FILED
MAY 20 2002
MICHAEL W. DOBBINS
CLERK, U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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

DOCKETED
MAY 21 2002

DEFENDANT'S MEMORANDUM IN SUPPORT OF HER MOTION FOR JUDGMENT ON THE PLEADINGS

INTRODUCTION

Plaintiff is the guardian and mother of Eric Radaszewski, who suffers from brain cancer and has lost many mental and physical functions. Defendant is the Director of the Illinois Department of Public Aid ("IDPA"). Until August 2000, when he became 21 years old, Eric, who lives with his parents, received 16 daily hours of in-home nursing funded by Illinois' Medicaid program. In February, 2000, IDPA determined that, after Eric turned 21, he would only be entitled to an exceptional care rate of $4,593 per month under its Medicaid Home Services Waiver Program. Plaintiff alleges that this rate, which was capped at the alternate cost of care for Eric at a skilled nursing facility, was only sufficient to pay for approximately five daily hours of in-home nursing.

On December 1, 2000, Plaintiff brought a state court action for injunctive relief against Defendant's predecessor in office challenging IDPA's reduction of the amount of in-home private duty nursing provided to her son. Plaintiff's four-count Complaint charged that IDPA's

10

limitation of private duty nursing services for adult Medicaid recipients constituted an invalid rule not adopted pursuant to notice and comment rulemaking procedures specified in Illinois' Administrative Procedure Act ("APA"), 5 ILCS 100/1-1 et seq. (Count I); IDPA violated Illinois' Medicaid Plan by failing to provide Eric with all the private duty nursing described in the Plan (Count II); IDPA's refusal to cover all the private duty nursing sought for Eric violated 89 Illinois Administrative Code ("ILAC") §140.435(b)(2) (Count III); and IDPA breached a contract by not providing Eric all the private duty nursing included in Ilinois' Medicaid Plan (Count IV). On December 19, 2000, the state court entered a Temporary Restraining Order requiring IDPA to maintain the 16 daily hours of private duty nursing previously received by Eric.

On February 2, 2001, the Health Care Financing Administration ("HCFA") of the United States Department of Health and Human Services, approved an IDPA State Medicaid Plan Amendment, effective retroactive to January 1, 2001, which removed coverage of private duty nursing from the Plan by deleting all provisions regarding this service. See attached Exhibit A. On September 1, 2001, IDPA amended 89 ILAC §§140.435 and 140.436 to strike all text relating to Medicaid coverage for private duty nursing services. 25 Ill. Reg. 11880 (September 14, 2001). See attached Exhibit B.

On November 15, 2001, the state court granted Plaintiff leave to file a Supplemental Complaint instanter. Although she realleged the four counts previously brought in her initial Complaint and brought a new count alleging that IDPA violated the APA in amending 89 ILAC §§140.435 and 140.436 (Count V), Plaintiff added two new counts alleging federal law violations. Specifically, Plaintiff complained that IDPA's refusal to provide Eric the amount of in-home nursing she sought violated Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §12132, and one of its implementing regulations, 28 C.F.R. §35.130 (Count VI) and that

this refusal also violated Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, and one of its implementing regulations, 28 C.F.R. §41.51(d) (Count VII).

Because Plaintiff amended her Complaint to add new claims arising under federal law, Defendant removed this case to federal court on December 14, 2001. On April 30, 2002, this Court remanded Plaintiff's state law claims (Counts I-V) to state court, while retaining jurisdiction over Counts VI and VII, Plaintiff's federal law claims. Pursuant to Federal Rule of Civil Procedure 12(c), Defendant now moves for entry of judgment on the pleadings on Counts VI and VII of Plaintiff's Supplemental Complaint for Injunctive Relief.

