws or the constitution. *Senn Park,* 104 Ill.2d at 189, 83 Ill.Dec. 609, 470 N.E.2d at 1039.

[5] Plaintiffs rely heavily on *Senn Park* to support their claims. In *Senn Park,* as in the present case, the Director of the IDPA was the only defendant. This, however, did not preclude the court from engaging in an analysis of the issues raised and the relief sought. The court ultimately determined that the suit was not against the state because it was an action to compel a public official to perform a clear and mandatory duty. *Senn Park,* 104 Ill.2d at 189, 83 Ill.Dec. 609, 470 N.E.2d at 1039 ("plaintiffs sought a writ of *mandamus* against [the Director of the IDPA] personally to direct him to pay them in accordance with the prior approved State plan"). Discretionary authority was not conferred on the Director nor was such discretion necessary in order for him to perform. Consequently, the court did not consider the cause of action to be against the state. Importantly, this conclusion did not frustrate the purposes of sovereign immunity because the state could not claim interference with its functions when the act complained of was unauthorized by statute. *Senn Park,* 104 Ill.2d at 188, 83 Ill.Dec. 609, 470 N.E.2d at 1039.

The issues raised and relief sought in count I of this case lead us to conclude, unlike *Senn Park,* that this count constitutes an action against the state. In count I, plaintiffs complain that the IDPA violated sections 5- 5.4(2) through (4) of the Public Aid Code. Ill.Rev.Stat.1985, ch. 23, pars. 5-5.4(2) through (4). This statute prescribes the requirements and parameters the IDPA must follow in determining reimbursement rates paid to nursing homes. The reimbursement rate is based on a formula that includes three components: nursing rate, capital rate, and support rate. The nursing rate component covers the direct costs of caring for

nursinghome residents. Reimbursement **406 ***776 of nursing care is calculated by assessing each resident's utilization of *439 services and the level of care provided. This periodic resident assessment is done by nurse surveyors with the aid of a patient assessment instrument called the "Inspection of Care Guidelines." The surveyors determine the level of care required by the residents and which services the residents have used. The services provided by the nursing homes have previously been assigned minutes per day, which eventually translate into costs.

Plaintiffs allege that defendant violated the statute when conducting patient assessments by failing to take into account the actual costs as required in sections 5-5.4(2) through (4). In 1985, the IDPA used the patient assessment instrument to determine that the amount of reimbursement would be reduced by approximately $4 per resident. Rather than impose this reduction immediately and all at once, the IDPA instituted a graduated reduction of the reimbursement rate to take place over a period of years. Plaintiffs argue that this was an arbitrary manipulation of the patient assessment instrument and, therefore, not based on actual costs. Plaintiffs further claim that the assessment instrument failed to adequately measure the residents' nursing care needs because the assigned minutes and staffing levels had not been reviewed periodically and were not based on time and motion studies. Finally, plaintiffs contend that the capital and support rate components of the reimbursement formula were flawed because two-year-old cost reports were used to set current rates rather than the "most currently available cost reports." Ill.Rev.Stat.1985, ch. 23, par. 5-5.4(1). To cure these alleged deficiencies, plaintiffs requested that the court order the IDPA to "[c]onduct a validated time and motion study to determine the actual time required to perform each component of nursing care" and to "[d]esign a payment system that adequately compensates nursing homes in compliance with the payment standards" provided in the statute.

A reading of the statute establishes that the IDPA has substantial discretion in determining a method for calculating reimbursement rates. Specifically, the sections at issue state:

"§ 5-5.4. Standards of Payment--Department of Public Aid. The Department of Public Aid shall develop standards of payment of skilled nursing and intermediate care services in facilities providing such services under this Article which:
* * *
(2) Shall take into account the actual costs incurred by facilities in providing services for recipients of skilled nursing and intermediate care services under the medical assistance program.
(3) Shall take into account the medical and psychosocial characteristics and needs of the patients.
*440 (4) Shall take into account the actual costs incurred by facilities in meeting, licensing and certification standards imposed and prescribed by the State of Illinois * * *." Ill.Rev.Stat.1985, ch. 23, pars. 5-5.4(2),(3), (4).

Under the express language of the statute, the IDPA has the authority to develop a methodology for formulating reimbursement rates based on certain factors. The IDPA has the power to develop these calculations without interference from other entities or persons. The statute's only constraint on the IDPA in creating a formula is that the IDPA must "take into account" certain factors. However, there is no restriction as to how or to what extent those factors must be considered.

Unlike *Senn Park*, plaintiffs are not asking the IDPA to perform clear, mandatory, and nondiscretionary tasks, but are requesting that the reimbursement rates be calculated in a particular manner using a method they desire. These requests invade the discretionary nature of the statute and frustrate the doctrine of sovereign immunity. Having the IDPA calculate reimbursements rates in a certain way relinquishes control of state operations and funds to plaintiffs. As the court in *Brucato v. Edgar*, 128 Ill.App.3d 260, 83 Ill.Dec. 489, 470 N.E.2d 615 (1984), so aptly stated:

"[W]hile it is true that an action to restrain a State official from acting in contravention **407 ***777 of the law or exceeding his authority thereunder is not considered to be against the State [citation], it is well settled that where the action seeks to control the officer's conduct in governmental matters with respect to which he has been granted discretionary authority [citation], and if a judgment for plaintiff could operate to control the actions of the State or subject it to liability, it will be deemed an action against the State even though it is not a named party therein." *Brucato*, 128 Ill.App.3d at 264, 83 Ill.Dec. 489, 470 N.E.2d at 618.

See also *Management Ass'n of Illinois, Inc. v. Board of Regents of Northern Illinois University,* 248 Ill.App.3d 599, 615, 188 Ill.Dec. 124, 618 N.E.2d 694, 705 (1993). Thus, it is for the Court of Claims to determine whether the methodology created by the IDPA, in its discretion, violated the statute.

[6][7] Plaintiffs' final contention in count I is that defendant did not use the "most currently available cost reports" to set reimbursement rates. Ill.Rev.Stat.1985, ch. 23, par. 5-5.4(1). The Court of Claims has jurisdiction over this claim as well. A distinction has been made between cases based on a present claim for damages and those seeking to enjoin a state official from taking future action in excess of her delegated authority. *Ellis v. Board of Governors of State Colleges*441 & Universities,* 102 Ill.2d 387, 395, 80 Ill.Dec. 750, 466 N.E.2d 202, 206 (1984). A case seeking to enforce a present claim must be brought in the Court of Claims.

Effective September 1, 1989, the legislature changed the language on which plaintiffs based their complaint. Prior to the substitution, the statute read, in pertinent part:

> "Such rates will be based upon the most currently available cost reports * * *." Ill.Rev.Stat.1985, ch. 23, par. 5-5.4(1).

The changed language states as follows:

> "Such rates will be based upon the rates calculated for the year beginning July 1, 1990, and for subsequent years thereafter shall be based on the facility cost reports for the facility fiscal year ending at any point in time during the previous calendar year, updated to the midpoint of the rate year. The cost report shall be on file with the Department no later than April 1 of the current rate year. Should the cost report not be on file by April 1, the Department shall base the rate on the latest cost report filed by each skilled care facility and intermediate care facility * * *." Ill.Rev.Stat.1989, ch. 23, par. 5-5.4(1).

This substitution mooted any requested injunctive relief related to this claim. Consequently, all that remains is a declaratory judgment as to whether the statute was violated during the years that the "most currently available" language was the law and, if so, whether plaintiffs were damaged. Because there is no future action to be taken on this issue, the issue has become a present claim for damages. Jurisdiction, therefore, is properly exercised by the Court of Claims.

In sum, after examining the issues and relief sought in count I, we conclude that jurisdiction is properly exercised by the Illinois Court of Claims. The fact that plaintiffs sued only the Director in an attempt to demonstrate that this suit is not against the state is unpersuasive. Because plaintiffs sought to compel compliance of a discretionary and nonministerial matter that would result in plaintiffs controlling state funds and interfering with the state's performance of governmental functions, this is a lawsuit against the state. The circuit court was correct in determining that it lacked subject matter jurisdiction.

[8] The Court of Claims has jurisdiction over counts II and III as well. In count II, part of the relief sought was a court order mandating the IDPA's compliance with the Administrative Procedure Act when enacting rules such as "Inspection of Care Guidelines." On August 28, 1991, the IDPA adopted "Inspection of Care Guidelines's" rules pursuant to the procedures prescribed by the statute. See 15 Ill. Reg. 13390, 13399. This action cured the alleged violation complained of by plaintiffs and mooted their request for injunctive relief.

[9] *442 As to count III, effective July 24, 1992, the State Prompt Payment Act was amended to eliminate its coverage as to nursing homes. 30 ILCS 540/1 (West 1992). This, too, mooted any potential need by the **408 ***778 IDPA to reform its billing system to conform with the procedures mandated in the statute.

Mooting the injunctive aspects of these counts eliminated any need for defendant to take future action if the statutes were found to be violated. However, plaintiffs' claims for declaratory relief and damages, if any, for the period of time when the statutes allegedly were violated were not mooted. The elimination of injunctive relief coupled with the existence of possible money damages transformed the requests for future action into present claims for damages that could subject the state to liability. Thus, these counts also must be heard in the Court of Claims. *Ellis,* 102 Ill.2d at 395, 80 Ill.Dec. 750, 466 N.E.2d at 206.

We must emphasize that we express no opinion regarding whether plaintiffs' allegations have any merit. Our sole concern in this case was the issue of jurisdiction and we have made no determination as to whether defendant violated the statutes in question.

For the foregoing reasons, we affirm the circuit court's dismissal of all counts for lack of subject matter jurisdiction.

Affirmed.

HARTMAN and GREIMAN, JJ., concur.

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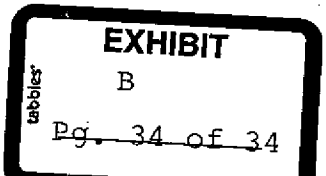

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
DUPAGE COUNTY, ILLINOIS

DONNA RADASZEWSKI, Guardian, on behalf of Eric Radaszewski,	)	
Plaintiff,	)	
vs.	)	No. 00 CH 1475
	)	Judge Mehling
JACKIE GARNER, Director of Illinois Department of Public Aid,	)	
Defendant.	)	

DEFENDANT'S OBJECTIONS TO PLAINTIFF'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL COMPLAINT AND TO EXTEND TEMPORARY RESTRAINING ORDER

NOW COMES the Defendant, Jackie Garner, the Director of the Illinois Department of Public Aid, by and through her attorney, James E. Ryan, Attorney General for the State of Illinois, and in response to the Plaintiff's Motion for Leave to File Supplementary Complaint and to Extend Temporary Restraining Order, objects as follows:

1. On December 1, 2000, Plaintiff filed her four-count Complaint for Injunctive Relief with this Court. Plaintiff complained that (1) IDPA's limitation of private duty nursing services provided to adult Medicaid recipients constituted an invalid rule not adopted in accordance with notice and comment rulemaking procedures specified in Illinois' Administrative Procedure Act ("APA"), 5 ILCS 100/1-1 et seq. (Count I); (2) IDPA violated Illinois' Medicaid Plan by failing to provide Eric with the full amount of private duty nursing described in the Plan (Count II); (3) IDPA's refusal to cover all the private duty nursing sought for Eric violated 89 Illinois Administrative Code §140.435(b)(2), which provided that "Payment shall be made for . . . [p]rivate duty nursing services" (Count III); and (4) Illinois' Medicaid Plan was a contract between IDPA and the federal government

EXHIBIT C Pg. 1 of 7

which IDPA breached by failing to provide the full amount of private duty nursing included in that plan to Eric, who was a third party beneficiary of that contract (Count IV).

2. Also on December 1, 2000, Plaintiff moved for a temporary restraining order and preliminary injunction enjoining IDPA's Director from reducing Eric's private duty nursing services pending the outcome of this case.

3. On December 4, 2000, Defendant moved to dismiss this case pursuant to Sections 2-619(a)(1), (3), (5) and (9) of the Illinois Code of Civil Procedure, 735 ILCS 5/2-619(a)(1), (3), (5) and (9) (West 2000).

4. On December 19, 2000, this Court (per Byrne, J.), denied Defendant's Motion to Dismiss and granted the Plaintiff's motion for TRO.

5. On September 7, 2001, the Defendant filed a motion to vacate the TRO and dismiss the case as moot. The Defendant's Motion to Vacate Temporary Restraining Order and Dismiss Case as Moot is fully briefed and currently pending before the court.

6. Rather than specifically respond to the Defendant's motion to vacate the TRO and dismiss the case as moot, the Plaintiff filed a motion of her own–Plaintiff's Motion for Leave to File Supplemental Complaint and to Extend Temporary Restraining Order. Plaintiff's motion alleges that new claims have arisen requiring a supplemental pleading and which justify an extension of the current TRO. (Pltf's Mot. ¶ 4).

7. Plaintiff's proposed Supplemental Complaint for Injunctive Relief re-alleges the original four-count Complaint for Injunctive Relief and alleges three additional counts: Violation of the Illinois Administrative Procedure Act (Count V); Violation of the Americans with Disabilities Act (Count VI); and Violation of Section 504 of the Rehabilitation Act of 1973.

8. The Defendant objects to the Plaintiff's request for leave to file the Supplemental Complaint in the form proposed because (1) it re-alleges the original Complaint for Injunctive Relief in its entirety, and (2) the original Complaint for Injunctive Relief is subject to a pending motion to dismiss as moot, filed by the Defendant on September 7, 2001. Plaintiff should not be allowed to circumvent the Defendant's motion by obtaining leave to file a supplemental complaint that re-alleges the same claims that are now subject to the pending motion to dismiss and vacate. In any event, judicial economy is not served by allowing the Plaintiff to re-allege four counts that are moot.

9. In the event the Court overrules the Defendant's objection and allows the Plaintiff to file the proposed Supplemental Complaint for Injunctive Relief or allows the Plaintiff to file a revised version of her Supplemental Complaint for Injunctive Relief, the Defendant objects to the Plaintiff's motion to extend the current TRO that is based on the new claims set forth in the proposed Supplemental Complaint for Injunctive Relief.

10. An applicant is not entitled to a preliminary injunction as a matter of right. *American Nat'l Bank & Trust Co. v. Carroll*, 122 Ill. App. 3d 868, 880, 462 N.E.2d 586, 595 (1st Dist. 1984). Rather, a preliminary injunction will only be granted where an applicant shows that (1) he has a clearly ascertainable right needing protection, (2) he will suffer irreparable harm without protection, (3) he has no adequate remedy at law and (4) he is likely to succeed on the merits. *Postma v. Jack Brown Buick, Inc.*, 157 Ill. 2d 391, 399, 626 N.E.2d 199, 204 (1993). The party seeking a preliminary injunction has the burden of proving all these elements by a preponderance of the evidence. *Magee v. Huppin-Fleck*, 279 Ill. App. 3d 81, 86, 664 N.E.2d 246, 250 (1st Dist. 1996).

11. Plaintiff's three new claims do not demonstrate a clearly ascertainable right to extend the TRO and the Plaintiff has not demonstrated a likelihood of success on the merits. A preliminary

injunction should not be granted where plaintiff's right is doubtful. *Hartlein v. Illinois Power Company*, 151 Ill. 2d 142, 160, 601 N.E.2d 720, 728-29 (1992). In the present case Plaintiff asserts a right for individuals over age 20 to receive any amount of in-home nursing care that may be medically necessary. As set forth in the Defendant's motion to vacate the current TRO, the Illinois Medicaid Plan, and 89 Ill. Admin. Code § 140.435, have been amended to delete or strike references to private duty nursing and in-home nursing services. Under the State Medicaid Plan and Illinois Administrative Code, the IDPA only covers private duty nursing or in-home nursing services for children under 21 years of age who are subject to a Medicaid waiver, as set forth in 89 Ill. Admin. Code § 140.471, or who are identified as needing the service through an Early and Periodic Screening Diagnosis and Treatment Program ("EPSDT) screening as described in 89 Ill. Admin. Code § 140.485. Both the State Medicaid Plan and the Illinois Administrative Code were properly amended. (*See* Def's Reply in Support of Mot. to Vacate TRO and Dismiss Case as Moot, pp. 3-8). Neither the State Medicaid Plan nor the Illinois Administrative Code contain a clearly ascertainable right to the relief sought and the Plaintiff is not likely to succeed with her challenge under the Illinois Administrative Procedure Act. In fact, Plaintiff's memorandum in support of extending the current TRO acknowledges that the State Medicaid Plan, "by virtue of its recent amendment, does not cover longer term home-based nursing services for adults." (Pltf's Mem. p. 8).

12. The Plaintiff then turns to federal law–the Americans with Disabilities Act ("ADA") and the Rehabilitation Act–in her attempt to establish a right and fashion a remedy. The Plaintiff bases her ADA and Rehabilitation Act arguments for extending the current TRO on identical reasoning. (*See* Pltf's Mem. p. 13).

13. The Plaintiff is not likely to succeed on the merits of her federal-law claims because the Supreme Court has held that private party cannot bring an ADA claim against a state defendant. *See Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 121 S. Ct. 955 (2001) (the ADA does not abrogate a state's Eleventh Amendment immunity from suit); *see also Alden v. Maine*, 527 U.S. 706, 119 S. Ct. 2240 (1999) (Congress cannot subject a state to suits in state court without the state's consent).

14. Neither the ADA nor the Rehabilitation Act provide Eric with the right to private duty nursing under the Medicaid program. The Plaintiff's reliance on the Supreme Court's decision in *Olmstead v. L.C.*, 527 U.S. 581, 119 S. Ct. 2176 (1999) is unavailing. The ADA and Rehabilitation Act are anti-discrimination statutes and the very limited integration mandate discerned in *Olmstead* does not require a state to provide the disabled with services not otherwise offered to anyone. In *Olmstead*, the Supreme Court cautioned in that "[w]e do not in this opinion hold that the ADA imposes on the State 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.'" *Id.* at 603, 119 S. Ct. at 2188, fn. 14. Rather, the Court merely held that "States must adhere to the ADA's nondiscrimination requirement with regard to the *services they in fact provide*." *Id.* (emphasis added). In other words, the ADA (and Rehabilitation Act) requires only that a particular service provided to some not be denied to disabled people. *Rodriguez v. City of New York*, 197 F.3d 611, 618 (2d Cir. 1999). In *Rodriguez*, plaintiffs brought a class action challenging New York's failure to provide safety monitoring to mentally disabled Medicaid recipients requiring assistance with daily living tasks. *Id.* at 614. Plaintiffs alleged that without safety monitoring, the personal care services they received were inadequate to meet their medical needs and to allow them to

continue living at home. *Id.* Since nobody was provided with safety monitoring, the court deemed plaintiffs not to be challenging illegal discrimination against the disabled, but rather the substance of the services the state provided. *Id.* at 618. *Olmstead* was inapposite because, in *Olmstead*, the Court addressed only *where* the state provided treatment, not *whether* the state was required to provide the treatment in the first place. *Id.* at 619 (emphasis in original). The *Rodriguez* court rejected any reading of *Olmstead* as requiring states to provide disabled individuals with an opportunity to remain out of institutions because *Olmstead* only held that states cannot discriminate with regard to services they in fact provide. *Id.* at 619. The ADA does not mandate provision of new benefits. *Id.* Under the ADA, it is not the court's role to determine what Medicaid benefits a state must provide. *Id.* Similarly, the Rehabilitation Act does not curtail the state's discretion to chose the amount, duration and scope of Medicaid coverage. *Alexander v. Choate*, 469 U.S. 287, 302-07, 105 S. Ct. 712, 721-23 (1985).

15. In this case, the Plaintiff is challenging the substance of the benefits provided to Eric. The Plaintiff readily acknowledges that Illinois does not cover long-term home-based private duty nursing for adults. (*See* Pltf's Mem. p. 8). Like the plaintiffs in *Rodriguez,* the Plaintiff asserts that Eric has a right to in-home private duty nursing–a benefit that does not exist in the State Medicaid Plan or in the Illinois Administrative Code–because the services are necessary to keep him at home. Because the ADA does not require the IDPA to provide Eric with in-home private duty nursing services, the Plaintiff fails to establish a clearly ascertainable right under the ADA or a likelihood of success on the merits of her ADA claim. Consequently, Plaintiff's motion to extend the current TRO should be denied.

16. Allegations of irreparable harm and lack of adequate remedy at law, without more, are not sufficient to grant a TRO. Defendant does not minimize the seriousness of Eric's medical condition, but the potential for irreparable harm does not require this Court to grant Plaintiff preliminary injunctive relief. Since preliminary injunctions are not granted as a matter of right, a plaintiff, in order to secure that relief, must establish both irreparable injury and a likelihood of success on the merits. *Mingare v. DeVito*, 67 Ill.App.3d 371, 373, 385 N.E.2d 20, 21 (1st Dist. 1978). Where, as here, a plaintiff has failed to demonstrate that she has no clearly ascertainable right and cannot establish a likelihood of success on the merits of her three newly-pled claims, preliminary injunctive relief must be denied, regardless of whether the failure to obtain an injunction might result in irreparable harm or whether her remedies at law are allegedly inadequate.

WHEREFORE, for the reasons stated above, the Defendant respectfully requests this honorable Court (1) deny the Plaintiff's motion for leave to file the Supplemental Complaint for Injunctive Relief, and (2) deny the Plaintiff's motion to extend the current TRO.

Respectfully submitted,

JAMES E. RYAN
Attorney General
State of Illinois

By: _____
Assistant Attorney General

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ORDER 2116-N (Rev. 9/99)

STATE OF ILLINOIS UNITED STATES OF AMERICA COUNTY OF DU PAGE

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT

DONNA RADASZEWSKI

-VS-

JACKIE GARNER

CASE NUMBER

00 CH 1475

File Stamp Here

ORDER

This matter coming on to be heard, the Court being fully advised in the premises and having jurisdiction of the subject matter, IT IS ORDERED HEREBY:

(1) Defendant's Motion to Vacate TRO + Dismiss Case as Moot is denied

(2) Plaintiff's Motion to Extend TRO is granted. Defendant is required to continue benefits at the previously set level. This order is based on the Court's determination that plaintiff has a likelihood of success on the merits.

(3) ~~Defendant has 21 days to~~ Plaintiff is granted leave to file Supplemental Complaint instanter. However, p

(4) Defendant is granted ~~leave~~ 21 days to answer the Supplemental Complaint.

(5) Date of hearing on preliminary injunction is set for January 23, 2002 at 1:30 p.m.

Name: PSCS/Abatement

DuPage Attorney No.: 67545

Attorney for: Plaintiff

Address: 350 S. Schmale Road #150

City/State/Zip: Carol Stream, IL 60188

Telephone: 630-690-2130

ENTER: _____ JUDGE

DATE: 11-15-01

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IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
DUPAGE COUNTY, ILLINOIS

DONNA RADASZEWSKI, Guardian, on behalf of Eric Radaszewski,

Plaintiff,

vs.

JACKIE GARNER, Director of Illinois Department of Public Aid,

Defendant.

No. 00 CH 1475
Judge Mehling

01 DEC 19 AM 9:31

DEFENDANT'S ANSWER TO PLAINTIFF'S SUPPLEMENTAL COMPLAINT FOR INJUNCTIVE RELIEF

Defendant JACKIE GARNER, Director of the Illinois Department of Public Aid, submits this Answerto Plaintiff's Supplemental Complaint for Injunctive Relief.

FIRST DEFENSE

Counts I, II, III and IV of Plaintiff's Supplemental Complaint for Injunctive Relief are moot.

SECOND DEFENSE

Count VI of Plaintiff's Supplemental Complaint for Injunctive Relief is barred by the Eleventh Amendment to the United States Constitution.

THIRD DEFENSE

Plaintiff canot bring Count VI of her Supplemental Complaint for Injunctive Relief against the Director of the Illinois Department of Public Aid.

FOURTH DEFENSE

Defendant answers the numbered paragraphs of Plaintiff's Supplemental Complaint for Injunctive Relief as follows:

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COUNT I: VIOLATION OF ILLINOIS ADMINISTRATIVE PROCEDURE ACT
5 ILCS 100/1 et seq.

1. Plaintiff Donna Radaszewski is the guardian for her disabled son, Eric Radaszewski. She brings this action in her capacity as Eric's guardian on his behalf.

ANSWER: Defendant admits the allegations contained in ¶1.

2. Plaintiff and Eric reside in Du Page County, Illinois.

ANSWER: Defendant admits the allegations contained in ¶2.

3. Defendant Ann Patla is the Director of the Illinois Department of Public Aid (IDPA).

ANSWER: Defendant admits that Ann Patla was IDPA's Director at the time this case was initially brought and avers that Jackie Garner is IDPA's current Director.

4. IDPA is the state agency charged with the administration of the Medicaid program in Illinois.

ANSWER: Defendant admits the allegations contained in ¶4.

5. Eric, born August 5, 1973, is 21 years old.

ANSWER: Defendant deny that Eric was born on August 5, 1973 and that he is presently 21 years old. Defendants aver that Eric was born on August 5, 1979 and is currently 22 years old.

6. Eric is disabled and receives disability benefits under the federal Supplemental Security Income program. He is eligible for Medicaid.

ANSWER: Defendant admits the allegations contained in ¶6.

7. On February 12, 1992, Eric was diagnosed with medulloblastoma, a brain cancer.

ANSWER: Defendant admits the allegations contained in ¶7.

8. On December 24, 1993, Eric suffered a mid-brain stroke after he had undergone surgery, radiation and chemotherapy as treatment for the cancer.

ANSWER: Defendant admits the allegations contained in ¶8.

9. The disease, stroke and the subsequent treatment have left Eric with a very low level of body and mental functioning. He is highly medically fragile.

ANSWER: Defendant admits the allegations contained in ¶9.

10. It is the opinion of Eric's physician that Eric requires private duty nursing services of a registered nurse, one-on-one, 24 hours per day in order to survive.

ANSWER: Defendant admits that Eric's physician recommends that he receive 24 hours per day of registered nursing care, but is without sufficient knowledge to form a belief as to the correctness of this recommendation.

11. For the past five years, Eric received private duty nursing care at home by registered nurses 16 hours per day, with 336 additional hours per year of services from registered nurses to provide Eric's parents respite. The balance of his 24 hour per day care came from his parents, who were specially trained to provide the necessary services to avoid medical crisis for Eric.

ANSWER: Defendant admits that, from 1995 to 2000, Eric received 16 hours per day of private duty nursing care at home by registered nurses, with 336 additional hours per year of respite care. Defendant is without sufficient knowledge to admit or deny that the balance of Eric's care was provided by his parents or that they were specially trained.

12. This care was paid for by Medicaid.

ANSWER: Defendant admits the care described in ¶11, other than any provided by Eric's parents, was paid for by Medicaid.

13. The Medicaid program is a joint federal and state funded program enacted to provide necessary medical assistance to needy disabled persons and families with dependent children, whose income and resources are insufficient to meet the cost of care. 42 U.S.C. §1396, 305 ILCS 5/5-1.

ANSWER: Defendant admits the allegations contained in ¶13.

14. Each State participating in the Medicaid program must submit a Medicaid plan to the Secretary of Health and Human Services (HHS) for approval. 42 U.S.C. §1396.

ANSWER: Defendant admits the allegations contained in ¶14.

15. The plan must specify the amount, duration, and scope of each service that the state provides in its Medicaid program. 42 U.S.C. §1396a(a)(10), 42 U.S.C. §1396d(a), 42 CFR §440.230(a).

ANSWER: Defendant admits the allegations contained in ¶15.

16. Private duty nursing is a service that states may choose to include in their Medicaid plans. 42 U.S.C. §1396d(a)(8), 42 U.S.C. §1396a(a)(10)(C), 42 CFR §§440.225, 440.80.

ANSWER: Defendant admits the allegations contained in ¶16.

17. Federal regulations define "private duty nursing" as nursing services provided to persons who require more individual and continuous care than is available from a visiting nurse or than is routinely provided by the nursing staff of a hospital or nursing facility. 42 CFR §440.80. Under the regulation, the state has the option to provide private duty nursing services in the recipient's home, at a hospital or at a skilled nursing facility. 42 CFR §440.80(c)

ANSWER: Defendant admits the allegations contained in ¶17.

18. In addition to providing the Medicaid coverage described in their Medicaid plans, States have the option of requesting approval from HHS to provide home and community based care services for persons who would otherwise require institutional care that would be paid for by Medicaid. These services are provided under a range of Medicaid waiver programs that are authorized under 42 U.S.C. §§1396a(a)(10)(A)(ii)(VI), 1396n(b)-(e). Under this waiver authority, the Secretary of HHS may grant waivers of certain otherwise applicable Medicaid requirements, including for example financial eligibility requirements and service limitations. Id.

ANSWER: Defendant admits the allegations contained in ¶18.

19. Illinois has submitted to HHS and obtained federal approval of its Medicaid plan.

ANSWER: Defendant admits the allegations contained in ¶19.

20. The Illinois Medicaid plan includes broad coverage for private duty nursing, with the sole conditions that the private duty nursing is recommended by a physician, that prior approval from the state agency is sought, and that the nursing care not be provided by a relative. The plan includes no limitations as to cost or as to where these services must be provided. The sections of the Illinois Medicaid Plan relating to private duty nursing services, Exhibit A, are attached to and made a part of this Complaint.

ANSWER: Defendants admits that the sections of Illinois' prior Medicaid Plan relating to private duty nursing services are attached to Plaintiff's initial Complaint for Injunctive Relief. Defendant denies each and every other allegation contained in ¶20. Defendant avers that a

Medicaid Plan amendment, deleting all references to private duty nursing services, was approved by HHS on February 2, 2001, with a retroactive effective date of January 1, 2001.

21. Illinois has also expanded its Medicaid program by including several home and community based care Medicaid waiver programs approved by the Secretary of HHS.

ANSWER: Defendant admits the allegations contained in ¶21.

22. Under the Home Services waiver program ("HSP"), Illinois provides services that are not otherwise covered under the Medicaid program, including personal care and homemaker services, to enable disabled adults to remain in their home. The cost of services which may be provided to recipients under this waiver program is limited, however, to the average Medicaid cost of care for persons in skilled nursing facilities.

ANSWER: Defendant admits the allegations contained in ¶22.

23. There is no ¶23 in Plaintiff's Complaint for Injunctive Relief.

24. Despite the language of the Illinois Medicaid plan covering private duty nursing with only the limitations described in paragraph 20, above, it is Defendant's unwritten policy to impose additional restrictions that eliminate private duty nursing for persons aged 21 or older and instead provide such services only through the HSP, its limited and community based Medicaid waiver program.

ANSWER: Defendant denies each and every allegation contained in ¶24.

25. As Eric's 21st birthday approached, state officials advised Eric's mother to contact the Office of Rehabilitation Services ("ORS") to apply for the HSP as the sole avenue to obtain continued private duty nursing services for Eric.

ANSWER: Defendant admits that state officials contacted Plaintiff regarding transitioning Eric to the HSP program, but avers that such contact first occurred in 1997, after Eric became 18.

26. On February 18, 2000, ORS issued a decision limiting Eric's eligibility for HSP services to a "service cost maximum" of $4,593 per month.

ANSWER: Defendant admits the allegations contained in ¶26.

27. This service cost maximum amount reduced funding for Eric's private duty nursing services to the equivalent of five hours per day.

ANSWER: Defendant is without sufficient knowledge to admit or deny the allegations contained in ¶27.