ARGUMENT

Under the facts set forth in her Complaint, Plaintiff has failed to state a legal claim for which relief may be granted. A Rule 12(c) motion for judgment on the pleadings can be used to challenge the legal sufficiency of a complaint and, when so used, is evaluated under the same standard as a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief may be granted. United Air Lines, Inc. v. ALG, Inc., 912 F.Supp. 353, 361 (N.D. Ill. 1995), *reconsidered on other grounds* 916 F.Supp. 793 (N.D. Ill. 1996). Thus, entry of judgment on the pleadings is appropriate when, taking all the factual allegations in plaintiff's complaint as true, defendant is clearly entitled to judgment as a matter of law. Flora v. Home Federal Savings and Loan Association, 685 F.2d. 209, 211 (7th Cir. 1982). Although the district court must view the facts in the light most favorable to the nonmoving party, it is not bound by that party's legal characterization of the facts. National Fidelity Life Insurance Co. v. Karaganis, 811 F.2d 357, 358 (7th Cir. 1987). Furthermore, on a motion for judgment on the pleadings, the court may consider documents incorporated by reference into the pleadings and may also take judicial notice of matters of public record. United States v. Wood, 925 F.2d 1580, 1582 (7th Cir. 1991).

I. Count VI: The ADA Claim

A. Plaintiff Cannot Sue IDPA's Director Under Title II of the ADA

Plaintiff has named IDPA's Director as defendant in this case. Title II of the ADA, however, provides that "[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. §12132. A "public entity" means "any State or local government" and "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. §12131(1)(A) and (B). In Walker v. Snyder, 213 F.3d 344, 347 (7th Cir. 2000), the Seventh Circuit Court of Appeals held that "[T]he only proper defendant in a action under [Title II of the ADA] is the public body as an entity." Public officials cannot be sued as proxies for the entity. 213 F.3d at 346. Accordingly, the court ordered dismissal of a Title II ADA claim brought against the director of the Illinois Department of Corrections. 213 F.3d at 347. Subsequently, in Boudreau v. Ryan, 2001 WL 840583, *5 (N.D. Ill. 2001), the court, bound by the Walker holding, dismissed a Title II ADA claim brought against various state officials, including IDPA's Director. This Court must likewise dismiss Plaintiff's Count VI ADA claim, which is improperly brought against an individual state official, not a public entity.

B. There Is No Enforceable Right for Eric to Receive In-Home Private Duty Nursing

In Count VI, Plaintiff contends that IDPA must provide Eric with in-home private duty nursing because it is legally compelled to afford services to the disabled in the most integrated community setting appropriate to their needs. Supplemental Complaint, ¶¶40-45. Plaintiff is really charging a violation of one of the ADA's implementing regulations rather than of the ADA itself. 28 C.F.R. §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." The ADA itself, however, merely prohibits discrimination against the disabled and their exclusion from government services. 42 U.S.C. §12132. No community integration requirement can be found in the statutory text. Under Plaintiff's interpretation, 28 C.F.R. §35.130(d) requires affirmative action beyond what is required by the ADA. However, regulations creating rights independent of any federal statute are not enforceable laws. Mungiovi v. Chicago Housing Authority, 98 F.3d 982, 984 (7th Cir. 1996) . See Harris v. James, 127 F.3d 993, 1009 (11th Cir. 1997) (if regulation goes beyond explicating specific content of statute and imposes distinct obligations in order to further broad statutory objectives, regulation is too far removed from congressional intent to create federal right enforceable under §1983).

For instance, in Alexander v. Sandoval, 532 U.S. 275, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001), the Supreme Court held disparate-impact regulations promulgated under Title VI of the Civil Rights Act of 1964 to be unenforceable. Title VI provided that no person shall, "on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any [covered] program or activity." 42 U.S.C. §2000d. Relying on a regulation forbidding funding recipients to utilize administrative methods having the effect of subjecting individuals to discrimination, plaintiff tried to compel accomodation of non-English speakers in administration of driver's license examinations. Any right of action to enforce Title VI did not include a right to enforce regulations proscribing activities having a disparate racial impact because Title VI interdicted only intentional discrimination. 532 U.S. at --, 121 S.Ct. at 1519. The regulation sought to be enforced did not apply Title VI, but rather prohibited conduct that the statute permitted. 532 U.S. at --, 121 S.Ct. at 1519. Federal agencies were authorized to "effectuate" Title VI by issuing regulations, 42

U.S.C. §2000d-1, but they could only effectuate rights already created by the statute and could not themselves create new rights or rights of action. 532 U.S. at --, 121 S.Ct. at 1520-21. The regulation in Sandoval could not create a right that Congress had not already incorporated in the enabling statute. 532 U.S. at --, 121 S.Ct. at 1522.

Under the Supreme Court's holding in Sandoval, the "integration mandate" in 28 C.F.R. §35.130(d) cannot create a right to compel IDPA to accomodate Eric with in-home nursing because this requirement cannot be found anywhere in Title II of the ADA. Title II only prohibits IDPA from *excluding* Eric, by reason of his disability, from those services it otherwise provides. Plaintiff, however, interprets 28 U.S.C. §35.130(d) as requiring IDPA to create new and additional services so that Eric may receive government benefits at home. This affirmative action requirement cannot be created by regulation alone, for the language of the ADA itself does not impose an affirmative action requirement on public entities. The United States Attorney General is authorized, pursuant to 42 U.S.C. §12134(a), to promulgate regulations that "implement" Title II, but this authority is necessarily limited to implementation of this Title's prohibition of discriminatory exclusion of the disabled from government services. Plaintiff's suggested reading of 28 C.F.R. §35.130(d) does not implement 42 U.S.C. §12132; rather it creates a whole new expansive range of affirmative governmental obligations not encompassed by the language of the enabling statute. Plaintiff cannot bring a claim for relief based on 28 C.F.R. §35.130(d) because the regulatory violation she alleges does not constitute a violation of 42 U.S.C. §12132. See Part I-C below.

C. The ADA Does Not Require IDPA to Provide Eric With In-Home Nursing Care

The ADA does not require IDPA to provide Eric with in-home private duty nursing, a service not covered by Illinois' Medicaid Plan, just so that he will not have to be institutionalized

in a nursing home. Title II of the ADA is only an anti-discrimination statute prohibiting public entities from excluding the disabled from government services, programs or activities. 42 U.S.C. §12132. As such, the ADA does not affirmatively require IDPA to provide the disabled with services not offered to anyone else. The Supreme Court cautioned in Olmstead v. Zimring, 527 U.S. 581, 603, n. 14, 119 S.Ct. 2176, 2188, n. 14, 144 L.Ed.2d 540 (1999), that "We do not in this opinion hold that the ADA imposes on the States a 'standard of care' for whatever medical services they render, or that the ADA requires States to 'provide a certain level of benefits to individuals with disabilities.'" Rather the Court held that "States must adhere to the ADA's nondiscrimination requirement with regard to the *services they in fact provide*." 527 U.S. at 603, n. 14; 119 S.Ct. at 2188, n. 14 (emphasis added).

The ADA cannot be used to challenge the adequacy of the care provided to the disabled or to obtain benefits for the disabled that are not available to anyone else. The ADA does not guarantee specific benefits. Wright v. Giuliani, 2000 WL 777940 (S.D.N.Y. 2000), p.8, *aff'd* Wright v. Giuliani, 230 F.3d 543 (2d Cir. 2000), or insure any particular level of medical care for disabled persons. N.A.M.I. v. Essex County Board of Freeholders, 91 F.Supp.2d 781, 788 (M.D. Pa. 2000). The ADA neither sustains actions seeking special services or affirmative assistance for the disabled, Charlie H. v. Whitman, 83 F.Supp.2d 476, 502 (D. N.J. 2000), nor even assures maintenance of services previously provided. CERCPAC v. Health and Hospitals Corporation, 147 F.3d 165, 168 (2d Cir. 1998). The disabled do not have a right to more public services than the non-disabled, even though the disabled need them. Lincoln CERCPAC v. Health and Hospital Corporation, 977 F.Supp. 274, 280 (S.D. N.Y. 1997), *aff'd* 147 F.3d 165 (2d Cir. 1998). Therefore the disabled cannot use the ADA to challenge the substance of the services they receive. Doe v. Pfrommer, 148 F.3d 73, 84 (2d Cir. 1998).