28. Plaintiff filed an administrative appeal on the ORS decision limiting Eric's services under the HSP to $4,593 per month, and an administrative hearing was held on July 25, 2000.

ANSWER: Defendant admits the allegations contained in ¶28.

29. At this hearing, Eric's treating physician, Janina Badowska, M.D. testified that in her medical opinion, Eric requires 24 hour one-on-one skilled nursing care from registered nurses and that the level of care offered by the ORS service cost maximum would leave Eric at great medical risk. She further testified that Eric's needs could not be met by staffing levels at a skilled nursing facility.

ANSWER: Defendant admits that Eric's treating physician testified that Eric needs substantial one on one nursing care and urged that he be provided the funds to support 24 hours per day of skilled nursing care. Defendant admits that Dr. Badowska testified that placing Eric in a nursing home would seriously medically compromise him. Defendant is without sufficient information to to admit or deny the remaining allegations contained in ¶29.

30. On August 18, 2000, Defendant Ann Patla, as Director of IDPA, issued an administrative decision, affirming the ORS decision limiting funding of Eric's services under the Home Services Program to $4,593 per month, despite a finding of fact in the decision that placing Eric in a nursing facility would place Eric at risk of danger.

ANSWER: Defendant admits that, on August 18, 2000, Defendant issued an IDPA final administrative decision affirming the ORS determination to limit funding of Eric's HSP services to $4,593 per month. Defendant admits that the Hearing Officer presiding over the underlying administrative proceeding made a factual finding that Eric's parents submitted uncontradicted evidence that Eric would be at risk of danger if he should be placed in a nursing home.

31. Under the Illinois Administrative Procedure Act, 5 ILCS 100/1-70, each agency statement of general applicability that implements, applies, interprets, or prescribes law or policy is a "rule" within the meaning of the Act.

ANSWER: Defendant avers that this statute speaks for itself and that Plaintiff has

omitted material portions thereof.

32. Defendant's unwritten policy limiting Medicaid coverage for private duty nursing services for adults to the services provided under the HSP waiver program is a rule of general applicability within the meaning of 5 ILCS 100/1-70.

ANSWER: Defendant denies each and every allegation contained in ¶32.

33. Under 5 ILCS 100/5-40, state agencies must adopt rules pursuant to the notice and comment rulemaking procedure specified in the provision.

ANSWER: Defendant avers that this statute speaks for itself and that Plaintiff has omitted material portions of this particular statutory provision and other provisions of the Administrative Procedure Act.

34. Because Defendant has not followed the notice and comment rule-making procedure set out in 5ILCS 100/5-40 for the unwrittem policy limiting Medicaid coverage for private duty nursing services for adults to the services provided under the HSP waiver program, the policy is invalid under the Illinois Administrative Procedure Act.

ANSWER: Defendant denies each and every allegation contained in ¶34. Furthermore, Defendant avers that, effective September 1, 2001, IDPA amended 89 Illinois Administrative Code §§140.435 and 140.436 to strike all text relating to Medicaid coverage of private duty nursing services, thereby clarifying that payment is made for this service only for children under 21 years of age who are covered under a program waiver or are identified as needing this service through a screening under the Early and Periodic Screening, Diagnosis and Treatment ("EPSDT") Program.

35. Eric will suffer irreparable injury if Defendant is not enjoined from applying this invalid rule to deny Eric the full amount and scope of private duty nursing services described in the Illinois Medicaid plan.

ANSWER: Defendant denies each and every allegation contained in ¶35.

36. Eric has no adequate remedy at law.

ANSWER: Defendant denies each and every allegation contained in ¶36.

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37. Eric is indigent and unable to post bond.

ANSWER: Defendant is without sufficient knowledge to admit or deny the allegations contained in ¶37.

COUNT II: VIOLATION OF THE MEDICAID PLAN

1-30. Plaintiff re-alleges paragraphs one through thirty of Count I as paragraphs one through thirty of Count II.

ANSWER: Defendant adopts her answers to ¶¶1-30 of Count I as her answers to ¶¶1-30 of Count II of Plaintiff's Supplemental Complaint for Injunctive Relief.

31. The Illinois Public aid Code directs IDPA to establish standards and rules to determine the amount and nature of medical services to be included in the Medicaid program, including private duty nursing services. 305 ILCS 5/5-4, 5-5.

ANSWER: Defendant avers that 305 ILCS 5/5-4 and 5-5 speak for themselves.

32. The Illinois Medicaid plan sets out such standards and rules.

ANSWER: Defendant denies each and every allegation contained in ¶32.

33. Defendant has violated the Illinois Medicaid plan by failing to provide Eric the full amount, duration and scope of private duty nursing services set out in the Illinois Medicaid plan.

ANSWER: Defendant denies each and every allegation contained in ¶33.

34. Eric will suffer irreparable injury if Defendant is not enjoined from failing to afford Eric the full amount and scope of private duty nursing services described in the Illinois Medicaid plan.

ANSWER: Defendant denies each and every allegation contained in ¶34.

35. Eric has no adequate renedy at law.

ANSWER: Defendant denies each and every allegation contained in ¶35.

36. Eric is indigent and unable to post bond.

ANSWER: Defendant is without sufficient information to admit or deny the allegations contained in ¶36.

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COUNT III: VIOLATION OF 89 ILL.ADM CODE §140.435

1-30. Plaintiff re-alleges paragraphs one through thirty of Count I as paragraphs one through thirty of Count III.

ANSWER: Defendant adopts her answers to ¶¶1-30 of Count I as her answers to ¶¶1-30 of Count III of Plaintiff's Supplemental Complaint for Injunctive Relief.

31. The Illinois Public Aid Code directs IDPA to establish standards and rules to determine the amount and nature of medical services to be included in the Medicaid program, including private duty nursing services. 305 ILCS 5/5-4, 5-5.

ANSWER: Defendant avers that 305 ILCS 5/5-4 and 5-5 speak for themselves.

32. The Department's rule at 89 Ill. Adm. Code §140.435(B)(2) provides that Medicaid payment "shall be made" for private duty nursing services.

ANSWER: Defendant denies that 89 Ill.Adm. Code §140.435(b)(2) currently provides that payment "shall be made" for private duty nursing services. Defendant avers that, effective September 1, 2001, IDPA amended 89 Illinois Administrative Code §140.435 to strike all text relating to payment for private duty nursing services.

33. Defendant's refusal to cover medically necessary private duty nursing services for Eric violates 89 Ill.Adm. Code §140.435(b)(2).

ANSWER: Defendant denies each and every allegation contained in ¶33.

34. Eric has no adequate renedy at law.

ANSWER: Defendant denies each and every allegation contained in ¶34.

35. Eric is indigent and unable to post bond.

ANSWER: Defendant is without sufficient information to admit or deny the allegations contained in ¶35

COUNT IV: BREACH OF CONTRACT

1-30. Plaintiff re-alleges paragraphs one through thirty of Count I as paragraphs one through thirty of Count IV.

ANSWER: Defendant adopts her answers to ¶¶1-30 of Count I as her answers to ¶¶1-30 of Count IV of Plaintiff's Supplemental Complaint for Injunctive Relief.

31. The Illinois medicaid plan is a contract between the Illinois Department of Public Aid and the federal government.

ANSWER: Defendant denies each and every allegation contained in ¶31.

32. Medicaid recipients, including Eric, are the clearly intended and direct beneficiaries of this contract.

ANSWER: Defendant denies each and every allegation contained in ¶32.

33. By failing to afford Eric the full amount, duration, and scope of private duty nursing included in the Illinois Medicaid Plan, defendant is in breach of contract.

ANSWER: Defendant denies each and every allegation contained in ¶33.

34. Defendant's decision to restrict Eric's nursing services to the cost maximum of the home Services Program, thereby denying him the benefit of the private duty nursing services described in the Illinois Medicaid plan, has injured Eric.

ANSWER: Defendant denies each and every allegation contained in ¶34.

35. Eric has no adequate remedy at law and requires specific performance of the terms of the Medicaid plan in order to obtain relief.

ANSWER: Defendant denies each and every allegation contained in ¶35.

COUNT V: VIOLATION OF THE ILLINOIS ADMINISTRATIVE PROCEDURE ACT

1-24. Plaintiff realleges paragraphs one and two, four, six through eighteen, twenty-one and twenty-two, and twenty-five through thirty of Count I as paragraphs one through twenty-four of Count V.

ANSWER: Defendant adopts her answers to ¶¶1, 2, 4, 6-18, 21, 22 and 25-30 of Count I as her answers to ¶¶1-24 of Count V.

25. In March 2001 Jackie Garner replaced defendant Ann Patla as Director of the Illinois Department of PublicAid and endorses all of the actions taken by Ms. Patla relevant to this lawsuit.

ANSWER: Defendant admits the allegations contained in ¶25.

26. Eric Radaszewski was born on August 5, 1979.

ANSWER: Defendant admits the allegations contained in ¶26.

27. In August, 2000, when Eric turned 21 years old, Illinois' Medicaid plan, as submitted to HHS, included coverage for private duty nursing, with the sole conditions that private duty nursing services be recommended by a physician, that prior approval from the State agency be sought, and that the nursing care not be provided by a relative. A copy of that provision as it existed at that time is attached to this Complaint as Exhibit A.

ANSWER: Defendant admits that Illinois' Medicaid Plan included coverage for private duty nursing in August, 2000, but denies that the conditions stated by Plaintiff in ¶27 were the sole conditions on such coverage. Defendant specifically denies that the Medicaid Plan ever provided coverage of private duty nursing for individuals 21 years of age or older. Defendant also denies that a copy of the Plan provision regarding private duty nursing is attached as an exhibit to Plaintiff's Supplemental Complaint for Injunctive Relief.

28. Despite the language of the Ilinois State plan covering private duty nursing with the sole limitations described in paragraph 28 [*sic*], above, it was the unwritten policy of the State to impose additional restrictions that eliminate private duty nursing for persons aged 21 or older and instead provide such services only through the HSP, its limited and comunity based Medicaid waiver program.

ANSWER: Defendant admits that it was State policy to provide in-home nursing for persons aged 21 or older only through the HSP program, but deny that this policy was unwriten, that this policy violated Illinois' Medicaid Plan and that the Medicaid Plan contained only the coverage limitations described by Plaintiff in ¶27.

29. On September 1, 2000, plaintiff brought an action in the United States District Court for the Northern District of Illinois against Defendant Patla, seeking to enjoin defendant's reduction of Eric's nursing services. Plaintiff claimed that defendant's actions, deviating from its Medicaid plan, violated the federal Medicaid statute, its implementing regulations and the requirements of due process.

ANSWER: Defendant denies that Director Patla's actions deviated from Illinois' Medicaid Plan or violated any legal requirements. Defendant admits the remaining allegations

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contained in ¶29.

30. The District Court denied plaintiff's motion for a preliminary injunction, and plaintiff appealed that interlocutory order.

ANSWER: Defendant admits the allegations contained in ¶30.

31. On December 1, 2000, plaintiff filed the present case, bringing claims founded on state law that could not be included in the federal law suit. Plaintiffs claims, set out as counts I-IV, included that defendant's unwritten policy to deny Eric private duty nursing violated the notice and comment requirements of the Illinois Administrative Procedure Act, 5 ILCS 100/1 et seq., the requirements set out in its Medicaid plan, and 89 Ill.Adm.Code 140.435(b), and deprived Eric of his rights as a third party beneficiary of the contract between the department and the federal government.

ANSWER: Defendant denies that Eric was denied private duty nursing pursuant to an unwritten policy, that that denial violated any legal requirements or that Eric was deprived of any contractual rights. Defendant admits the remaining allegations contained in ¶31.

32. On December 19, 2001, this Court entered an Order denying Defendant's Motion to Dismiss and issued a Temporary Restraining Order enjoining Defendant from reducing Eric's nursing services pending further order.

ANSWER: Defendant admits the allegations contained in ¶32.

33. On January 3, 2000,without prior notice to either this Court or to the Seventh Circuit Court of Appeals, the plaintiff or the public, the department submitted to HHS an amendment to the Illinois Medicaid plan, deleting coverage for private duty nursing services for adults. On February 2, 2001, HHS approved the amendment.

ANSWER: Defendant denies that Illinois' Medicaid Plan ever covered private duty nursing services for adults. Defendant avers that the Plan amendment entirely removed private duty nursing from the Plan by deleting all provisions and language regarding this service. Defendant further avers that prior notice was not required in order to obtain HHS approval of this amendment. Defendant admits the remaining allegations contained in ¶33.

34. On March 16, 2001, IDPA published in the Illinois Register a proposed rule to amend 89 Ill.Adm.Code §140.435 and §140.436 to delete Medicaid coverage for private duty nursing services. The "Complete Description of the Subjects and Issues Involved" section of the notice

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of rulemaking stated that the changes "are being made as clarifications...."

ANSWER: Defendant admits the allegations contained in ¶34, but avers that Plaintiff's recitation of the content of the "Complete Description of of the Subjects and Issues Involved" section of the notice of rulemaking is incomplete and that material portions have been omitted.

35. On May 23, 2001, pursuant to public request, the Department conducted a hearing on the proposed rules.

ANSWER: Defendant admits the allegations contained in ¶35.

36. On July 23, 2001, the Department submitted to the Joint Committee on Administrative Rules ("JCAR") its Second Notice of Proposed Rulemaking for the proposed amendment.

ANSWER: Defendant admits the allegations contained in ¶36.

37. In the section of the Second Notice describing the public comments objecting to the deletion of Medicaid coverage for private duty nursing services for adults, the Department claimed that "the comments received were not related to the rules, or their intended purpose or potential effect" and that the "proposed amendments do not change the Department's policy on coverage for home health services for adults." Exhibit B, Second Notice of Proposed Rulemaking, page 8.

ANSWER: Defendant denies that IDPA's rules ever provided Medicaid coverage of private duty nursing for adults. Defendant avers that IDPA's rules were amended to clarify that payment was provided for private duty nursing only for children under 21 years of age who are covered under a Medicaid waiver or are identified as needing the service through an EPSDT screening. Defendant admits that, in response to a comment, IDPA stated in the Second Notice that "The proposed amendments do not change the Department's policy on coverage for home health services for adults," but avers that Plaintiff has omitted material portions of IDPA's response. Defendant admits that, in its Second Notice, IDPA generally stated that some of the comments received "are not related to these rules or the intended purpose and potential effect of the proposed amendments," but denies that such a response was made to any particular comment

objecting to a supposed deletion of medicaid coverage of private duty nursing for adults.

38. On August 7, 2001, JCAR reviewed the rules without objection.

ANSWER: Defendant admits the allegations contained in ¶38.

39. On September 1, 2001, the Department filed a certified copy of the amended rules with the office of the Secretary of State.

ANSWER: Defendant admits the allegations contained in ¶39.

40. Under the Illinois Administrative Procedure Act, 5 ILCS 100/1-70 each agency statement of general applicability that implements, applies, interprets, or prescribes law or policy is a rule within the meaning of the Act.

ANSWER: Defendant avers that this statute speaks for itself and that Plaintiff has omitted portions thereof.

41.Under 5 ILCS 100/5-40, state agencies must adopt rules pursuant to the notice and comment rule making procedure specified in the provision. Among these requirements, an agency must include in the first notice of rule making a "complete description of the subjects and issues involved." 5 ILCS 100/5-40(b)(3). During the notice period, the agency must accept from interested persons data, views, arguments or comments and it must "consider all submissions received." 5 ILCS 100/5-40(b).

ANSWER: Defendant avers that this statute speaks for itself and that Plaintiff has omitted portions thereof.

42. In promulgating the amendments to 89 Ill.Adm.Code §140.435 and §140.436, defendant has not followed the letter or the spirit of the requirements set out in 5 ILCS 100/5-40(b). The Department refused to consider the comments of the public on the decision to delete Medicaid coverage for private duty nursing services, having deemed the comments not pertinent to the purpose of the rule making. The Department's Notice of Proposed Rule making did not include a complete description of the subjects and issues involved, failing to disclose that it was implementing a policy to delete Medicaid coverage for private duty nursing services for adults or the reasons for not covering those services.