The ADA only requires that services provided to others not be denied to the disabled. Rodriguez v. City of New York, 197 F.3d 611, 618 (2d Cir. 1999). A state does not unlawfully discriminate against the disabled by denying a benefit not provided to anyone. Townsend v. Quasim, 163 F.Supp.2d 1281, 1286 (W.D. Wash. 2001). No matter how much the disabled may need additional services, the ADA does not require that substantively different services be provided to them. Wright v. Giuliani, 230 F.3d at 548. Thus, under the ADA, a state need only provide the disabled with meaningful access to "such services as may be provided," regardless of whether such services are adequate. Wright v. Giuliani, 230 F.3d at 548. Under the ADA, it is not the role of the courts to determine what benefits a state must provide. Rodriguez v. City of New York, 197 F.3d at 619. Rather it is within the purview of the legislative branch to determine what substantive benefits should be granted. Wright v. Giuliani, 2000 WL 777940, p.8.

In Rodriguez v. City of New York, 197 F.3d 611 (2d Cir. 1999), the Second Circuit addressed the city's failure to include safety-monitoring among the home care services provided to mentally disabled Medicaid recipients requiring assistance with daily living tasks. Plaintiffs complained that this failure violated the ADA because they could not continue living at home without safety monitoring. The court noted that nobody was provided safety monitori ng and that the services provided to the mentally disabled were no different from those provided to anybody else. 197 F.3d at 618. Therefore the city did not violate the ADA by failing to provide this benefit to plaintiffs. 197 F.3d at 619. Since the ADA only required that services provided to others not be denied to the disabled, plaintiffs were not really alleging discrimination, but rather were challenging the substance of the services they received. 197 F.3d at 618. The court flatly rejected any contentions that the ADA requires the states to provide new benefits to the disabled

or to provide them with sufficient benefits to remain out of institutions. 197 F.3d at 619.

Similarly, in Townsend v. Quasim, 163 F.Supp.2d 1281 (W.D. Wash. 2001), medically needy disabled persons who were Medicaid eligible for nursing facility care, but who had excess income, challenged their exclusion from a home and community based waiver program for categorically needy recipients. Plaintiffs contended that the state's failure to provide them with similar home-based services violated the ADA because they were not receiving care in the most integrated setting appropriate to their needs. The court held that, inasmuch as the ADA only forbids exclusion from government programs by reason of disability and the disabled can still be excluded based on other unrelated grounds, the state did not violate the ADA by excluding plaintiffs on the basis of their income. 163 F.Supp.2d at 1284. Since plaintiffs exceeded the income limits of the home-based program, they could not meet that program's essential eligibility requirements. 163 F.Supp.3d at 1284-85. Modification of the program's income limit would be a fundamental alteration of an essential eligibility requirement and was not mandated by the ADA. 163 F.Supp.2d 1285. The ADA merely required nondiscrimination with regard to services the state actually provided. 163 F.Supp. at 1287. Because the state did not provide home-based programs to the medically needy, the integration mandate contained in 28 C.F.R. §35.130(d) did not compel creation of such programs for plaintiffs. 163 F.Supp. at 1287. *See also* Hodges v. Smith, 910 F.Supp. 646, 649 (N.D. Ga. 1995) (no cause of action under ADA to require state to resume payments for nutrient which had been discontinued when severely retarded Medicaid recipient turned 21 years old, notwithstanding argument that plaintiff would be forced to leave his family and live in nursing home); Egan v. DeBuono, 259 A.D.2d 414, 688 N.Y.S.2d 18 (N.Y. Sup.Ct. App.Div. 1999) (determination that person suffering from bipolar disorder was no longer eligible for 24-hour in-home personal care services did not violate ADA's

integration requirement despite allegation that plaintiff would be institutionalized in nursing home).