ANSWER: Defendant denies each and every allegation contained in ¶42.

43. Eric will suffer irreparable injury if Defendant is not enjoined from applying its invalid rules to deny Eric the full amount and scope of private duty nursing services he has been receiving under the former Illinois Medicaid plan.

ANSWER: Defendant denies each and every allegation contained in ¶43.

44. Eric has no adequate remedy at law.

ANSWER: Defendant denies each and every allegation contained in ¶44.

45. Eric is indigent and unable to post bond.

ANSWER: Defendant is without sufficient knowledge to admit or deny the allegations contained in ¶45.

COUNT VI: VIOLATION OF THE AMERICANS WITH DISABILITIES ACT: 42 USC §12132 and 28 CFR §35.130

1-39. Plaintiff re-alleges paragraphs one through thirty-nine of Count V as paragraphs one through thirty-nine of Count VI.

ANSWER: Defendant adopts her answers to ¶¶1-39 of Count V as her answers to ¶¶1-39 of Count VI.

40. Under the Department's policy, Eric may receive Medicaid payment for necessary long term care services in institutions, meaning skilled nursing facilities and hospitals, but not at home.

ANSWER: Defendant admits that Eric may receive Medicaid payment for necessary long term care services in skilled nursing facilities and hospitals, but denies that Eric may not receive payment for long term care services at home. Defendant avers that IDPA has determined that Eric is eligible to receive $4,593 per month under its Medicaid Home Services Waiver Program.

41. In-home nursing care is the most integrated setting for services for Eric, and is at least as cost-effective as treatment he would receive in an institution.

ANSWER: Defendant denies each and every allegation contained in ¶41.

42. Under Title II of the Americans with Disabilities Act, 42 USC §12132 and its implementing regulations at 28 CFR ¶35.130, public entities must provide services to persons with disabilities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

ANSWER: Defendant avers that the Americans with Disabilities Act ("ADA") and its

implenting regulations speak for themselves and that Plaintiff has omitted relevant portions thereof.

43. Eric is a qualified individual with a disability within the meaning of Title II of the ADA.

ANSWER: Defendant denies each and every allegation contained in ¶43.

44. The Illinois Department of Public Aid of which defendant Patla is Director is a "public entity" within the meaning of Title II of the ADA.

ANSWER: Defendant denies that Ann Patla is currently Director of the Illinois Department of Public Aid. Defendant admits the remaing allegations contained in ¶44.

45. The Department's failure to provide Eric Medicaid services in his home, the most integrated setting for receipt of those services, violates the community integration requirements of Title II of the Americans with Disabilities Act, 42 USC §12132 and its implementing regulation 28 CFR §35.130.

ANSWER: Defendant denies each and every allegation contained in ¶45.

46. Eric will suffer irreparable injury if Defendant is not enjoined from reducing his Medicaid covered nursing services at home forcing him into an institution where his health will be in imminent danger and he will be segregated from his family and the larger community.

ANSWER: Defendant denies each and every allegation contained in ¶46.

47. Eric has no adequate remedy at law.

ANSWER: Defendant denies each and every allegation contained in ¶47.

48. Eric is indigent and unable to post bond.

ANSWER: Defendant is without sufficient knowledge to admit or deny the allegations contained in ¶48.

COUNT VII: VIOLATION OF SECTION 504 OF REHABILITATION ACT OF 1973: 29 USC §794 and 28 CFR 41.51(d)

1-41. Plaintiff re-alleges paragraphs one through forty-one of Count VI as paragraphs one through forty-one of Count VII.

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ANSWER: Defendant adopts her answers to ¶¶1-41 of Count V as her answers to ¶¶1-41 of Count VI.

42. Section 504 of the Rehabilitation Act of 1973 ("Section 504") prohibits discrimination against people with disabilities on the basis of their disabilities in programs and services that receive federal financial assistance. 29 USC §794.

ANSWER: Defendant avers that the Rehabilitation Act speaks for itself and that Plaintiff has omitted relevant portions thereof.

43. Section 504 requires that services must be provided in the most integrated setting appropriate to the needs of individuals with disabilities. 28 CFR §41.51(d).

ANSWER: Defendant avers that the Rehabilitation Act and its implenting regulations speak for themselves and that Plaintiff has omitted relevant portions thereof.

44. The Department's failure to provide Medicaid services for Eric in his home, the most integrated setting for receipt of those services, even though it will provide Medicaid services in institutions for Eric, violates Section 504.

ANSWER: Defendant denies each and every allegation contained in ¶44.

45. Eric will suffer irreparable injury if Defendant is not enjoined from reducing the Medicaid covered nursing services he currently receives at home, forcing him into an institution where his health will be in imminent danger, and he will be segregated from his family and the larger community.

ANSWER: Defendant denies each and every allegation contained in ¶45.

46. Eric has no adequate remedy at law.

ANSWER: Defendant denies each and every allegation contained in ¶46.

47. Eric is indigent and unable to post bond.

ANSWER: Defendant is without sufficient knowledge to admit or deny the allegations contained in ¶47.

Respectfully submitted,

James E. Ryan,
Attorney General of Illinois

By: _____

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United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

JUDGMENT - WITH ORAL ARGUMENT

Date: March 8, 2001

BEFORE: Honorable WILLIAM J. BAUER, Circuit Judge

Honorable DANIEL A. MANION, Circuit Judge

Honorable ILANA DIAMOND ROVNER, Circuit Judge

No. 00-3929

DONNA RADASZEWSKI, Guardian for Eric Radaszewski,
Plaintiff - Appellant

v.

ANN PATLA, Director, Illinois Department of Public Aid,
Defendant - Appellee

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division
No. 00 C 5391, John F. Grady, Judge

This case is DISMISSED as moot. The district court's judgment on the merits is VACATED and the case is REMANDED for the district court to dismiss all previous orders entered in this case as moot. The above is in accordance with the decision of this court entered on this date.

(1061-110393)

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Argued January 26, 2001
Decided March 8, 2001

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*

Hon. DANIEL A. MANION, *Circuit Judge*

Hon. ILANA DIAMOND ROVNER, *Circuit Judge*

No. 00-3929

DONNA RADASZEWSKI, Guardian for Eric Radaszewski
Plaintiff-Appellant,

v.

ANN PATLA, Director, Illinois Department of Public Aid,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 00 C 5391

John F. Grady,
Judge.

ORDER

Plaintiff filed suit under 42 U.S.C. § 1983 seeking declaratory and injunctive relief against defendant for reducing the private duty nursing care provided to her son, thereby violating his due process rights and the Medicaid statute, 42 U.S.C. § 1396 *et seq*. The district court entered a temporary restraining order, enjoining defendant from reducing the nursing care. The district court subsequently denied plaintiff's motion for a preliminary injunction, concluding that it lacked subject-matter jurisdiction because plaintiff's claims did not state a violation of the Medicaid statute or the Constitution. Plaintiff appealed.

During oral argument before this Court, defendant's counsel notified us that a proposed amendment to the Illinois State Medicaid Plan had been submitted to the Health Care Financing Administration of the United States Department of Health and Human Services for approval. The amendment proposed to wholly eliminate private duty nursing care as a service provided under the state plan. Therefore, at the close of oral argument, we requested that the parties apprise us of any change in the status of this case.

On February 9th, defendant's counsel notified us that the amendment had been approved on February 2nd. In light of this change, on February 21, 2001, we ordered both parties to file memoranda arguing what effect the amendment to the state plan had on this pending case. Both parties responded that the amendment renders this case moot. We agree.

Accordingly, **IT IS ORDERED** that this case is **DISMISSED** as moot, so we hereby **VACATE** the district court's judgment on the merits and **REMAND** for the district court to dismiss all previous orders entered in this case as moot. *See DiGiore v. Ryan*, 172 F.3d 454, 466 (7th Cir. 1999).

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
DUPAGE COUNTY, ILLINOIS

DONNA RADASZEWSKI, Guardian for Eric Radaszewski, on his behalf,	)	
Plaintiff,	)	
vs.	)	No. 00 CH 1475
JACKIE GARNER, Director, Illinois Department of Public Aid,	)	
Defendant.	)	

PLAINTIFF'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL COMPLAINT AND TO EXTEND TEMPORARY RESTRAINING ORDER

Plaintiff, Donna Radaszewski, by counsel Prairie State Legal Services, Inc., pursuant to 735 ILCS 5/2-609, moves this Court to grant her leave to file a supplemental complaint and further moves the Court to extend the temporary restraining order entered on December 19, 2000.

In support of this Motion, plaintiff states as follows:

1. On December 19, 2000, this Court entered a temporary restraining order enjoining defendant to continue to provide ongoing private duty nursing services to Eric Radaszewski until further order of the Court.

2. On September 9, 2001, defendant filed her Motion to Vacate Temporary Restraining Order and Dismiss Case as Moot.

3. Under 735 ILCS 5/2-609, supplemental pleadings may be filed with leave of court to address matters that arise after the original pleadings are filed.

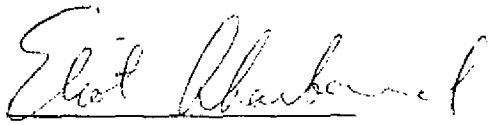
4. Since the filing of the Complaint, several significant matters, described in plaintiff's memorandum accompanying this Motion, have occurred that give rise to additional claims

requiring supplemental pleading and which justify extension of the temporary restraining order: plaintiff will likely succeed on the merits of these claims and Eric will suffer irreparable injury with no adequate remedy at law if defendant is not enjoined to continue to provide nursing services pending the outcome of the case

5. This Motion is based on the accompanying memorandum, the affidavits attached thereto and to be submitted to the Court, and on the papers already on file in this action.

WHEREFORE, plaintiff respectfully requests that this Court grant her leave to file her Supplemental Complaint and that the Court extend the Temporary Restraining Order entered on December 19, 2000.

Respectfully submitted,



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IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
DUPAGE COUNTY, ILLINOIS

DONNA RADASZEWSKI, Guardian for Eric Radaszewski, on his behalf,	)	
Plaintiff,	)	
vs.	)	No. 00 CH 1475
JACKIE GARNER, Director, Illinois Department of Public Aid,	)	
Defendant.	)	

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION TO EXTEND TEMPORARY RESTRAINING ORDER AND IN OPPOSITION TO DEFENDANT'S MOTION TO VACATE AND DISMISS

Statement

Eric Radaszewski's mother, Donna Radaszewski, filed this suit on Eric's behalf on December 1, 2000. The reason she had filed this lawsuit was because the defendant's predecessor, Ann Patla, then the Director of the Illinois Department of Public Aid, upon Eric reaching the age of 21, had reduced Medicaid coverage from the sixteen hours a day of in-home, private duty nursing he had been receiving to five hours a day. The existing record in this case indicates that Eric requires constant, round-the-clock, private duty nursing services to meet his numerous medical requirements. Without this level of private duty nursing, Eric will likely die. (See Affidavit of Janina Badowska, M.D. attached hereto as Exhibit 1, and Affidavit of Paul Wibbenmeyer, R.N., attached as Exhibit 2. Plaintiff plans shortly to submit an additional affidavit by Dr. Badowska, who is presently out of the country.)

When this lawsuit was filed, the Illinois State Medicaid Plan, which defendant administers, authorized private duty nursing to all persons no matter their age. As defendant acknowledges on page six of her memorandum in support of her pending motion, this Court "apparently agreed with Plaintiff's interpretation." The applicable provision of the Plan is set forth on page eight of Plaintiff's Memorandum in Support of her Motion for a Temporary Restraining Order. Defendant has responded in this lawsuit that notwithstanding the language of that plan, it was her agency's policy to provide only very limited, private duty nursing once a person who had been receiving Medicaid reimbursement for that service reached the age of 21. In further response to this lawsuit, defendant's predecessor, Ann Patla, applied to the Health Care Financing Authority (HCFA), a division of the United States Department of Health and Human Services, for approval of an amendment to the State Medicaid Plan that would totally eliminate private duty nursing as a Medicaid service for persons aged 21 and over. (See defendant's brief at page six.) HCFA approved the amendment on February 2, 2001.

On December 19, 2000, this Court entered an order enjoining defendant's predecessor to maintain Medicaid coverage for nursing services for Eric Radaszewski at the level of 16 hours per day with an additional 336 annual hours of respite nursing services. (Memorandum Opinion and Order dated December 19, 2000). The Court determined that plaintiff was likely to succeed on the merits of her claim that defendant's efforts to amend the Illinois Medicaid plan to deny Eric necessary nursing services violated that Illinois Administrative Procedure Act (5 ILCS 100/5-10) and that Eric would suffer irreparable injury, perhaps even death, without the requested injunctive relief. Id. Since that time, Eric's medical condition and needs remain unchanged. (See Affidavits of Janina Badowska, M.D., and Paul Wibbenmeyer, R.N.)

Subsequent to the issuance of that order, The Department of Public Aid (Department), embarked on a rule making effort to delete coverage of private duty nursing services for adults. Defendant now asks the Court to vacate the temporary restraining order. The Department's rule making effort, however, did not follow the procedures required by the Illinois Administrative Procedure Act, 5 ILCS 100/1-1 et seq. This failure gives rise to an additional claim under the Administrative Procedure Act. Moreover, defendant's action taken in response to this lawsuit of terminating private duty nursing for all eligible adults, including Eric, violates provisions of the Americans with Disabilities Act, 42 U.S.C. §12132, et seq., and Section 504 of the Rehabilitation Act of 1973. 29 U.S.C. §794, et seq. Plaintiff asks that this Court continue the temporary restraining order, deny the defendant's motion to dismiss as to the first three Counts of the Complaint, and permit her to file a supplemental complaint raising these new claims.

Argument

1. Defendant Failed to Follow the Requirements of the APA in its Recent Rulemaking.

Defendant argues that Eric, as an adult, is no longer entitled to nursing services under the amendment to the Illinois Medicaid plan approved by the Health Care Financing Administration on February 2, 2001, and under an amendment to the Department's administrative rules published as final on September 14, 2001. The Department did not follow either the letter or the spirit of the rule making requirements set out in the Administrative Procedure Act, and defendant's Motion, based on its flawed efforts at rule making, should be denied.

Under the general rule making requirements of the APA , an agency must give at least 45 days' notice of its intended action. 5 ILCS 100/5-40(a). This first notice must appear in the Illinois Register, and must include , inter alia, a "complete description of the subjects and issues

involved." 5ILCS 100/5-40(a)(3). During this first notice period, the agency must "accept from any interested persons data, views, arguments, or comments." Id. The APA expressly imposes on the agency the duty to "consider all submissions received." Id. The obvious purpose of the APA's requirements is not to force agencies to jump through meaningless procedural hoops, but to afford members of the public a meaningful opportunity to participate in the development of state policies that affect them. Cf. DeBraun v. Meissner, 958 F. Supp. 227, 230 (E.D. Pa. 1997) (explaining the purposes of the notice and comment requirements of the federal Administrative Procedure Act).

The Department did not follow these requirements. The perfunctory nature of the rule making was evident even before the Department published its proposed rule in the March 16, 2001, Illinois Register. Public participation did not inform this policy. The Department first implemented the policy by seeking, on January 3, 2001, with no notice to the public, approval from HCFA to amend its Medicaid plan to delete private duty nursing services for adults. Defendant's Memorandum, 4. HCFA approved the amendment on February 2, 2001. Id. One month later, on March 16, 2001, when the policy change was already accomplished, the Department published the first notice to change the private duty nursing rule in the Illinois Register. The "complete description of the issues involved" section of the notice includes reference to several changes in the Medicaid nursing services rules. Included in the description is the cryptic description of the change to delete private duty nursing services for adults:

> the . . . changes are being made as clarifications because payment is provided for private duty nursing services only for children under the age of 21 who are covered under a waiver, as described in Section 140.645, or are identified as needing the service through an EPSDT screening (Early and Periodic Screening Diagnosis and Treatment Program) as described in Section 140.485.

Exhibit J to Defendant's Memorandum. This description is not complete, and it does not describe the issues involved – whether the Illinois Medicaid program should cover private duty nursing services for eligible adults, the costs and benefits of such coverage, and the costs and benefits of alternatives. Moreover, the description is misleading. The rule is not a "clarification." It is a change. Before this change adults could receive private duty nursing under the Department's Medicaid program. After the promulgation of this rule, they could not. Intent on its decision to change the rule, the Department asked for comments within 30 days, even though the APA requires a 45 day comment period. 5 ILCS 100/5-40.

Comments were submitted to the Department, both in writing and at a public hearing, objecting to the proposed deletion of Medicaid coverage of private duty nursing services for adults.[1] Several commentators told the Department that by eliminating the authority to pay for private duty nursing services in the home for adults in this rule making, the Department was restricting its options to provide services in a community integrated setting, contrary to the direction outlined in the Supreme Court's decision in Olmstead v. L.C., 527 U.S. 581 (1999). In its Second Notice on the rule making delivered to the Joint Committee on Administrative Rules (JCAR), the Department characterized these comments as "not related to the rules or their intended purpose or potential effect" and that the "proposed amendments do not change the policy on coverage of home health services for adults." Exhibit L to Defendant's Memorandum. The Department did not consider the views or information of the public

[1] Under 5 ILCS 100/5-40, an agency must conduct a public hearing when an organization representing at least 100 persons affected by the rulemaking make a timely request for such a hearing. In this instance, ARC and the Centers for Independent Living, organizations representing persons with disabilities, made such a request.

submitted in the comments. It refused to consider them, and proceeded to adopt the policy it had already changed with HCFA by publishing the rules as final in the Illinois Register on September 14, 2001. Its procedures here violated both the requirements and the spirit of the Administrative Procedure Act.

The Illinois Supreme Court has invalidated rules when the requirements of the APA were disregarded by the Illinois Department of Public Aid. In Senn Park Nursing Center v. Miller, 104 Ill.2d 169, 470 N.E.2d 1029 (1984), the Department amended its Medicaid plan to adjust nursing home reimbursement rates without following the APA's rule making requirements. When the court declared the adjusted rates invalid under the APA, the Department promulgated the rate adjustment as an emergency rule in order to avoid the effect of the court's order. The Illinois Supreme Court did not just defer to the mechanical steps the Department had taken to comply facially with the APA. Instead it examined the Department's reasons for declaring an emergency to determine if the APA were truly followed. The court found that there was no emergency within the meaning of the APA other than the emergency created by the Department's own conduct in failing to follow the general rule making requirements of the APA. Similarly here, where the agency has refused to even consider the comments of the public, the rule making should be invalidated.

The Court's invalidation of a rule for failure to follow the requirement of the APA is consistent with decisions of courts interpreting the requirements of the federal Administrative Procedure Act. 5 U.S.C. §553. Similar to the Illinois statute, the federal statute requires that when a federal agency proposes an administrative rule the general notice of the proposed rule making shall include "either the terms or substance of the proposed rule or a description of the

subjects and issues involved." 5 U.S.C. §553(b)(3). In National Tour Brokers Assoc. v. United States, 591 F.2d 896 (D.C. Cir. 1978), the court invalidated a rule of the Interstate Commerce Commission because, among other deficiencies, the federal agency, similar to the present case, had misled interested parties in describing the purpose of the rule making. 591 F.2d at 900. In its notice the ICC had stated that the purpose of the notice was to obtain suggestions for legislative changes regarding the licensing of certain tour brokers when in fact what ultimately occurred was the promulgation of a final rule that instituted substantive and procedural changes in licensing such brokers. Similarly, in DeBraun v. Meissner, 958 F. Supp. 227 (E.D. Pa. 1997), the court invalidated a rule of the Immigration and Naturalization Service when the notice of rule making failed to inform interested parties of the impact of the rule. The proposed rule regarding the regulation of private contractors who furnished finger printing services to immigrants making applications to the INS, mentioned that the purpose of the rule was to maintain clean and suitable facilities available to the public. As published, the final rule prohibited the use of temporary sites such as vans as a suitable location for such services. The court found that the federal agency had failed to apprise interested parties that it intended to address other issues that would be material to them. 958 F. Supp. 231. See also, Kooritzky v. Reich, 17 F.3d 1509 (D.C. Cir. 1994)(Rule of United States Department of Labor invalidated because it failed to accurately describe the impact of the proposed rule).

Due to the defendant's failure to follow the requirements of the Administrative Procedure Act, the proposed amended rule should be deemed invalid and, therefore, should not serve as the basis for a dismissal of the first three counts of this lawsuit, as requested by defendant.

2. Defendant's Actions Violate the Community Integration Mandate of the Americans with Disabilities Act, 42 U.S.C. §§12131-12136, and its Implementing Regulations.

If the Illinois Medicaid program will not continue to cover adequate nursing services for Eric at home, Eric's only real option is institutionalization in a hospital, although the Department has indicated Eric should be placed in a skilled nursing facility. The Illinois Medicaid plan covers hospitalization and skilled nursing facilities for adults. The plan, by virtue of its recent amendment, does not cover longer term home-based nursing services for adults. As this Court has already noted, the Department's hearing officer found that placing Eric in a nursing home facility would result in Eric being seriously medically compromised. Memorandum Opinion and Order, p.5. In addition, Eric's interrelationship with his father and mother will be compromised. As described in the affidavits of Donna Radaszewski (Exhibit 3) and Paul Wibbenmeyer, R.N. (Exhibit 2), Eric's life at home and in the community provides him with a quality of life that is highly significant for someone with his profound disabilities. His parents provide an extremely important emotional anchor for him. They have been his constant source of care and nurturing since the onset of his disability. He becomes very upset even when his parents are briefly absent. In addition, he is able to attend educational activities at the College of DuPage because of the presence of one-on-one registered nursing. Institutionalization will not only place Eric's life at risk but will eliminate those community activities that give his life meaning. He will be in the most highly segregated setting possible, separated from his family who have nurtured and cared for him since the onset of his illnesses in 1992. Not only does life in the community increase the quality of his life, it is also the most likely reason that he survives.

Title II of the Americans with Disabilities Act of 1990 (ADA) provides that "no qualified

individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. §§12132. In Olmstead v. L.C., 527 U.S. 581, 596-597, 119 S. Ct. 2176, 144 L.Ed.2d 540 (1999), the Supreme Court decided that unjustified placement or retention of persons in institutions, severely limiting their exposure to the outside community, constitutes a form of discrimination based on disability prohibited by Title II of the Americans with Disabilities Act. Under the Court's decision, a state violates the ADA when it will pay only for institutional services for people with disabilities who both want to be served and could appropriately be served in a home- or community-based setting, and the state cannot show adequate justification for doing so. Olmstead involved two women with developmental disabilities and mental illnesses who resided in Georgia's state-run psychiatric hospital, waiting years for Medicaid funded community-based placement that their physicians had recommended. Georgia officials argued that they were not discriminating against the plaintiffs based on their disabilities, that the state was already using all available funds to provide home based services to other persons, and that a court order directing the state to transfer the plaintiffs to the community would fundamentally alter its services.

In reaching its conclusion that unjustified institutionalization is discrimination, the Court relied in part on Congress' express legislative findings, that "historically, society has tended to isolate and segregate individuals with disabilities, and despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;" that "discrimination against individuals with disabilities persists in such critical areas as institutionalization...; " and that "individuals with disabilities continually encounter various

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forms of discrimination, including .... failure to make modifications to existing facilities and practices.... [and] segregation" 527 U.S. at 588 and 600.

The Justice Department's regulations implementing Title II were also key in the Court's rationale. The "integration regulation" requires public entities to provide services in "the most integrated setting appropriate to the needs" of the person with disabilities. 28 C.F.R. §35.130(d). The Justice Department defines the most integrated setting to mean "a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible." 28 C.F.R.Part 35, App.A. In recognizing the basis for the regulations, the Court observed that institutional placement of persons who can live and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of community life. 527 U.S. at 601. The Court also noted that confinement in an institution severely diminishes the everyday life activities of individuals with disabilities, impairing, among other things, their family relations, social contacts and cultural enrichment. Id.

The second regulation, key to a plurality of the Court, requires that public entities make reasonable modifications in their practices when necessary to avoid discrimination on the basis of disability, unless the entity can show that the modification would fundamentally alter the nature of the service, program or activity. 28 C.F.R. §35.130(b)(7). In taking the integration and the reasonable modifications regulations together with the express purposes of the ADA, the Court determined that the ADA requires states to place persons with disabilities in community settings rather than institutions when treatment professionals have determined community placement is appropriate, community placement is not opposed by the individual, and the placement can be reasonably accommodated, taking into account the resources available to the state to meet the

needs of others. 527 U.S. at 587.

Olmstead applies to Eric's situation. From August 1995 until August 2000, the Illinois Medicaid program provided Eric with 16 hours/day of private duty nursing services in his home and an additional 336 hours per year of respite care. Eric received these services under the Department's Medicaid waiver program for Medically Fragile, Technology Dependent Children. The Department's agents approved and arranged this service plan, based on the determination that Eric needed the private duty nursing services, that he could benefit from those services at home and that it would be cheaper to provide Eric those services at home than to pay for the institutionalization he would otherwise require.[2] Last year, when the Department's agents decided to terminate this level of nursing care for Eric, the decision was not based on any change in Eric's medical condition or needs. It was based only on his turning age 21. The Department, however, went further. In response to Eric's challenge to its practice of restricting private duty nursing for adults, the Department moved to change its Medicaid Plan and its rule to officially prohibit providing private duty nursing to all adults. These actions ignore the requirements of Title II of the ADA. They ignore the interpretation of Title II made by the United States Supreme Court that states affirmatively seek to utilize the community as a treatment option when it is appropriate. The Department's steadfast refusal to continue to provide Eric the same services as an adult that he received before he turned 21, when it would in any event pay the costs of institutionalizing him, is discrimination the Supreme Court determined violates Title II of the

[2] With regard to this waiver program, the Department's Website explains that if services were not "provided in the home, these children would require institutional care in a hospital or skilled pediatric facility....most of the funding is for the provision of private duty nursing, home health aides of respite care in the client's home. See Exhibit 4, p. 3, attached, or www.state.il.us/dpa/html/home.

ADA.

In a case similar to this case, a trial court in New York considered the claims of three women each who suffered from severe disabilities and who had been receiving nursing services at home under New York's Medicaid program. Sanon v. Wing, 2000 N.Y. Misc. LEXIS 139 (Supreme Court of New York, New York County February 25, 2000))(copy attached as Exhibit 5). The state in that case sought to move these individuals from their homes into a nursing facility. As in this case there was evidence before the New York court that the physical condition of each of the parties would deteriorate if she were placed into a nursing home. As here, there was evidence before the court that institutionalizing these individuals would remove benefits attained by living in the community and inter-relating with family and friends. The court examined New York's attempt at institutionalization under Title II of the ADA and found such action to be a violation of that provision as interpreted by 42 CFR §35.130(d), the "integration regulation."

Defendant may argue, as Georgia did in Olmstead, that to require her to provide nursing services to Eric as an adult at home would fundamentally alter the Department's Medicaid program. The only alteration that has occurred here, however, is the Department's alteration of its Medicaid plan to eliminate coverage of private duty nursing services for adults outside its waiver programs, and its alteration of its administrative rules to accomplish the same. Moreover, as described above, a key aspect of the home-based services Eric has received for the past six years is the Department's determination that the cost of services provided to Eric in his home would be cheaper than the cost of Medicaid covered services he would need in an institution. With very small modification in its practices, the Department can provide Eric the

services he needs, the services that are life-saving for Eric, in his home. Instead, the Department wants to force 22 year old Eric into an institution, which, its own hearing office has acknowledged, will endanger Eric's life. Under Title II of the ADA, as interpreted by the Supreme Court in Olmstead, the Department's actions are prohibited as unlawful discrimination.

3. Defendant's Actions Violate the Community Integration Mandate of Section 504 of the Rehabilitation Act of 1973 and its Implementing Regulations.

Section 504 of the Rehabilitation Act prohibits discrimination against persons who have disabilities on the basis of disability in programs and services, like Medicaid, that are federally funded. 29 U.S.C. §794. The Department of Justice has promulgated an integration regulation for implementation of §504 that served as its model for its integration regulation implementing the ADA: "[R]ecipients [of federal funds] shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped." 28 C.F.R. §41.51(d). The Supreme Court in Olmstead relied in part on §504 and the Justice Department's interpretation of §504's requirements, to determine that unjustified institutionalization of persons with disabilities by public entities is discrimination based on disability. Olmstead v. L.C., 527 U.S. at 590-591. For all the reasons stated in the previous section, Defendant's actions, forcing Eric into an institution instead of providing Eric the services he needs at home, are unjustified, and violate 29 U.S.C. §794 and 28 C.F.R. §41.51(d), as well as Title II of the ADA.

Conclusion

For the foregoing reasons, Plaintiff respectfully requests that this Court deny Defendant's Motion to Vacate Temporary Restraining Order and Dismiss Case As Moot, and grant Plaintiff's Motion For Leave To File Supplemental Complaint And To Extend Temporary Restraining Order.

Respectfully submitted,

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One of the Attorneys for Plaintiff

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DONNA RADASZEWSKI,

Plaintiff,

v.

ANN PATLA, Director,
Illinois Department of Public Aid,

Defendant.

No. 00C 5391

AFFIDAVIT

Janina Badowska, M.D., having been duly sworn states as follows:

1. My name is Janina Badowska, M.D.

2. I am a physician, board certified in pediatrics.

3. My medical practice is located at 10 W. Martin in Naperville, Illinois, 60540.

4. I presently have in my care as a patient, Eric Radaszewski.

5. Except for a brief period, in approximately 1991, I have treated Eric since he was four and one-half years old.

6. Eric is twenty-one years old.

7. In 1992 Eric contracted melanocytic medulloblastoma which is a cancer in the brain. His medical treatment for this disease consisted of surgery, radiation and chemotherapy.

8. In November of 1993, Eric suffered a mid brain stroke. The mid-brain regulates those body functions that a person performs unconsciously such as swallowing and urinating.

9. These two medical events and the necessary medical treatment Eric has received have caused the following medical problems for Eric:

   A. His immunity to disease has been substantially reduced. He is at a substantial risk for infection which can occur very quickly. Immediate detection and treatment, often in a hospital, are necessary to prevent the rapid progression of the particular disease he may have contracted.

B. He has fracturing osteoporosis which has thinned the mass of his bones. He is thus prone to his bones breaking.

C. He has contractures to his hands and feet. This condition leaves his hands and feet unnaturally rigid so that he is subject to falling or other body movements that can result in bone fractures.

D. Because of the fracturing osteoporosis and his contractures he is confined to bed or a wheelchair and is not supposed to walk.

E. He has hydrocephalus which means that he has cerebral fluid within his skull cavity. This condition has resulted in Eric's mental deterioration and has caused seizures.

F. He has double vision, 100 percent loss of hearing in his right ear and 80 percent loss of hearing in left ear.

G. He is apraxic and unable to move his arms and legs knowingly; aphasic meaning he has lost the majority of his ability to speak and suffers from a condition known as Syndrome of Inappropriate Anti-Diuretic Hormone (SIADH) which affects his ability to urinate properly. This medical condition results in nausea, vomiting and can cause seizures. Because of Eric's loss of motor skills, vomiting can be a life threatening event to him.

10. These medical conditions require that the following medical procedures be available at all times and administered when needed:

A. Eric requires a person with sufficient medical knowledge and training to identify the onset of infections. That person, at a minimum, should be a registered nurse.