In the present case, IDPA's refusal to provide Eric with in-home private duty nursing is based on his age, not his disability. Illinois' Medicaid program provides private duty nursing only to children under 21 years old who are identified as needing this service through an EPSDT screening (Early and Periodic Screening, Diagnosis and Treatment Program). Services under Illinois' EPSDT program are only available to persons under age 21, 305 ILCS 5/5-19(a), and private duty nursing is provided to these children because federal law requires provision of this optional Medicaid service to EPSDT participants, even though it is not covered in this State's Medicaid Plan. 42 U.S.C. §1396d(r)(5). A state may exclude the disabled from a program on the basis of their age, which is a factor unrelated to their disability. *See* Hodges v. Smith, 910 F.Supp. 646, 649 (N.D. Ga. 1995) (after former EPSDT participant turned 21, ADA did not require continued Medicaid reimbursement for his liquid diet); Aughe v. Shalala, 885 F.Supp. 1428, 1433 (W.D. Wash. 1995) (AFDC program eligibility requirement based on age did not violate ADA). Since Eric is an adult, he cannot, as the ADA itself requires, 42 U.S.C. §12131(2), be a "qualified individual" who "meets the essential eligibility requirements" for the receipt of an EPSDT service such as private duty nursing. Under both federal and state law, the EPSDT program provides services only to children and thus this age restriction is an essential eligibility requirement. Furnishing private duty nursing to Eric, as Plaintiff requests, would fundamentally alter the character of the EPSDT program. A public entity, however, is not required to make a modification in its policies, however arguably reasonable, if that modification "would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. §35.130(b)(7).

Since IDPA does not provide private duty nursing to any adult Medicaid recipient, it cannot discriminate against Eric on the basis of his disability by not providing this service to him. Under the guise of alleging an ADA violation, Plaintiff is actually challenging the adequacy of the nursing services IDPA reimburses, which she alleges are insufficient to allow Eric to continue residing at home. The ADA, however, only dictates evenhanded administration of whatever services IDPA actually provides to the public. The ADA does not require IDPA to provide the disabled sufficient services to remain at home. Consequently, the ADA does not require IDPA to create and fund new services especially for Eric, no matter how salutary such services could be or how socially desirable it might be to keep him out of a nursing home.

II. Count VII: The Rehabilitation Act Claim

A. There Is No Enforceable Right for Eric to Receive In-Home Private Duty Nursing

The Rehabilitation Act of 1973 provides that "No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. §794(a). An implementing regulation states that "Recipients [of federal financial assistance] shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons." 28 C.F.R. §41.51(d). Like the ADA, the Rehabilitation Act is only an anti-discrimination statute. Insofar as Plaintiff interprets 28 C.F.R. §41.51(d) as requiring states to fund any and every service necessary to keep the handicapped out of nursing facilities, that regulation is an unauthorized implementation of the Rehabilitation Act and creates no enforceable right to such services for the same reasons as stated in Part I-B of this Memorandum regarding the ADA's similar implementing regulation.

The financial obligation Plaintiff seeks to impose on the states is potentially enormous and, indeed, could even be ruinous. Hundreds of thousands of disabled and handicapped individuals either currently receive Medicaid-funded care in nursing homes or will eventually become eligible for such care. Many of these persons could instead be maintained at home if a sufficient amount of expensive private duty nursing were made available. Under Plaintiff's view of the Rehabilitation Act, states would be required to provide exactly this type of in-home care to every such actual or potential adult Medicaid nursing home resident. Neither the Rehabilitation Act nor its implementing regulations can plausibly be read as imposing a sweeping and open-ended deinstitutionalization mandate on the states as a condition on federal funding. The Rehabilitation Act is legislation enacted under Congress' spending power. Stanley v. Litscher, 213 F.3d 340, 344 (7th Cir. 2000). Legislation enacted under the spending power must unambiguously impose a condition on any grant of federal money, particularly where it is alleged that Congress intended the states to fund an entitlement. Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17, 101 S.Ct. 1531, 1540, 67 L.Ed.2d 694 (1981). In Pennhurst, the Supreme Court held that the Developmentally Disabled Assistance and Bill of Rights Act did not require the states to assume the high cost of providing the mentally retarded with "appropriate treatment" in the "least restrictive environment." 451 U.S. at 18, 101 S.Ct. at 1540. In the present case, a specific deinstitutionalization mandate cannot legitimately be extracted from a vague requirement to administer programs in "the most integrated setting appropriate to the needs of qualified handicapped persons" (language found in an implementing regulation and not in the statute itself). 28 C.F.R. §41.51(d). Such indeterminate regulatory language cannot support Plaintiff's claim that the Rehabilitation Act requires IDPA to provide Eric with in-home nursing.