B. Eric is primarily fed intravenously eight hours each night. He cannot feed himself. To reduce elimination problems, he is also fed solid foods. His tolerance for these solid foods is low and can lead to intractable vomiting. When this occurs he must be fed first stage baby foods through an NG tube which is inserted through his nose to his stomach. His NG tube is also used to administer his medications.

C. In addition to the NG tube he has a catheter to urinate, a ventricular pleural shunt that drains the fluid in his skull into the pleural space of his lungs, and a Groshung catheter by which he receives food and hydration. All of these tubes are prone to infection and must be constantly monitored. He requires a registered nurse level of medical assistance to provide the sterile care of these tubes, to place his NG tube, to provide suctioning, and to prepare drugs that must be measured and administered sometimes rapidly.

D. Because Eric has deficiencies in long and short term memory, he does not remember his disabilities and limitations and is prone to undertaking activities which threaten his well being and even his life such as attempting to walk or pulling on his tubes. Accordingly, he must be constantly monitored to ensure that he does not injure himself.

E. He requires constant monitoring by a person with a registered nurse level of training for

seizures, shunt malfunction and desaturation.

F. He requires care at a registered nurse level to administer intravenous drugs, hydration, triphosopyridine nucleotide (TPN) (intravenous feedings), injections and oxygen.

G. Because he suffers from SIADH, the quantity and quality of his urine and its composition must be monitored by a trained person.

H. The quality of his skin must be monitored.

I. Because Eric does not have the mental capacity to protect his airway, he at times requires emergency suctioning to prevent aspiration.

11. The above medical conditions render Eric totally dependant for all activities of daily living (ADL).

12. Eric's chronic health problems will continue to multiply due to the damage he received from his cancer treatments. Only in his home, with proper medical care and support, can he medically survive and achieve some quality of life in the caring and loving environment that his parents provide.

13. For Eric, the alternative to home care is hospital care. A skilled nursing facility cannot provide the one-on-one around the clock medical care that Eric requires.

14. His survival to this point is attributable to the high level of registered nursing care he has received. Without this level of care, it would have been necessary to admit him to a hospital many times a year.

15. He requires a high level of registered nursing care to properly perform the medical tasks outlined above. This care needs to be one-on-one and I recommend that he receive such care 24 hours each day. Any amount of daily care less than this level endangers Eric's fragile medical condition. His survival depends upon his receiving this level of care.

Janina Badowska, M.D.

SUBSCRIBED AND SWORN to
before me this 31st day
of August 2000.
Cynthia A. Autry
NOTARY PUBLIC

OFFICIAL SEAL
CYNTHIA A AUTRY
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES: 12/09/00

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IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
DUPAGE COUNTY, ILLINOIS

DONNA RADASZEWSKI, Guardian for Eric Radaszewski, on his behalf,	)	
Plaintiff,	)	
vs.	)	No. 00 CH 1475
JACKIE GARNER, Director, Illinois Department of Public Aid,	)	
Defendant.	)	

AFFIDAVIT

I, Paul Wibbenmeyer, having been duly sworn under oath, state as follows:

1. I am a registered nurse.

2. I have been involved in Eric Radaszewski's care since May 1992.

3. I am the lead nurse and coordinate the care and treatment of Eric by the various nurses working for the Radaszewskis. I have been Eric's lead nurse since May 1992.

4. I have had extensive training and experience in treating severely disabled patients such as Eric.

5. Since Dr. Badowska's report in her affidavit of August 31, 2000, Eric's condition remains the same. Eric continues to experience all the medical conditions which are described in Dr. Badowska's affidavit. In addition, he continues to require all the nursing services described in Dr. Badowska's affidavit of August 31, 2000.

6. Fortunately, due to the excellent nursing care received by Eric during the past year, his

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condition has not deteriorated.

7. Given the technological complexity, skill, and judgment required to administer these multiple skilled nursing tasks, it is inconceivable that his care could be handled by anyone other than a fully licensed registered nurse on a one-to-one basis.

8. He is at risk of exacerbation of his chronic health problems and they could escalate to acute life threatening problems.

9. All these multiple health problems require the continuous monitoring by someone with the training and education of a registered nurse.

10. It is important to Eric's care and progress that he remain in his home, where he is comfortable and oriented. He receives consistent care in the home from the same nurses, with very little turnover of staff.

11. His parents are his anchors. Their constant presence contributes greatly to his quality of life. He is very dependent on them. Without their presence, he would be more confused, scared, and frightened. He has not been away from his parents in his entire life.

12. In my opinion, Eric's condition would markedly deteriorate if he were placed in an institution away from his parents and without the constancy of care that he receives at home.

13. Also, by remaining at home, Eric is able to participate in several educational activities. He attends the College of DuPage with the assistance of a registered nurse for independent learning activities. These activities would not be possible without the constant presence of a registered nurse.

The foregoing is true and accurate to the best of my knowledge and belief, and I would so testify if called upon to do so in a court of law.

Paul Wibbenmeyer, RN, RSA
Paul Wibbenmeyer, R.N.

SUBSCRIBED AND SWORN to
before me this 15th day
of October, 2001.

Susan E. Beard
NOTARY PUBLIC

OFFICIAL SEAL
SUSAN E BEARD
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES:09/08/05

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IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
DUPAGE COUNTY, ILLINOIS

DONNA RADASZEWSKI, Guardian for Eric Radaszewski, on his behalf,	)	
Plaintiff,	)	
vs.	)	No. 00 CH 1475
JACKIE GARNER, Director, Illinois Department of Public Aid,	)	
Defendant.	)	

AFFIDAVIT

I, Donna Radaszewski, having been duly sworn under oath, state as follows:

1. I am the mother and plenary guardian of Eric Radaszewski.

2. I have been actively involved in the care and treatment of Eric since he first developed severe medical problems in 1992.

3. I and my husband, Lester Radaszewski, provide a loving and caring home environment for Eric. He has known no other home during his entire life.

4. We provide a clean and healthy environment for Eric, changing his clothes and bed sheets daily.

5. We make special foods that we know Eric likes and can tolerate, such as waffles, pancakes, and hamburgers.

6. I cut his hair, finger nails, and toe nails at least once a week.

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7. Eric is very dependent on my husband and me for emotional and psychological support.

8. My husband and I talk with Eric, watch television with him, and play various games with him. Eric enjoys watching sporting events with my husband and also enjoys doing puzzles with both of us.

9. We assist in his education by doing homework with him. Since he can't read, we often read his homework materials to him and he is able to answer the questions. I work with him on his reading and math.

10. My husband often rough houses with Eric, which promotes an emotional attachment with him.

11. Many of our conversations serve to alleviate Eric's anxieties about his medical and physical condition. We talk about how he got the way he is and what he can expect in the future.

12. Eric gets depressed when he is away from us for any period of time. For example, I was recently hospitalized for several days. Eric became very depressed during that period.

13. When we're gone from the house, even for brief periods, Eric constantly asks when we will return.

14. Eric has episodes of dementia; we provide positive reinforcement of where and who he is.

15. We also attempt to foster his self-sufficiency by requiring him to perform as many tasks as we think he is capable of.

The foregoing is true and accurate to the best of my knowledge and belief, and I would so testify if called upon to do so in a court of law.

Donna Radaszewski

SUBSCRIBED AND SWORN to
before me this 12th day
of October, 2001.
Susan E. Beard
NOTARY PUBLIC

OFFICIAL SEAL
SUSAN E BEARD
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES:08/08/05

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HOME AND COMMUNITY BASED SERVICES (HCBS) WAIVERS

Section 1915(c) of the Social Security Act authorized the Secretary of Health and Human Services (HHS) to waive certain Medicaid statutory requirements. The waivers enable State Medicaid programs to offer HCBS, not otherwise furnished under the Medicaid State Plan, as an alternative to hospital and nursing facility care. Services can be targeted to a limited, select group of individuals. Cost-effectiveness must be demonstrated by reasonable estimates of annual expenditures for waiver individuals compared to average per capita costs of institutionalization. Most waivers are not directly administered by the Department. As the single State Medicaid Agency, the Department is responsible for oversight and monitoring of the administering agencies in enforcement of health and safety standards and fiscal responsibility.

The Department has entered into Interagency agreements with the administering agencies, described below, that are responsible for the day-to-day operations of the individual waiver programs. The Department works closely with these agencies to assure that Federal requirements are being met. The Bureau of Interagency Coordination performs monitoring of the seven HCBS waiver programs with day to day operations administered by other agencies. The Bureau of Long Term care administers the Supportive Living Program Waiver. Some monitoring activities have been in place for two to three years, others are in the implementation or development stages. The following is a description of nine waivers and the Department's monitoring activities.

Supportive Living Program (SLP)

This waiver serves those over the age of 18 with disabilities and the frail elderly. Supportive Living Facilities combine housing, personal and health related services for individuals who would otherwise be institutionalized in a nursing facility. The Department administers this waiver which was originally approved September 23, 1997. This waiver was amended on April 22, 1999, to cover a three year period commencing July 1, 1999.

The Department has contracts with nine entities that were selected through a request for proposal process, to develop ten sites around the state that would serve up to 1,000 persons. One entity will develop two sites. It is anticipated that by end of Fiscal Year 2001, all sites will be operational and offer the following services to residents:

- Intermittent Nursing Services
- Personal Care
- Medication Oversight and Assistance in Self-Administration
- Meals
- Laundry
- Housekeeping

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- Maintenance
- Social and Recreational Programming
- Ancillary Services (i.e., group activities, arranging outside services, shopping assistance)
- 24 Hour Response/Security Staff
- Health Promotion and Exercise Programming
- Emergency Call System

Service rates paid by the Department will be 60 percent of what would be spent on NF care. The Department wants to determine how effective SLP is to postponing entry into a NF, while offering a less costly alternative to NF care.

AIDS/HIV

This HCBS waiver services medically needy individuals diagnosed with HIV or AIDS, who are eligible for hospital or nursing home level of care. This waiver was renewed on October 1, 1998, for five years. During Fiscal Year 1999, 1,225 persons were served. This program is operated by the DHS - ORS. Services in this waiver include homemaker, personal assistant, nursing and therapies not covered in the State Plan, home delivered meals, emergency home response and home modifications. The Department is currently developing processes to monitor program and financial activities. A pilot review of this program will be conducted in the Spring of 2000.

Adults With Developmental Disabilities

This waiver program serves individuals with developmental disabilities, eighteen years or older, and allows them to remain in their homes or home-like community residential settings rather than be institutionalized in an Intermediate Care Facility for the Mentally Retarded (ICF/MR). The waiver served 6,773 individuals during the Fiscal Year 1999.

On July 1, 1999, a new waiver application was approved by the HCFA to provide habilitation services, which includes residential, developmental training, and supportive employment. Foster care services are not covered under the new waiver. Other available services, not covered by the State Plan, include physical, occupational and speech/language therapies and behavioral services which are currently bundled under residential habilitation; and home modifications and special medical equipment and supplies, individually approved based on need. At HCFA's request, DHS, the administering agency, will phase in unbundling (separate funding) of therapy services over the next year.

In Spring 1999, the Department completed four pilot onsite monitoring visits of residential and developmental training sites, two in the Chicago Metropolitan area and two downstate. The Department also completed onsite reviews of over 650 individuals in foster care homes.

The pilot reviews allowed the Department to work with DHS in coordinating onsite processes and develop a comprehensive monitoring protocol. Since August 1999, the Department has completed record reviews of 225 individuals receiving waiver services. In addition, four comprehensive onsite reviews, coordinated with the DHS monitoring process, were completed. Findings are referred to DHS for follow-up and response.

Early Intervention (EI)

This waiver serves infants and toddlers under age three who are experiencing a 40 percent or more developmental delay with cognitive, physical, language and speech, psychological or self-help skills; or who have a physical or mental condition that has a high probability of resulting in a 40 percent or more developmental delay, such as Down's syndrome or cerebral palsy. The severity of the delay is at a level that could require institutional care. Cost-effectiveness of these waiver services are compared to institutionalization in an ICF/MR.

The Department of Human Service's Bureau of Early Intervention is the administering agency for the EI waiver. Developmental Therapy is the only service provided under this waiver. No EI waiver services have been claimed for the second year of this waiver (Fiscal Year 1999). In February 1999, to improve accessibility, DHS broadened eligibility for EI services to include infants and toddlers with a delay of 30 percent or more in one area. Since the waiver only applies to children with a delay of 40 percent or more, not all developmental therapy services are eligible for Federal match under the approved waiver. There is currently no means to electronically identify and sort out the 40 percent level of delay for reimbursement and the cost to capture the eligible population is estimated to exceed the potential Federal reimbursement.

Elderly

This waiver provides services to individuals who are 60 years and older, who would otherwise be in nursing facilities. This waiver was approved by HCFA, effective October 1, 1999, for a five year renewal. It is operated through the Department on Aging (DoA). The number of persons served in this waiver for Fiscal Year 1999 was 17,602.

Services for this waiver primarily include homemaker and adult day care services. Other services approved in the waiver are emergency home response and home delivered meals. The Department expanded oversight of this waiver during the past year to include record reviews at Case Coordination Units, the case management entity for this program. Interviews of individuals in the waiver have also been conducted. The Department plans to continue intensive quarterly reviews of a selected sample. These reviews look at individual satisfaction and DoA oversight of individual services, case coordination, and providers.

Medically Fragile, Technology Dependent Children

This waiver serves medically fragile, technology dependent children under the age of 21. Over 230 individuals were served through this waiver in Fiscal Year 1999. If waiver services were not provided in the home, these children would require institutional care in a hospital or skilled pediatric facility. Cost-effectiveness for eligibility is compared to service costs in these institutional settings. The University of Illinois at Chicago, Division of Specialized Care for Children (DSCC) implements the waiver program, through case management, claims management and monitoring of the waiver services. Most of the funding is for the provision of private duty nursing, home health aides or respite care in the client's home. Other covered services include: environmental modification, special medical equipment and supplies, and placement counseling.

The Department recognizes the benefit of respite services for families and care givers. On December 27, 1999, the Department requested an amendment to the waiver to include an optional setting for respite services that are now only provided in the child's home. In August 1999, the first Children's Respite Care Center Model,

Respite House, was licensed by the Department of Public Health, under the Alternative Health Care Delivery Act. The Children's Respite Care Center Model will provide technological support and nursing care, for a period of one to fourteen days, in a home-like environment. Medicaid coverage for services is limited to Medicaid eligible children, under age 19, participating in this waiver. Again, this is not an additional service, but an optional setting allowing the family more flexibility. It is not expected to increase the cost of the waiver.

The Department's Bureau of Comprehensive Health Services (BCHS) reviews the individual service plans. The Department's Bureau of Interagency Coordination (BIC), and BCHS meet quarterly with the DSCC to discuss issues. The Department's BIC has been reviewing a sampling of records for service needs and cost-effectiveness and will implement case review and onsite monitoring of services early in Fiscal Year 2000.

Physically Disabled

The Physical Disabilities HCBS waiver provides services to those individuals under age 60 with physical disabilities (including ventilator dependent adults), who would otherwise require admittance to a nursing facility. The waiver renewal was approved by HCFA, effective October 1, 1999 for five years. It is operated through DHS - ORS. The waiver served approximately 12,290 individuals for Fiscal Year 1999.

Primary services for this waiver include homemaker services, provided through home health care agencies and/or personal assistants (PAs) that are hired, supervised, and/or fired by individual customers. Other services include Adult Day Care, Extended State Plan Nursing and Therapy Services, Emergency Home Response, Home Delivered Meals and Environmental Modifications.

The Department expanded oversight of this waiver during the past year beyond record reviews to include interviews of individual customers on a selected sample. These reviews also focus on the provider's delivery of services for those interviewed and DHS-ORS oversight of provider compliance.

Traumatic Brain Injury

The Traumatic Brain Injury (TBI) HCBS waiver provides services to medically needy individuals with acquired brain injuries that occurred as a result of injury or disease rather than degenerative, congenital or neurologic disorders related to aging. The alternative to waiver services would be nursing home level of care. This program is operated by DHS-ORS.

This waiver was approved by HCFA with an effective date of July 1, 1998, but was not implemented until July 1999. The Department is currently amending the waiver to change the effective date to July 1, 1999. DHS-ORS contracted with eleven case management entities and trained them to meet the needs of the individuals with traumatic brain injury. There are currently 250 participants in this program. Approximately 150 individuals were transferred from the HCBS waiver for persons with physical disabilities. The remaining 100 participants are new to waiver services. This waiver is unique as other HCBS waivers do not provide the array of services that are needed to keep a person with traumatic brain injury in the community. Services for this waiver include services provided in the physically disabled waiver and additional services including habilitation, occupational therapy, speech, hearing and language services, and behavioral services.

The Department has been meeting regularly with DHS-ORS staff as the program been implemented. The Department will be developing protocols and complete a pilot review of the program in the second half of Fiscal Year 2000.

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Service: Get by LEXSEE®
Citation: 2000 n.y misc. lexis 139

*2000 N.Y. Misc. LEXIS 139, **

In the Matter of the Application of CLARICE SANON, Petitioner, For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules, v. BRIAN WING, as Commissioner of the New York State Office of Temporary and Disability Assistance, BARBARA A. DeBUONO, as Commissioner of the New York State Department of Health; JASON TURNER, as Commissioner of the New York City Human Resources Administration, Respondents.

Index No. 403296/98

SUPREME COURT OF NEW YORK, NEW YORK COUNTY

2000 N.Y. Misc. LEXIS 139

February 25, 2000, Decided

NOTICE: [*1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

CASE SUMMARY

PROCEDURAL POSTURE: Petitioners sought to annul decisions of respondents state department of heath and city department of social services to terminate Medicaid home care services, that would result in disabled petitioners' placement in nursing homes, based upon issues of due process, defective standards, and procedures in evaluating an exception to fiscal assessment law, and compliance with the Americans with Disabilities Act of 1990, 42 U.S.C.S. § 12101 et seq.

OVERVIEW: Disabled plaintiffs were receiving Medicaid home health care from defendant city and state health agencies. The defendants decided to terminate that care such that plaintiffs' placement in a nursing home for the care would likely follow. The court determined that the decisions were to be annulled in order to enable defendants to consider the requirements of the Americans With Disabilities Act of 1990 (ADA), 42 U.S.C.S. § 12101 et seq. The ADA requirements to provide appropriately integrated services were not absolute. The ADA did not require that a state make fundamental alterations in its Medicaid program. However, unless the state could demonstrate that accommodating Medicaid recipients who otherwise qualify for 24-hour home care would result in a fundamental alteration in the Medicaid program, the state had to provide services in the most integrated setting appropriate to the needs of plaintiffs. The state was required to demonstrate what the cost of such an undertaking would be with respect to the system as a whole and not just the comparative cost with respect to the individual. That showing was not made by the state here, so in-home service to plaintiffs was to continue.

OUTCOME: This court set aside and annulled the determinations of defendants to discontinue personal care services and such that referral of plaintiffs to a residential health care facility would likely follow, in order to enable defendants to consider and follow the requirements of the Americans With Disabilities Act to demonstrate what t cost would be with respect to the system as a whole and not just the individual.

CORE TERMS: home care, placement, recipient, regulation, nursing home, integrated, fair hearing, disabilities, contraindicated, integration, health care, residential, daughter,

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substantial evidence, Disabilities Act, appropriateness, discontinue, continuous, disabled, diminish, vacated, fiscal, services provided, ability to perform, hypertension, entitlement, monitoring, alteration, attendant, constant

CORE CONCEPTS - ♦ Hide Concepts

Administrative Law : Agency Adjudication : Hearings
- Where a petition raises questions which could terminate the proceeding, other than substantial evidence, the IAS court must address them.

Pensions & Benefits Law : Americans With Disabilities Act
- The Americans With Disabilities Act of 1990, 42 U.S.C.S. § 12101 et seq. is an effort Congress to combat discrimination against people with disabilities and to provide integration into the economic and social mainstream of American life for these individuals.

Healthcare Law : Insurance : Medicaid
- One of the objectives for individuals with disabilities, the statute states, is independent living. 42 U.S.C.S. § 12101(a)(8).

Pensions & Benefits Law : Americans With Disabilities Act
- The Americans With Disabilities Act of 1990 (Act), 42 U.S.C.S. § 12101 et seq., directs the United States Attorney General to promulgate regulations necessary to implement the Act. 42 U.S.C.S. § 12134(a). These regulations are entitled to substantial deference.

Pensions & Benefits Law : Americans With Disabilities Act
- See 28 C.F.R. § 35.130(d).

Pensions & Benefits Law : Americans With Disabilities Act
- 28 C.F.R. § 35.130(d) is virtually identical to the § 504 integration regulation of the Rehabilitation Act of 1973, 29 U.S.C.S. § 701 et seq., in effect since 1981. Because Congress approved the earlier regulation by mandating that the Americans With Disabilities Act of 1990 (Act), 42 U.S.C.S. § 12101 et seq., regulations be patterned after the § 504 regulations, 28 C.F.R. § 35.130(d) has the force of law.

Healthcare Law : Insurance : Medicaid
- While the analysis which demonstrates that disabled people are being treated differently from non-disabled people is appropriate when comparing services provided to both disabled and non-disabled people, it does not apply to services provided only to disabled individuals, who seek compliance with the integration mandate of the regulations contained in 28 C.F.R. § 35.130(d).

Labor & Employment Law : Employment Discrimination
Pensions & Benefits Law : Americans With Disabilities Act
- The Supreme Court has rejected the proposition that, in order to constitute discrimination, a party must demonstrate that he or she was treated differently from similarly situated individuals.

Pensions & Benefits Law : Americans With Disabilities Act
- Congress explicitly identifies unjustified segregation of persons with disabilities as a form of discrimination.

Pensions & Benefits Law : Americans With Disabilities Act

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The Americans With Disabilities Act of 1990 (Act), 42 U.S.C.S. § 12101 et seq., mandates integration.

Healthcare Law : Insurance : Medicaid
Pensions & Benefits Law : Americans With Disabilities Act : Defenses
The Americans With Disabilities Act of 1990 (Act), 42 U.S.C.S. § 12101 et seq., provides an affirmative defense to a violation of the integration requirement of the Act if a defendant proves that making a modification would fundamentally alter its service or program. 28 C.F.R. § 35.130(b)(7). In order to establish this affirmative defense, the defendant must prove that the requested relief would alter the essential nature of the program or impose an undue burden or hardship in light of the overall program.

Healthcare Law : Insurance : Medicaid
Pensions & Benefits Law : Americans With Disabilities Act
In evaluating a state's fundamental-alteration defense to the integration requirement of The Americans With Disabilities Act of 1990 (Act), 42 U.S.C.S. § 12101 et seq., the court must consider, in view of the resources available to the state, not only the cost of providing community-based care to the litigants, but also the range of services the state provides others with mental disabilities, and the state's obligation to mete out those services equitably. The focus is, therefore, not only on the impact on the state's budget of providing the services, but also on the competing demands of others requiring services and the state's available resources.

Pensions & Benefits Law : Americans With Disabilities Act
A state's obligation to provide appropriately integrated services is not absolute as The Americans With Disabilities Act of 1990 (Act), 42 U.S.C.S. § 12101 et seq., does not require that a state make fundamental alterations in its Medicaid program.

Healthcare Law : Insurance : Medicaid
Pensions & Benefits Law : Americans With Disabilities Act
The Director of Social Services (DSS) must address the requirements of the Americans With Disabilities Act of 1990, 42 U.S.C.S. § 12101 et seq., in considering the provision of services. Unless DSS can demonstrate that accommodating Medicaid recipients who otherwise qualify for 24-hour home care would result in a fundamental alteration in the Medicaid program, DSS must provide services in the most integrated setting appropriate to the needs of petitioners. 28 C.F.R. § 35.130(d).

JUDGES: KARLA MOSKOWITZ, J.S.C.

OPINIONBY: KARLA MOSKOWITZ

OPINION: AMENDED n1 DECISION AND ORDER

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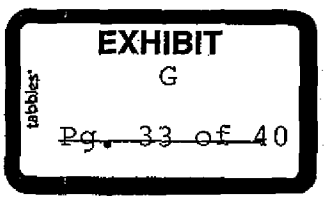
n1 When this decision was initially released on February 17, 2000, the court erroneously believed that petitioner Florence Rubin had died while the proceeding was *sub judice,* thus mooting the proceeding. In a letter dated February 24, 2000, petitioner's counsel informed the court that this was not the case; Ms. Rubin is still living, and in fact, is still living at home. This amended decision is identical to the prior-released decision except that the decretal paragraph(s) have been amended to address Ms. Rubin.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -



KARLA MOSKOWITZ, J.

In three separate proceedings, n2 petitioners seek to annul the decisions of respondents New York State Department of Heath ("DOH") and New York City Department of Social Services ("DSS") to terminate Medicaid home care services, that would result in petitioners' placement **[*2]** in nursing homes. Petitioners raise issues of due process, of defective standards and procedures in evaluating whether petitioners meet an exception to the fiscal assessment law and of compliance with the Americans with Disabilities Act ("ADA").

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n2 The other two proceedings are *Matter of Rubin v DeBuono,* Index No. 402767/1998 and *Matter of Jackson v DeBuono,* Index No.: 402855/98

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Because the legal issues involved in the three proceedings are closely related, I am deciding them together.

Petitioner Ena Jackson

Petitioner Ena Jackson is an 84-year-old recipient of personal care services through the Medicaid program. She was a nurse for thirty years and is now severely disabled as a result of severe osteoarthritis and polymyositis, diabetes mellitus, hypertension and urinary incontinence. She is confined to a wheelchair due to severe muscle weakness and limited range of motion and has had 24-hour continuous care of "split shift" Medicaid personal care services since October 1988. Since 1979, **[*3]** Mrs. Jackson has lived in an apartment that was built under a Federal program to enable elderly persons to live independently. The building provides services tailored to the needs of an elderly population.

In March 1996, DSS began to conduct a reauthorization of Mrs. Jackson's services pursuant to 18 NYCRR § 505.14(b)(5)(ix). This included a "fiscal assessment" of Mrs. Jackson's home care to determine whether home care services are "cost-effective," as required by Social Services Law § 367-k. Under that section, if the cost of a recipient's care exceeds 90% of the average Medicaid cost of a nursing home placement, the local agency is required to determine whether the home care meets one of several statutory exceptions. Mrs. Jackson contends that the fourth statutory exception is applicable to her. That exception applies when "personal care services are appropriate for the patient's functional needs and ... institutionalization is contraindicated, based on a review by the social services district of the recipient's medical case history." Social Services Law § 367-k(1)(d)(iv).

Dr. Mark Eberle, Mrs. Jackson's primary physician **[*4]** since 1988, submitted an "M-28u" form to DSS, in which he set forth his opinion that all of the enumerated activities of daily living ("ADLs") would deteriorate if Mrs. Jackson were placed in a residential health care facility ("RHCF" or "nursing home"). DSS then sent an RHCF Review Form known as "Form 28v" to a nursing home for review of the physician's opinion. Dr. Kaplan, medical director of Florence Nightingale Nursing Home, signed the form and checked the box stating that he had reviewed the Medical Request for Home Care completed by the treating physician and form M-28u and disagreed with the patient's physician that placement in an RHCF would cause the diminishment of the ability to perform ADLs. DSS's Local Medical Director ("LMD") concluded that Mrs. Jackson did not meet any of the statutory exceptions.

On May 6, 1996, DSS notified Mrs. Jackson that the cost of her home care exceeded the fiscal limits and that she must be referred to an RHCF. Mrs. Jackson requested a fair hearing, which the State DOH held, by telephone, on July 30, 1996, and continued in Mrs. Jackson's home on November 26, 1996 and January 6, 1998. DSS appeared only at the first hearing

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date, and relied solely [*5] on documentary evidence. Mrs. Jackson submitted a supplemental Physician's Certification form from Dr. Eberle, detailing the many risks that Mrs. Jackson would face, if she were placed in a nursing home, and explaining that the lack of the personal attention that she requires would cause her health to deteriorate and result in a diminution of her ability to perform ADLs. Mrs. Jackson testified on her own behalf, as did her home attendant of six years and the Director of Social Services in her building. In addition, Mrs. Jackson submitted other documentary evidence.

The State DOH's Hearing Decision, dated April 15, 1998, affirmed DSS's decision to discontinue personal care and to refer Mrs. Jackson for nursing home placement. After quoting the relevant statutes, the decision concluded that:

> the record substantiates the conclusion of the local medical director. The record contains no basis for concluding that placement is contraindicated for the Appellant, as contended by the Appellant' physician and Appellant's Representative. The record substantiates a finding that the Appellant, who has serious functional limitations, need for assistance with all basic personal care, including [*6] at night, and, no informal caregivers, would not be contraindicated for appropriate care in a residential health care facility.

The decision does not address the questions petitioner raises as to whether the nursing home would provide adequate care. Nor does the decision refer to any evidence presented or relied upon.

Mrs. Jackson agreed to accept sleep-in care to avoid nursing home placement, on condition that she waived no rights to appeal the fair hearing decision and have the split-shift reinstated if the sleep-in care proved inadequate. By mid-July 1998, it was apparent that the sleep-in care was inadequate because of the frequency with which Mrs. Jackson needed attention during the night. The split-shift care was reinstated when this Court granted a temporary restraining order.

Petitioner Florence Rubin

On May 15, 1996, petitioner Florence Rubin submitted a Medical Request for Home Care consisting of chores and personal care services 24 hours a day. Mrs. Rubin had been receiving such services for several years prior to this request. Mrs. Rubin suffers from chest pain, shortness of breath, hypertension, multiple sclerosis, arthritis, dizziness, congestive heart [*7] failure, syncope, transient ischemic attacks, cardiovascular accident, deafness, weakness and a peptic ulcer. The nursing assessment dated June 4, 1996 said that Mrs. Rubin was alert and oriented, hard of hearing, right leg amputated, wheelchair-bound and required total care in all areas of ADLs, as well as constant safety monitoring. The social assessment did not recommend personal care services. Mrs. Rubin's physician indicated on the form that Mrs. Rubin's ADLs *would not diminish* if she were placed in an RHCF, but also checked off all the activities (apparently indicating that those activities *would* diminish with such placement). Mrs. Rubin contends that the form was erroneously filled out by her physician.

The LMD found that Mrs. Rubin requires continuous personal care services, that the cost of such care far exceeds 90% of the cost of an RHCF and that Mrs. Rubin does not meet any of the statutory exceptions. On October 18, 1996, a Notice of Decision to Discontinue Personal Care Services (Fiscal Assessment), stating that home care services would be discontinued as of November 1, 1996, was sent to Mrs. Rubin. The notice set forth the computations of the cost of her care [*8] and the average cost of an RHCF in her district and that Mrs. Rubin did not meet any of the statutory exceptions.

The State DOH held a fair hearing on November 14, 1996 that continued on April 14, 1998. Mrs. Rubin's doctor submitted a letter in which he stated that Mrs. Rubin must be turned every two hours. During a recent hospital stay, she was not turned and an ulcer developed in only two days. Mrs. Rubin is also unable to use a catheter and requires constant diaper changes throughout the night and day. She has had many flap surgeries and, if the surgery area is not kept extremely clean, she develops infections easily. Her leg amputation resulted from the lack of proper decubitus care and improper turning and positioning. Trained personnel must transfer Mrs. Rubin between bed and chair for limited periods several times a day on a wooden board. The doctor also stated that Mrs. Rubin has lived in her apartment for 46 years and that her daughter and grandchildren live nearby and visit her often. She also goes shopping and sits in the park with neighbors and friends. The doctor concluded that Mrs. Rubin needed a great deal of individual round-the-clock attention, that she could not **[*9]** get in an RHCF, and that she would incur medical problems if taken out of her home and neighborhood.