B. The Rehabilitation Act Does Not Require IDPA to Provide Eric With In-Home Nursing Care

Because the Rehabilitation Act is materially identical to, and the model for, the ADA, except that it is limited to programs receiving federal financial assistance, courts need not address a Rehabilitation Act claim separately from an ADA claim. Crawford v. Indiana Department of Corrections, 113 F.3d 481, 483 (7th Cir. 1997). Courts rejecting ADA claims also reject them when brought under the Rehabilitation Act in a separate count. *See e.g.* Rodriguez v. City of New York, 197 F.3d 611, 618-19 (2d Cir. 1999). Thus, for the same reasons stated in Part I-C regarding the ADA, the Rehabilitation Act does not require IDPA to provide Eric with in-home nursing. Moreover, neither the language, purpose, nor history of the Rehabilitation Act reveals any Congressional intent to impose an affirmative-action obligation on recipients of federal funds. Southeastern Community College v. Davis, 442 U.S. 397, 411, 99 S.Ct. 2361, 2369-70, 60 L.Ed.2d 980 (1979).

In Alexander v. Choate, 469 U.S. 287, 105 S.Ct. 712, 83 L.Ed.2d 712 (1985), handicapped Medicaid recipients asserted that reducing the number of annual hospital days covered by a state program violated the Rehabilitation Act. The Supreme Court pointed out that the reduction left both handicapped and nonhandicapped Medicaid recipients with the same services. 469 U.S. at 302; 105 S.Ct. at 721. The greater need of the handicapped for prolonged hospital care did not require the state to single them out for more coverage, even if the remaining services were inadequate. 469 U.S. at 302-03; 105 S.Ct. at 721. The Medicaid Act conferred substantial discretion on the state to determine the amount and scope of its coverage and the Rehabilitation Act did not override that discretion. 469 U.S. at 303; 105 S.Ct. at 721. The state did not need to choose the benefit option most favorable, or least disadvantageous, to the

handicapped. 469 U.S. at 307, n. 32; 105 S.Ct. at 723, n. 32. The Rehabilitation Act assured evenhanded treatment, but did not guarantee that the handicapped would receive "adequate health care" precisely tailored to their particular needs. 469 U.S. at 303-04; 105 S.Ct. at 721-22. *See also* Parks v. Pavkovic, 753 F.2d 1397, 1409 (7th Cir. 1985) (Rehabilitation Act does not force states to create special programs for handicapped children). In the present case, Plaintiff wants IDPA to take affirmative action by providing her son with private duty nursing, an in-home service not covered for any adult recipient under this state's Medicaid program. This type of affirmative action for the handicapped, however, is not mandated by the Rehabilitation Act.

III. CONCLUSION

THEREFORE, for the reasons stated in this Memorandum, Defendant respectfully requests this Court to grant her Motion for Judgment on the Pleadings and enter a judgment in her favor on Counts VI and VII of Plaintiff's Supplemental Complaint for Injunctive Relief.

Respectfully submitted,

James E. Ryan,
Attorney General of Illinois

By: 

James C. O'Connell
David Adler
Christopher S. Gange
Assistant Attorneys General
(Of Counsel)
160 North LaSalle Street
Suite N-1000
Chicago, Illinois 60601
(312) 793-2380