Mrs. Rubin testified on her own behalf, as did her daughter, Annabelle Waldman, and her long-time home attendant. They testified about her need for one-on-one assistance round-the-clock and the importance of her independence in choosing her activities, shopping and meal planning. Mrs. Rubin goes out daily to meet with friends, sit in the park, and visit with family members, including her older sister.

The fair hearing decision, dated June 19, 1998, found that placement of Mrs. Rubin in an RHCF was not contraindicated and that statutory exception four did not apply. The decision states that the physician's letter does not imply that the care which Mrs. Rubin needs cannot be adequately provided at an RHCF.

Petitioner Clarice Sanon

Petitioner Clarice Sanon submitted a Medical Request for Home Care to DSS's Home Care Services Program on March 14, 1996. She, too, has received services for several years. Mrs. Sanon is a 79-year-old widow who lives with her daughter, Myriamme Sanon, and suffers from dementia, hypertension, depression and anxiety, as well as occasional disorientation **[*10]** and agitation. Mrs. Sanon speaks only French and Creole and eats only creole food. She will accept food only from her daughter or from a home attendant whom she has grown to know and trust. Mrs. Sanon will not allow strangers to touch her and will refuse to eat and become agitated when confronted by strangers. The nursing assessment found Mrs. Sanon to be alert but disoriented, prone to wandering, incontinent of bladder and bowel, verbally abusive and physically assaultive. The assessment recommended continuing current care, while noting that this care does not comply with the fiscal assessment. On the M-28u form, Mrs. Sanon's physician stated that her ability to perform ADLs would not diminish as a result of placement in an RHCF.

The LMD, in a report dated September 6, 1996, set forth his opinion that Mrs. Sanon requires continuous care services and that her health and safety cannot be ensured through the provision of home care services. The LMD also found that the cost of continuous home care services exceeds 90% of the cost of an RHCF, that Mrs. Sanon is not an appropriate candidate for any other services, and that she does not meet any of the exceptions. On September 10, 1996, DSS **[*11]** sent a Notice of Decision to Discontinue Personal Care Services to Mrs. Sanon, along with a copy of the assessment.

A fair hearing was held on August 4, 1997 and continued on February 10, 1998. Mrs. Sanon was represented by her daughter, Myriamme Sanon. The fair hearing decision, dated April 7, 1998, found that placement in an RHCF was not contraindicated and that DSS's decision was correct. In an affirmation dated July 15, 1998, Mrs. Sanon's physician recants his earlier opinion and states that Mrs. Sanon's ADLs would diminish if she were placed in a nursing

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home. Mrs. Sanon, through legal counsel, sought unsuccessfully to reopen the hearing, after which she initiated this proceeding.

DISCUSSION

Respondents contend that the questions raised in these proceedings are substantial evidence questions, and, therefore, that the court must transfer these proceedings to the Appellate Division. CPLR 7804(g). While a number of issues raised in the petitions are substantial evidence questions, not all can be so categorized. Petitioners also challenge respondents' failure to comply with the ADA. Where a petition raises questions which could terminate the proceeding, **[*12]** other than substantial evidence, the IAS court must address them. *G&G Shops, Inc. v New York City Loft Bd.*, 193 A.D.2d 405, 597 N.Y.S.2d 65; *Duso v Kralik*, 216 A.D.2d 297, 627 N.Y.S.2d 749. Thus, this court must address the applicability of the ADA to respondents' determinations.

Congress passed the ADA in an effort to combat discrimination against people with disabilities and to provide integration into the economic and social mainstream of American life for these individuals. *Helen L. v DiDario*, 46 F.3d 325 (3d Cir), *cert denied sub nom Pennsylvania Secretary of Pub. Welfare v Idell S.*, 516 U.S. 813, 133 L. Ed. 2d 26, 116 S. Ct. 64, *citing* S. Rep. No 116, 20: H.R.Rep. No 485(II), 50. It is undisputed that all three petitioners are disabled within the meaning of the statute.

One of the objectives for individuals with disabilities, the statute states, is independent living. 42 USC § 12101(a)(8). The ADA directs the Attorney General to promulgate regulations necessary to implement the Act. 42 USC § 12134(a). These regulations are entitled to substantial deference. **[*13]** *Blum v Bacon*, 457 U.S. 132, 141, 72 L. Ed. 2d 728, 102 S. Ct. 2355 (1982).

ADA regulation 28 CFR 35.130(d) provides that "[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." This regulation is virtually identical to the section 504 integration regulation of the Rehabilitation Act in effect since 1981. Because Congress approved the earlier regulation by mandating that the ADA regulations be patterned after the section 504 regulations, 28 CFR 35.130(d) has the force of law. *Helen L. v DiDario, supra*, at 332.

DSS contends that the ADA does not apply to petitioners' situations because petitioners cannot demonstrate that they are being treated differently from non-disabled people. While this analysis is appropriate when comparing services provided to both disabled and non-disabled people *(see, Alexander v Choate*, 469 U.S. 287, 83 L. Ed. 2d 661, 105 S. Ct. 712), it does not apply to services provided only to disabled individuals, who seek compliance with the integration mandate of the regulations. In fact, in *Cercpac v Health and Hosp. Corp.* (147 F.3d 165), **[*14]** upon which DSS relies, the Second Circuit specifically declined to address the issue of integration.

More recently, the United States Supreme Court addressed this issue in *Olmstead v L. C. ex rel. Zimring* (527 U.S. 581, 119 S. Ct. 2176, 144 L. Ed. 2d 540 [1999]). The Supreme Court specifically rejected the State's position that, in order to constitute discrimination, a party must demonstrate that he or she was treated differently from similarly situated individuals. 119 S. Ct. at 2186. The Supreme Court noted that "Congress explicitly identified unjustified 'segregation' of persons with disabilities as a 'form of discrimination.'" *Id.* at 2187. Even before this decision, many courts required agencies to provide services in the most integrated setting feasible. *See, Helen L. v DiDario, supra; Kathleen S. v Department of Pub. Welfare of the Commonwealth of Pennsylvania*, 10 F. Supp. 2d 460 (ED Pa 1998); *Messier v Southbury Training School*, 1999 U.S. Dist. LEXIS 1479, F. Supp. 2d , 1999 WL 20910 (D Conn 1999); *Cramer v Chiles*, 33 F. Supp. 2d 1342, (SD Fla 1999); *Williams v*

Wasserman, 937 F. Supp. 524 (D Md 1996); **[*15]** *Cable v Department of Dev. Servs. of the State of California*, 973 F. Supp. 937 (CD Cal 1997); *Charles Q. v Houstoun*, 1996 U.S. Dist. LEXIS 21671, 1996 WL 447549 (MD Pa 1996). *Olmstead* dispelled any continuing uncertainty with respect to this issue, and it is now clear that the ADA mandates integration.

The ADA provides an affirmative defense to a violation of this requirement if a defendant proves that making a modification would fundamentally alter its service or program. *See*, 28 CFR 35.130(b)(7); *Alexander v Choate, supra.* In order to establish this affirmative defense, the defendant must prove that the requested relief would alter the essential nature of the program or impose an undue burden or hardship in light of the overall program. *Olmstead v L. C. ex rel. Zimring, supra; Williams v Wasserman, supra; Easley by Easley v Snider*, 36 F.3d 297, 305 (3d Cir 1994).

In *Olmstead*, the United States Supreme Court addressed the issue of what constitutes a fundamental alteration of a service or program. The Court rejected the Circuit Court of Appeals' construction of the reasonable-modification regulation. The **[*16]** Court of Appeals would have required the District Court to assess the reasonableness of each mental health care recipient's request when measured against the entire mental health budget of the State. Thus, the inquiry would have been whether the cost of providing Jackson, Rubin and Sanon with home care services would be unreasonable given the demands of the State's overall Medicaid budget.

The Supreme Court concluded that this standard is too restrictive of a state's ability to maintain a range of services and to administer services with an even hand. Instead, the Supreme Court stated the standard as follows:

> In evaluating a State's fundamental-alteration defense, the District Court must consider, in view of the resources available to the State, not only the cost of providing community-based care to the litigants, but also the range of services the State provides others with mental disabilities, and the State's obligation to mete out those services equitably.

Olmstead v L. C. ex rel. Zimring, 119 S. Ct. at 2185. The focus is, therefore, not only on the impact on the State's budget of providing the services, but also on the competing demands of others requiring services **[*17]** and the State's available resources. *Id.; Rolland v Cellucci*, 191 F.R.D. 3, 15, 2000 WL 60927, at *14 (D Mass 2000).

The Appellate Division, First Department, touched upon the issue of the applicability of the ADA to the state's provision of services under Medicaid in *Egan v DeBuono* (259 A.D.2d 414, 688 N.Y.S.2d 18). In that case, the First Department unanimously affirmed the determination of DOH that petitioner was no longer eligible for 24-hour in-home personal care services. After concluding that the respondents did not violate petitioner's due process rights, the Appellate Division stated that, although the petitioner had pled a cognizable claim under the ADA, "a State's obligation 'to provide appropriately integrated services is not absolute as the ADA does not require that [a State] make fundamental alterations in its [Medicaid] program.'" *Id.* at 415. Respondents maintain that the *Egan* decision is dispositive here.

Initially, it should be noted that *Egan* was decided before *Olmstead*. Therefore, if there is any conflict, the requirements set forth in *Olmstead* must prevail.

Egan recognizes that a petitioner can **[*18]** set forth a cognizable claim for continuing personal care services at home under the ADA, but that integrated services are not an

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absolute requirement. This merely states the standard to use and is in accordance with the Supreme Court's decision in *Olmstead.* While the First Department rejected the petitioner's ADA claims in *Egan,* the decision does not reveal the basis for that rejection. Nor does the decision discuss whether respondents' procedures complied with ADA requirements. Thus, the decision in *Egan* does not mandate a finding that respondents complied with the ADA in these proceedings.

DSS contends that the adoption of a requirement that home care be continued will substantially alter or modify the State's Medicaid program. However, there is no indication in the record that any factual inquiry took place here with regard to the application of the ADA to petitioners' applications. DSS merely alleges that the public would be required to pay for 24-hour personal care services whenever the Medicaid recipient "prefers" home care. DSS does not, however, dispute the fact that 24-hour home care is a service already provided by Medicaid, and that DSS did not consider what **[*19]** would be the most integrated setting in reaching its determination. Nor has DSS demonstrated that there would be a "massive" change in the program.

Before that determination can be made, DSS must demonstrate what the cost of such an undertaking would be with respect to the system as a whole and not just the comparative cost with respect to the individual. *Olmstead v L. C. by Zimring, supra; Helen L. v DiDario, supra.* Further, any other costs that have not been addressed, but that can be substantiated, should also be considered. For example, petitioners have alleged that there are increased hospitalization costs incurred when people are placed in RHCFs compared to hospitalization for those receiving home care. If petitioners can prove those costs, DSS must take them into account in determining whether providing care in the most integrated setting would amount to a fundamental change in the services provided. *See, Olmstead,* 119 S. Ct. at 2189. Accordingly, respondents must address the requirements of the ADA in considering the provision of services. Unless respondents can demonstrate that accommodating Medicaid recipients who otherwise qualify for 24-hour home care **[*20]** would result in a fundamental alteration in the Medicaid program, respondents must provide services in "the most integrated setting appropriate to the needs of" petitioners. 28 CFR 35.130(d); *Id.*

The parties have brought a number of recent cases to the Court's attention that arguably could affect this court's decision. In *Kuppersmith v Dowling* (93 N.Y.2d 90, 688 N.Y.S.2d 96, 710 N.E.2d 660), the Court of Appeals addressed the issue of whether an agency must consider a physician's estimate in determining the number of hours of home care services that a recipient requires. The Court of Appeals determined that the agency need not consider the physician's recommendation because the determination relies on more than just a medical determination. This is not an issue in these proceedings because all parties agree that petitioners require constant care. To the extent that *Kuppersmith* may have some bearing on substantial evidence questions petitioners also raise, this court need not address the decision because those issues are for the Appellate Division. CPLR 7804(g).

In *Rodriguez v City of New York,* (197 F.3d 611), the Second Circuit **[*21]** Court of Appeals addressed the application of the ADA to the provision of services under Medicaid. The plaintiffs sought to have their home health care services expanded to include safety monitoring, so that they could remain in their homes. In that case, the Second Circuit determined that the ADA did not apply to the plaintiffs, because they were seeking services that Medicaid did not provide, *i.e.,* safety monitoring. Thus, the issue was not where to provide services, as in *Olmstead,* but which services to provide. At bar, there is no question that Medicaid provides the services petitioners seek. The question, as in *Olmstead,* is where respondents must provide those services. Consequently, *Rodriguez* does not affect the outcome in this matter.

Mitchell v Barrios-Paoli (253 A.D.2d 281, 687 N.Y.S.2d 319) is a case involving workfare recipients' challenge of workfare's failure to accommodate their disabilities. The First

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Department held that the recipients were entitled to notice and an opportunity for a hearing on their right to contest the appropriateness of their work placements. Petitioners maintain that this is analogous to their claim that they are **[*22]** entitled to notice and an opportunity for a hearing on the appropriateness of any particular nursing home placement. This position is without merit. In *Mitchell,* the respondents conceded that workfare recipients, who were acknowledged to be employable only within certain limitations, were entitled to challenge medically inappropriate assignments. Thus, the petitioners were not seeking to create a right. The challenge concerned respondents' failure to adequately advise the recipients of how to protect their rights without endangering either their benefits or their health. The holding in *Mitchell* does not, however, create any new right for either the petitioners in that proceeding or for the petitioners here.

Petitioners raise a number of due process claims regarding the appropriateness of the State's forms, the appropriateness of the particular RHCF selected, and adequacy of the notice supplied to the petitioners informing them of the specific basis on which respondents denied continued home care. Petitioners make many allegations of impropriety with respect to the application of Mrs. Sanon, who did not know that her physician had filled out the M-28u form saying that her ADLs **[*23]** would not be adversely affected. Inasmuch as this court is setting aside the determinations of DSS in order to enable DSS to consider the requirements of the ADA, it is unnecessary to decide these issues.

Accordingly, it is hereby

ORDERED AND ADJUDGED that so much of this court's order dated February 17, 2000 as dismissed the petition of Florence Rubin as moot because she was believed to be deceased, shall be and hereby is vacated upon her, counsel's advice that Mrs. Rubin is still living. It is further

ORDERED AND ADJUDGED that the petitions are granted as follows:

1) The determination of respondent New York City Human Resources Administration, dated May 6, 1996, to discontinue personal care services to Ena Jackson and to refer her to a residential health care facility is vacated and annulled and the matter is remanded to respondent to reassess petitioner Jackson's entitlement to continued personal care services light of the requirements of the Americans with Disabilities Act.

2) The determination of respondent New York City Human Resources Administration, dated October 18, 1996, to discontinue personal care services to Florence Rubin and to refer her to a residential health **[*24]** care facility is vacated and annulled and the matter is remanded to respondent to reassess petitioner Rubin's entitlement to continued personal care services in light of the requirements of the Americans with Disabilities Act.

3) The determination of respondent New York City Human Resources Administration, dated September 10, 1996, to discontinue personal care services to Clarice Sanon and to refer her to a residential health care facility is vacated and annulled and the matter is remanded to respondent to reassess petitioner Sanon's entitlement to continued personal care services in light of the requirements of the Americans with Disabilities Act; and it is further

The foregoing constitutes the decision and judgment of this court, copies of which have been provided to the parties before filing.

Dated: February 25, 2000

KARLA MOSKOWITZ, *J.S.C.*

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